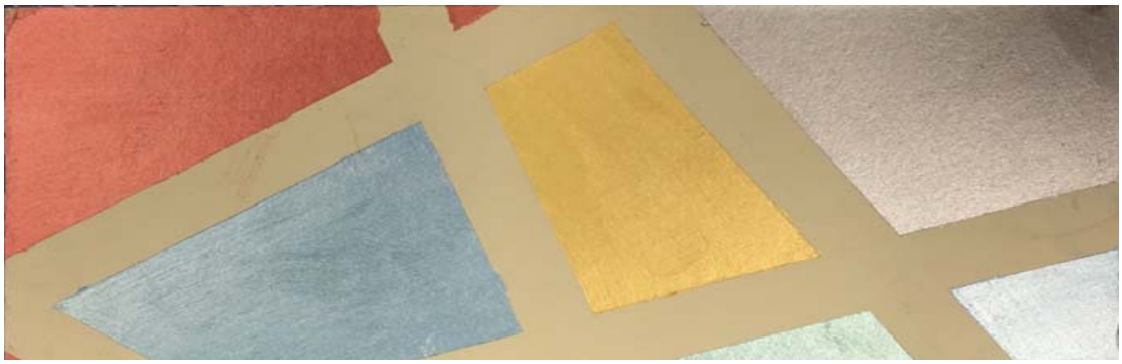

Welcome to the May 2018 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: CANH withdrawal on the papers and DOLs statistics;

(2) In the Property and Affairs Report: variation of trusts and the Court of Protection, and Charles J's last hurrah;

(3) In the Practice and Procedure Report: a new President for the Court of Protection and a regionalization update;

(4) In the Wider Context Report: the interim report of the independent MHA review, capacity and housing, covert medication and capacity in the MHT context, and a guest article on autonomy and mental capacity;

(5) In the Scotland Report: an appreciation of the Public Guardian and an update on the AWI consultation;

You can find all our past issues, our case summaries, and more on our dedicated sub-site here.

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

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HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

CANH withdrawal and the Court of Protection: further developments

NHS Windsor and Maidenhead Clinical Commissioning Group v SP (by her litigation friend, the Official Solicitor) [2018] EWCOP 11 (Williams J)

Medical treatment – treatment withdrawal

Summary[1]

SP was 50 years old when she suffered a cardiac arrest in October 2014. She was admitted to hospital, treated with clinically assisted nutrition and hydration (CANH) and never regained consciousness. In March 2015, she was transferred to the care of a nursing home and, in April 2015, she was diagnosed as being in a permanent vegetative state (PVS).

Two best interests meeting were held in March 2015 and October 2016 which concluded that it was in SP's best interests to withdraw CANH and provide palliative care only. Although it was very difficult for some of them, all of SP's family agreed that SP would not have wished to live in this condition and that it was in her best interests to with CANH.

In October 2016, the CCG approached the OS to invite him to consider a streamlined application to the court. The OS agreed to act for SP in January 2017 and investigate her case. The OS instructed an expert, Dr Hanrahan, and consulted SP's family. Dr Hanrahan reported on 17 July 2017 and 20 November 2017. Dr Hanrahan confirmed much that the earlier doctors had concluded, namely that SP was in a PVS and that further CANH was not in SP's best interests.

On 15-16 February 2018, the OS confirmed that he and the family were content for the application to the COP to be made on the papers. The proceedings were issued on 19 March 2018. The Court was invited to determine the application without a hearing but with the provision of a public judgment.

After setting out the legal framework and case law, Williams J held (at paragraph 35) that the following factors were most relevant in deciding that it was not in SP's best interests to continue receiving CANH:

> *i) The medical evidence is clear that SP is in a permanent vegetative state with no prospect of improvement. She will never regain capacity and cannot participate in decision making.*
> *ii) The medical benefits of CANH are limited to simply keeping her body alive. The person that was SP in so far as a person is their personality no longer exists and can never return. CANH cannot help SP to regain consciousness or to resume any part of the life she led. She derives no benefit from living save insofar as being alive in itself (albeit with no awareness of being alive) is a benefit.*
> *iii) Palliative care will reduce to a minimum any experience that SP might have of discomfort or pain as a result of CANH being withdrawn.*

[1] Tor being involved in the case, she did not contribute to this note.

iv) The evidence of her family and the nursing staff from their observations of SP is that there has been no improvement in her condition over the years and that her symptoms are consistent with her having no awareness of her surroundings. This is the experience of her closest family including her children; if she was likely to be aware of anyone it would be her children.

v) No one is motivated by a desire to bring about SP's death but rather that it is not in her best interests to live like this.

vi) SP had expressed the view to her son whilst watching a programme about a person in a PVS that she would rather die than stay in a bed for years in that condition. SP had expressed the view that if someone close to her was ill like her father had been she would turn off the life support and not leave them in that state. I accept that she had expressed a wish not to live in the sort of situation she is now in.

vii) SP's actions in life in particular in relation to her approach to her father's terminal illness support the contention that she would prefer the withdrawal of life-sustaining but futile treatment and a move to palliative care only. I accept that her beliefs and values are such that they would influence her to want to have CANH withdrawn,

viii) Her family and friends (those interested in her welfare) are unanimously of the view that having regard to her personality and how she was before the cardiac arrest that she would not want to live as she is now and that it is in her best interests for CANH to be withdrawn and palliative care implemented. The doctors and nursing staff involved in her care are of the view that this course is in her best interests.

ix) The contrast between the full life SP led before the cardiac arrest and her existence now could not be more divergent. For a woman who loved life and lived it to the fullest she would find her current situation intolerable. Not only for her own sake but I believe also to relieve the suffering that her family endure from seeing her in this condition she would want to adopt a course which would end her and their suffering. She would not want to be a burden and would want her family to be able to move on with their lives and remember her as she was. In this case that means ending CANH and entering a palliative care programme.

x) She would want before leaving this life to be satisfied that her minor children were properly provided for and that nothing further could be done in her name to provide for them and their future. I accept that the family believe what has been done would meet with her approval. I also am satisfied she would endorse those arrangements and accept that there was no more she could do.

xi) The withdrawal of CANH has been planned and will be implemented by the nursing team with input from a hospice nurse. Her family understand what it involves and the timescales. They would have preferred for it to occur in February.

Comment

This case is significant as being the first in which the withdrawal of CANH has been authorised by the court 'on the papers' without a hearing. Whilst the collaborative approach between all parties (the Trust, the family and the OS) is to be commended, the length of time between the best interests meeting on 7 October 2016, at which it was decided that it was in SP's best interests to withdraw CANH, and the eventual decision of the court on 20 April 2018 is striking. Most of that time appears to have been devoted to investigating the circumstances of SP's case and obtaining an expert report by the OS which confirmed the conclusions of two other clinicians. After the investigations had taken place, the application was issued in March 2018 and dealt with by the court within one month. If, following *Re Y* [2017] EWHC 2866 (QB) and the outstanding appeal to the Supreme Court, it is correct that there is no requirement to come to court where P's family and the clinicians are in agreement that it is in P's best interests for CANH to be withdrawn, then this appears to be a case in which treatment could have been withdrawn from SP following the best interests meeting in October 2016 (some 18 months earlier). The move towards a streamlined approach by making an application on the papers where all parties are in agreement is both sensible and pragmatic, but it may be that such applications are not necessary at all in the future. The judgment of the Supreme Court in *Re Y* is awaited with interest.

Court of Protection statistics

The most recent Court of Protection statistics have now been published, covering the period October to December 2017, and accompanied by the first time by a .csv file containing the number of Deprivation of Liberty applications by Local Authority, although, as the file does not break down what sort of applications they were, it is of limited assistance only.

There were 3,995 applications relating to deprivation of liberty made in 2017, up 27% on 2016. There were 1,030 Deprivation of Liberty applications in October to December 2017, up 9% on the same period of 2016. Of these, 557 were *Re X* applications, 318 s.21A applications and 155 were applications for orders under s.16 MCA 2005. For comparison, the figures for the third quarter of 2017 were 630 for *Re X* orders, 306 s.21 applications and 141 applications for s.16 orders. Deprivation of liberty orders made also rose over the same period by 81%.

Children, consent, and confinement

Whilst we wait for the Supreme Court to determine the Official Solicitor's application for permission to appeal the decision of the Court of Appeal in *Re D* [2017] EWCA Civ 1695, cases continue to come thick and fast in relation to the deprivation of liberty of those under 18. In *Buckinghamshire CC v RT (by his Guardian KT)* [2018] EWCOP 12, Williams J made orders under the MCA authorising the deprivation of liberty of a young man of 17 ½. RT presented with high anxiety and when anxious, extremely impulsive and acting in extremes. He had absconded twice from the placement where was living, he had tied ligatures round his neck and tried to run in front of a moving bus; he also remained fixated on women, especially younger women.

Williams J was clear that the confinement to which he was subject (2:1 support at the placement, and 1:1 at night, with a further 2 members of staff to assist if required):

> [38] *is far in excess of that which might be applied to even the most unruly 17-year-old in a domestic setting. It clearly amounts to continuous supervision and control. Given RT does not have capacity there is a lack of a valid consent. The deprivation of liberty is attributable to the state.*

Williams J considered that it was:

> [35] *clear that RT may injure himself if not subject to the most stringent levels of supervision. He has demonstrated impulsive behaviour of the most extreme kind which has put his life at risk. It is also clear that RT can behave towards others in a highly aggressive and threatening way which puts him at risk of retaliation by third parties who do not know him. It also puts him at risk of being subject to criminal proceedings. There are particular risks relating to his communications with others through his mobile phone. There will need to some limitations on this. I am well aware that this is a bone of contention for almost every parent of a teenager and in that sense authorising restrictions of this sort are no more than many parents might impose but for RT the limits may need to go further.*
>
> [37]. *I take account of the views of the local authority and of his mother who both believe the deprivation of liberty is in his best interests.*

Williams J therefore authorised the deprivation of his liberty as being in RT's best interests.

An oddity of the case is that Williams J does not seem to have his attention directed to the decision of the Court of Appeal in *D*, as he did not seek to examine whether RT's adoptive mother was capable (in law) of giving consent to the arrangements to as to prevent them being a deprivation of RT's liberty up to the point of his 18th birthday.

On one view, the arrangements for RT were materially identical to those the Court of Appeal appear to have considered in *D* to have been "*within ordinary acceptable parental restrictions upon the movements of a child.*"[2] Why, then, could not his adoptive mother consent on his behalf until his 18th birthday? Whilst foster parents appear to be outside the scope of those who can give consent on the approach of the Court of Appeal in *D*, does the same restriction apply to a situation where the person has been adopted (by a mother described as "clearly devoted" to him at para 28 of the judgment)?[3]

The other view is that this is a decision which applies conventional *Storck* principles as explained by Lord Kerr in *Cheshire West* – i.e. one asks whether the arrangements go beyond those societally acceptable for a child of that of "*age and relative maturity who are free from disability*" (paragraph 79); if they are, then either one needs the consent of the person themselves or one has a deprivation of liberty.

[2] See *D* at 85(iii).
[3] Lord Neuberger in *Cheshire West* would appear to have thought there was a distinction – see paragraph 72.

We will hopefully see in due course the knots in this area revisited – and untied – by the Supreme Court.

In the meantime, consent was under the microscope in the two linked cases of *A Local Authority v SW & Ors* [2018] EWHC 576 (Fam) and *Local Authority v SW & Ors* [2018] EWHC 816 (Fam), Mostyn J was asked to make orders under the inherent jurisdiction authorising the deprivation of liberty of a young person in a placement akin to a s.25 Children Act 1989 secure accommodation order. In the first case, the question arose whether the second limb of the Strasbourg test for deprivation of liberty had to be satisfied for the court to make an order, namely that there was a lack of valid consent on the part of the child. The court concluded that this subjective element did apply, as in other cases engaging Article 5, such that the order could only be made if the child was not validly consenting, even though when the court makes a secure accommodation order, the consent of the child may be present.

Mostyn J also considered the case of *A Local Authority v D* [2016] EWHC 3473 (Fam), in which a 15 year old was found to be validly consenting to his confinement. Mostyn J expressed the view that what this authority shows, is that valid consent must be both (i) authentic – the child must say it and mean it – and (ii) enduring rather than evanescent.

On the facts of the case, there was no such consent, and the order was made in January 2018. By the time of the second judgment in March 2018, two things had happened – the placement had broken down due to the young person's conduct, and the permission to appeal the first judgment had been granted by the Court of Appeal. (Readers may recall that permission had previously been granted in respect of the Re *D* decision, relied on by Mostyn J, but that appeal did not proceed for reasons not relevant to these issues). Mostyn J made a new order in respect of the young person's new placement, and noted that would no doubt also be appealed, so it seems that in the near future, the Court of Appeal will finally grapple with the question of what counts as valid consent in the Article 5(1)(d) context.

PROPERTY AND AFFAIRS

Trust variation and the Court of Protection

ET v JP and others [2018] EWHC 685 (Ch) (High Court Business List (Chancery Division)(Morgan J))

CoP jurisdiction and powers – interface with civil proceedings

Summary

In this case Morgan J had to consider the proper interpretation of section 1(3) Variation of Trusts Act 1958. The issue was whether the High Court could approve a variation of a trust on behalf of a minor who lacked mental capacity or whether that approval had to be given by the Court of Protection.

Section 1 of the 1958 Act allows the court to approve variations of a trust on behalf, of, amongst others, those who lack capacity to approve the variation themselves.

In this case, one of the beneficiaries was 10 and severely autistic so lacked capacity to approve the variation because of his age and mental capacity.

Section 1(3) of the 1958 Act provides:

> *the jurisdiction conferred by subsection (1) of this section shall be exercisable by the High Court, except that the question whether the carrying out of any arrangement would be for the benefit of a person falling within paragraph (a) of the said subsection (1) who lacks capacity (within the meaning of the Mental Capacity Act 2005) to give his assent is to be determined by the Court of Protection.*

Morgan J held that where the beneficiary is not able to approve the arrangement by reason of his age, then that is the reason why the court has to approve the arrangement and so section 1(3) does not apply and the issue does not have to be determined by the Court of Protection even if, additionally, the beneficiary is unable to approve the arrangement by reason of mental incapacity. (See paragraphs 16-27).

Comment

This case is an interesting example of a situation in which it may make a difference as to whether the lack of the relevant legal capacity derives from a lack of the relevant mental capacity or some other cause. In this case it was clear that the beneficiary in question could not approve by reason of age. In other cases, such as with 16 and 17 year olds, that may not be so clear and the question of whether, in those circumstances, a referral to the Court of Protection is necessary will arise again.

The last hurrah of Charles J

Re AR [2018] EWCOP 8 (Charles J)

Best interests – property and affairs

Summary

In this case Charles J ruled that the practice of making bulk orders for the approval of a deputy's remuneration was wrong and that remuneration was a best interests decision that had to be made on an individual basis.

In a judgment that was significantly critical of previous Court of Protection practice, Charles J ruled that the Court of Protection could and should not approve remuneration for deputies on a bulk basis but, rather, should assess each case individually, see paragraphs 18-19, 21, 24-26 of the judgment.

Charles J held that the bulk orders should all be reviewed by the COP of its own motion without the need for an application fee (see paragraphs 93-94) but until an order that has been sealed has been set aside or varied, it can still be relied upon, see paragraph 27.

Charles J made clear that COP PD 19B (which sets out fixed costs for various types of work), is not a presumptive scale but rather a relevant factor to be taken into account when deciding the level of a deputy's remuneration, see paragraphs 34-35.

As regards the actual case, P had limited means, so the question arose whether a solicitor's higher charging rates (when compared to those of a local authority deputy) could be justified. In the end, from paragraph 55 on, the judge held that in the individual case, they were. That was on the basis of a more personal approach that had resulted in additional benefit to P.

In many cases, the expenditure on the deputy will be accepted by a local authority as disability related expenditure and so reduce P's means and liability to contribute to care costs. In those circumstances, the issue will not be so acute as P will suffer no loss by virtue of a solicitor deputy's higher changes.

Charles J also held that the court had power to authorise pre-appointment expenditure, see paragraph 49 and that orders should include an inflation index for charges (the CPI), see paragraph 88.

Comment

There is always a balance to be struck between administrative convenience and specific consideration of individual cases. In his parting shot as Vice-President of the Court of Protection, and in line with

other case-law criticizing "bulk" approaches, Charles J made clear that he considered that a regime had developed which had swung considerably too far towards the side of administrative convenience.

PRACTICE AND PROCEDURE

New President of the Court of Protection

We congratulate Sir Andrew McFarlane on his appointment as President of the Family Division and of the Court of Protection with effect from 28 July 2018 and the retirement of Sir James Munby. We might also tentatively hope that an appointment will also be in the offing soon for a replacement for Charles J as Vice-President (the position currently being vacant).

CoP regionalisation moves ahead

As the regionalisation project moves ahead, s.16 (health and welfare) and s.21A these applications will be issued from regional centres, starting with the South West (Bristol) Regional Hub, as from 30 April 2018. The other regional centres will begin issuing their own applications from 25 June 2018. This does not apply to serious medical treatment cases or to property and affairs cases.

A letter from HMCTS setting out essential information about how the new process will work, including how issue fees should be paid can be found here.

Ex parte applications – a further reminder

We published a few months ago a detailed practice note on ex parte (without notice) applications. The judgment in *R (Sathivel) v SSHD* [2018] EWHC 913 (Admin) only reinforces (by analogy) the obligations on Counsel, as well as solicitors, to ensure that they are acting on proper – and materially complete – instructions when making a without notice application.

Parents with learning disabilities

The President has issued guidance on Family proceedings: Parents with a learning disability, his primary purpose being "*to bring to the attention of practitioners and judges, and to commend for careful consideration and application by everyone, the very important 'Good practice guidance on working with parents with a learning disability' issued by the Working Together with Parents Network and the Norah Fry Centre in September 2016*." This guidance is equally applicable in relation to a parent of "P" before the Court of Protection.

THE WIDER CONTEXT

Independent Mental Health Act Review – interim report

The independent review of the Mental Health Act 1983 (MHA), commissioned by the Government in October 2017, has just published its interim report.[4] It is tasked with looking at the rise in the use of the MHA over the last 10 years, the racial disparities in detention, and concerns that the MHA is out of step with a modern mental health system.

Amongst the review's preliminary conclusions are:

- The MHA needs to change;
- Improvements cannot be achieved by legislation alone;
- The MHA could be improved to do more to enable a person's wishes;
- Advocacy is an impactful safeguard;
- Experiences of people from block African and Caribbean heritage are particularly poor;
- The MHA is possibly being used inappropriately in relation to people with a learning disability or autism, potentially linked to lack of appropriate provision in the community;
- Service users are left too long in prison when they should be in hospital.

Being at an interim stage, the report does not reach any firm conclusions or make any recommendations about these important issues. However, it does provide a useful sense of direction as to where the review is going. In particular, it identifies the priority issues that will be considered in detailed as part of the review:

Before detention

- Addressing the rising numbers of detentions under the Mental Health Act
- Decisions to detain under the Mental Health Act, and renewals
- Interfaces with the Mental Capacity Act
- Police role

During detention

- Dignity and respect of the service user

[4] Alex is the lawyer on the Review working group; in the spirit of seeking to give a dispassionate view, this note is prepared by Annabel.

- Autonomy of the service user
- Procedural safeguards
- Tribunals and hospital managers' hearings
- Advocacy
- Family and carer involvement
- Use of restraint and seclusion

Leaving hospital

- Community Treatment Orders
- Discharge and aftercare

Issues for particular groups

- Black, Asian and minority ethnicities
- Children and young people
- Learning disabilities and autism
- Criminal justice system
- Compatibility with human rights
- Wales

In relation to the MCA/MHA interface, there is significant criticism about the effective use of DoLS. In an area which causes MCA practitioners much angst, there are concerns about those who are confined for the purposes of assessing or treating mental disorder but do not have capacity to consent to that confinement, and are therefore deprived of their liberty. The independent review has identified that there are "*significant practical difficulties and confusion caused when making decisions about whether or not the MHA or the MCA should be applied, particularly in the context of general hospitals*." The Government's final response in March 2018 agreed with the Law Commission's recommendations in principle, leaving the "interface" issues to be considered by the review in the first instance.

The Law Commission suggested that the "fusion" of mental health and mental capacity legislation potentially represented the future direction for mental health law reform in England and Wales, noting that the current relationship between the two regimes was extremely complex. The review, however, has indicated that it is unlikely to be recommending "fusion" between the MCA and MHA in the short term, but will be considering this as a longer-term option.

The independent review is keen to hear from anyone with specific evidence or experiences relevant to the issues and topics above. They can be contacted via MHActreview@dh.gsi.gov.uk.

The final report of the independent review with recommendations for change is expected in autumn 2018. The editors (with the exception of Alex, who will be invited in writing it!), look forward reading the final report and, of course, will keep our readers posted. In the interim, readers may also be interested to read the briefing document prepared by the King's Policy Institute and the Mental Health and Justice project on the *Future of the Mental Health Act*.

Capacity and housing – a strange relationship

WB v W District Council [2018] EWCA Civ 928 (Court of Appeal (Arden, Lewison and Asplin LJJ)

Mental capacity – tenancy agreements

Summary

WB is a woman who applied to the W Council under Part VII of the HA 1996 in 2013 for accommodation on the basis that she had a priority need as a result of her mental disability. The W Council considered that she was in priority need but she had become homeless intentionally. WB appealed against that decision to the County Court. During that appeal she was found to lack capacity to litigate and to manage her property and affairs. The Official Solicitor was instructed to act as her litigation friend.

The procedural history of the proceedings before the County Court were somewhat complex, and need not detain us here, but ultimately her appeal was rejected on the basis that the Court was bound by the decision of *R v Tower Hamlets LBC ex parte Ferdous Begum*, reported under the name of a conjoined appeal about child applicants, *R v Oldham Metropolitan Council ex parte Garlick* [1993] AC 509. This was a decision which set out that the priority need for housing for the disabled is set out in statuate "*a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason, or with whom such a person resides or might reasonably be expected to reside*'

The judgment itself held as follows:

> *Other people although vulnerable are nevertheless able to lead an independent existence, albeit sometimes in sheltered accommodation, these people also have the status of priority Judgment Approved by the court for handing down. WB v W DC need and can apply for assistance if they are homeless but not intentionally so. When they are made the offer of accommodation they can decide whether or not to accept it. But I can see no purpose in making an offer of accommodation to a person so disabled that he is unable to comprehend or evaluate the offer. In my view it is implicit in the provisions of the Act that the duty to make an offer is only owed to those who have the capacity to understand and respond to such an offer and if they accept it to undertake the responsibilities that will be involved. …* [Emphasis added]

In consequence Ms Begum was not eligible for housing assistance as a homeless person.

The decisions in R*e Garlick and ex parte Ferdous Begum* are reflected the 'Homelessness Code of Guidance for Local Authorities' published on 22 February 2018 ("2018 Code") which at paragraph 18.8 provides that *'An application can be made by any individual who has the mental capacity to do so.'*

WB ran three arguments as two why the CA were not bound by the decision in *ex parte Ferdous Begum*: (1) that the exclusion of persons lacking mental capacity can be classed as an obsolete statutory provision ("the obsolescence argument"), or (2) that HA 1996, s 189(1) can be interpreted, using HRA, s.3 in a manner which puts applicants for priority housing with mental disability, which currently prevents them from being an applicant for priority housing, on the same footing as those by persons with no such disability (the "Human Rights Interpretation" argument), or (3) the effect of *ex parte Ferdous Begum* is simply to prevent a person from signing a tenancy agreement but allows them to make an application (the "Narrow Ratio" argument.)

The Court of Appeal rejected the obsolescence argument and the Human Rights interpretation argument on the basis of the doctrine of precedence and statutory interpretation (with Lord Justice Lewison dissenting).

Of most interest for our purpose sis the Narrow Ratio argument. It was argued (para 37) that "*Convention jurisprudence would look with disfavour on any blanket exclusion of an application without taking account of their particular circumstances. In any particular case, it may be possible for the applicant to show that she has capacity to make an application and consider an offer of housing, but not capacity to enter into a tenancy agreement carrying legal obligations over a period of time*."

This is of course correct, as capacity is issue specific. Lady Justice Arden was unimpressed by this argument, primarily because it had not been run below. In refusing to consider the argument for that reason she stated:

> [39]. *I accept that a person may have capacity to decide where to live but lack capacity to enter a tenancy. Indeed, the Court of Protection has issued guidance for cases where it is desired to enter into a tenancy agreement on behalf of a person who has capacity, for example, to apply for social security payments but not to enter into a tenancy agreement: see Applications for the Court of Protection in relation to tenancy agreements (updated February 2012).*

Lord Justice Lewison engaged with the argument more substantively. He held that the question, was whether it is "*possible to interpret the Housing Act 1996 as enabling an application to be made by or on behalf of a person without mental capacity*?" Butler-Sloss LJ in the Court of Appeal in *ex parte Fergus Begum* (with whom half the House of Lords Judges agreed) had considered this aspect holding that an application could be made "*by someone on behalf of a person who is entitled to make an application but is unable through mental incapacity to make or consent to the making of an application. In the latter case the writer or maker of the application on behalf of another must demonstrate reasonable grounds for making the application and for acting on behalf of the actual applicant and that he is acting bona fide in the interests*

of the person unable to act without such help. An application by a well-meaning busybody would not be an acceptable application under section 62"

Lord Justice Lewison posed the question as to whether WB fell "within Butler-Sloss LJ's description of how an application by or on behalf of such a person may be made?" At paragraph 68, he held as follows:

> *Lady Justice Arden has adverted to the possibility of the appointment of a deputy or the execution of a lasting power of attorney. A deputy may make decisions on behalf of the person without capacity to the extent that his or her appointment allows. As Lady Justice Arden points out those powers may include a power to decide where a person is to live (section 17 (1) (a)) and a power to acquire property on his or her behalf (section 18 (1)). If authorised to do so by his or her appointment a deputy could make the application, decide whether to accept offered accommodation, and enter into a tenancy on behalf of the person without capacity. However, the mere fact that the Court of Protection authorised a council official to sign a tenancy agreement is not, in my judgment, enough. That is no more than an administrative act; and does not amount to decision making. There is, therefore, no one in this case who has the power to make such decisions on WB's behalf.*

Comment

It is somewhat unsatisfactory that the Housing Act, which specifically provides that those with a mental disability qualify for priority need housing, then disqualifies a whole category of those people on the grounds of capacity. We suggest that this issue requires consideration in the Supreme Court were the consideration in respect of the precedent value of previous case law will of course be different.

That point aside, we note that the Court of Appeal appear to have been somewhat influenced by the procedure for applying to the Court in respect of tenancy agreements by the guidance put before them entitled *Applications for the Court of Protection in relation to tenancy agreements (updated February 2012)*. However:

- This guidance was withdrawn in the autumn of 2016;
- In any event, the guidance simply set out the procedure that was to be adopted in relation to tenancy agreements, and was a pragmatic solution to the difficulty of getting tenancy agreements signed by third parties on behalf of P without having to appoint a deputy to do so (the other alternative being to get the Court to sign it). The guidance did not therefore not limit the powers a third party (i.e. a deputy) can be granted by the Court of Protection in respect of housing. It is plain that a Deputy can be given 'decision making' powers in respect of Housing Act applications. This would then mean that a P with a deputy whose powers extended to making applications pursuant to the Housing Act, would come within the category of those for whom such an application could be made for priority need.

For those who want to read more about this thorny issue, we recommend also the blog post by Nearly Legal.

Covert medication and capacity – the MH context

M v ABM University Health Board [2018] UKUT 120 (AAC) (Upper Tribunal (Administrative Appeals Chamber (UTJ Mitchell))

Mental Health Act 1983 – interface with MCA

Summary

With the Legal Aid Agency having taken more than a year to determine the patient's funding application, this appeal finally reached the Upper Tribunal to consider the disclosure of covert medication to patients lacking the mental capacity to appoint a legal representative. It had to be determined against a somewhat concerning evidential backdrop. For it seemed highly likely that the tribunal had not been informed that the covert medication had ceased three months before the hearing (para 88). The second opinion certificate that would have authorised the covert medication, addressed the patient's capacity, and contained the consequences of not administering it covertly, had not been supplied to the tribunal and should have been requested (para 89). Moreover, the mental incapacity evidence was absent (para 90).

Rule 17(1) of the Welsh Tribunal rules positively requires the tribunal to give a direction prohibiting the disclosure of a document or information to a person if satisfied of two matters:

(a) such disclosure would be likely to cause that person or some other person serious harm; and

(b) having regard to the interests of justice it is proportionate to give such a direction.

It was stressed that these are independent tests; not to be merged (para 35). The English equivalent (rule 14(2) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care) Rules 2008) confers a power rather than a duty to direct non-disclosure. With regard to the first limb of 'serious harm', UTJ Mitchell held that some types of 'serious harm' are more severe than others and its nature must be set out: "*To take a dramatic example, a likelihood of certain death is a more significant form of serious harm than a likelihood of a drastic but temporary deterioration in a patient's mental health*" (para 87).

Previous guidance had been given by the Upper Tribunal in *RM v St Andrew's Healthcare* [2010] UKUT 119 (AAC) which concerned a patient who, during earlier tribunal proceedings, had been informed that he had been covertly medicated and appeared to have capacity to appoint a legal representative. In the present appeal, the patient had not been informed and was found to lack such capacity: "*To some extent, therefore, Mr M's mental condition impaired his ability himself effectively to challenge his detention*" (para 93). UTJ Mitchell went on to hold:

> *94… In a case involving a patient who has capacity to appoint a legal representative, I can well understand why the failure to disclose information about covert medication may be considered so*

great a rupture in the fairness of proceedings that it could not be proportionate to withhold the information.

95. The fact that a patient lacks the mental capacity to appoint a legal representative does not mean the patient has no relevant wishes and feelings about his detention nor that any wishes and feelings fall out of account…

96. Throughout, the Tribunal in Mr M's case remained under an obligation to ensure, so far as practicable, that Mr M was able to participate fully in the proceedings (rule 3(2) of the Rules)… The Tribunal's participative duty did not disappear upon the appointment of a legal representative for Mr M on the ground that he lacked capacity to appoint a representative. For this reason, the Tribunal was required to turn its mind to the extent to which Mr M was capable of participating in the proceedings. Only then could it properly answer the key question, that is whether the obstacles placed in the way of Mr M's participation in the proceedings by non-disclosure of information about covert medication, including the difficulties this would cause for his solicitor, were such that, having regard to the interests of justice, it would nevertheless be proportionate to withhold the information from Mr M.

97. In conclusion, I decide that the Tribunal's decision involved an error on a point of law. In deciding whether it would be proportionate to withhold covert medication information from Mr M the Tribunal failed to take into account its ongoing obligation to ensure, so far as practicable, that Mr M was able to participate in the proceedings.

98. It is, of course, important not to introduce unnecessary complexity into mental health tribunal proceedings. I do not suggest that a patient's lack of capacity needs to be calibrated. In fact, the precise issue is the extent to which a patient's mental condition allows him or her to participate in the proceedings rather than some determination of 'residual' capacity. However, it is necessary, in a case like Mr M's, to seek submissions from the parties as to the patient's ability to participate in the proceedings. A Tribunal may also decide it is necessary for this purpose to require the detaining authority to supply it with any formal mental capacity assessments that have been carried out. (emphasis added)

Accordingly, the case was remitted to the tribunal to determine whether it should set aside or vary its non-disclosure direction in light of this guidance.

Comment

Requiring tribunals to first consider the patient's ability to participate in the proceedings before determining whether it was proportionate to withhold covert medication information is a welcome development. Not only does it stress the importance of the participative duty on tribunals (Welsh rule 3(2)(b), English rule 2(2)(c)); it also reflects the broader point that those unable to make decisions must still have their wishes heard, feelings felt, beliefs considered, and values respected.

The judgment also illustrates the careful line that is being drawn between requiring necessary evidence of mental incapacity (and best interests), without unduly complicating the inherently informal nature of tribunal proceedings.

The relationship between autonomy and adult mental capacity in the law of England and Wales

[*We are very pleased to be able to publish here a summary of forthcoming article by Paul Skowron in the Medical Law Review. We are always keen to disseminate research of relevance to practitioners (of all hues), including by way of guest articles. If you have research that you would like to disseminate in this fashion, in particular where the research will otherwise be behind a paywall, please contact one of the editors*]

I began working on this article because I noticed that judges tell three conflicting stories about the relationship between autonomy and mental capacity. As I worked, though, I realised that each of these stories predictably appears in response to certain situations. In other words, the accounts that judges give of the relationship between autonomy and capacity conflict; but judicial behaviour, taken as a whole, implies a single, coherent account of that relationship. This situation is strange, but there is not necessarily much wrong with it. The apparent conflicts emerge because judges are giving partial accounts, tailored to suit the case before them; and, after all, a court is not 'a general advice centre'. All the same, extracting the underlying relationship between autonomy and capacity from the partial stories that judges tell about it does take a little work.

The gatekeeper account

The simplest story that judges tell about the relationship between autonomy and mental capacity is the 'gatekeeper account'. On this view, if someone has mental capacity with regard to a particular decision, then they so are autonomous with regard to the matter that the state should not interfere with their decision. If, however, they do not have the relevant mental capacity, then the state need not exercise such restraint. Mental capacity is the gatekeeper to the state treating a person's autonomy as an overriding reason not to interfere with their wishes.

The gatekeeper account appears in two characteristic situations. The first is when someone is found to have capacity, but is making an unwise decision. For example, in *PC v City of York Council*, "*unless they lack mental capacity to make that judgment, it is against their better judgment . . . the statute respects their autonomy so to decide*" (McFarlane LJ, emphasis in original). Legally, this is unobjectionable, but it gives only a partial account of the relationship between autonomy and capacity, for it omits any discussion of undue influence. The gatekeeper account is also given when it is believed to be in the best interests of someone without capacity to act contrary to their expressed wishes. For example, in *An NHS Trust v CS*, "*it seems to me impossible for this court to attach any significant weight to* [her *current wishes] bearing in mind her patent lack of capacity*" (Baker J). This, too, gives only a partial account of the relationship between autonomy and capacity. After all, sometimes the court does attach significant weight to the current wishes of someone with a 'patent lack of capacity'.

The insufficiency account

The gatekeeper account conflicts with a second judicial story, the 'insufficiency account'. On the gatekeeper account, if you have capacity about a matter, then you are autonomous with regard to it.

Sometimes, though, judges hold that capacity is not enough to be autonomous. Freedom from coercion and undue influence is also needed. On this view, capacity is necessary for autonomy, but it is not sufficient. Lady Hale gives a version of this account in *R v Cooper*: 'autonomy entails *the freedom and* the capacity to make a choice' (emphasis added).

It is significant that *Cooper* is a criminal case, but the insufficiency account has a broader range. It appears, unsurprisingly, whenever coercion or undue influence are felt to be live issues. For instance, it underwrites some (and only some) uses of the inherent jurisdiction. *DL v A Local Authority* is an example. In that case, 'Mrs L' had capacity and did not wish to bring proceedings for a non-molestation order against her son. Nevertheless, she was found to be "*a vulnerable adult whose autonomy has been compromised by a reason other than mental incapacity*" (McFarlane LJ, emphasis added), so a wide range of injunctions were made restraining him. This case cannot be made to fit the gatekeeper account: Mrs L was found both to have capacity and to lack autonomy. The same is true of cases decided under the equitable doctrine of undue influence, which allows someone's transactions to be rendered voidable when 'the influence has invaded the free volition of the donor' (Lewison J), regardless of mental capacity.

The survival account

The insufficiency and gatekeeper accounts conflict about people who have capacity, but that is not the end of the story. There is also a 'survival account', and this clashes with both the others about people who do not have capacity. Its name is taken from *W v M*. In that case, Mr Justice Baker states that "*personal autonomy survives the onset of incapacity*." Care is needed here. The survival account does not hold that everyone, regardless of capacity, is so autonomous that the state should not act against their wishes. It merely holds that some people without the relevant capacity might be so autonomous, and that the issue is decided as part of the best interests decision. Even this conflicts with the gatekeeper account, which takes the issue of autonomy as decided by the capacity assessment. It can also seem to conflict with the idea that wishes and feelings carry 'great weight' but are not 'determinative' of best interests (Lewison J in *Re P*). This latter conflict, though, is more apparent than real. Wishes and feelings are not *necessarily* determinative of best interests, but they *can* be determinative of best interests: as seen, for instance, in *Wye Valley*, *Ms X*, and *SAD v SED*.

The survival account raises the question of exactly when the wishes and feelings of a person without capacity will be determinative of their best interests. When answering, the list of factors in *ITW v Z* (at 35(iii)) is the best place to start. It brings several broad considerations, which draw on diverse ideas about autonomy, together in one place. For example, one factor is 'the strength and consistency of the views being expressed by P', and this was important in *Wye Valley*. In that case, it would have contradicted s3(1)(a) of the MCA to hold that 'Mr B', who did not 'understand the reality of his injury', had capacity to make decisions about treatment for it. Mr B did, however, demonstrate autonomy in another sense: an authentic 'fierce independence' that ultimately determined his best interests. This responsiveness to wider ideas about autonomy than the gatekeeper account can accommodate is

characteristic of the survival account. Fairly often, people without capacity know what they want, want it for intelligible reasons, or would be utterly distraught if what they wanted was disregarded. By softening the link between autonomy and capacity, the survival account allows these things to be taken into account.

A coherent account

On the face of things, the gatekeeper, insufficiency, and survival accounts appear to conflict about the relationship between autonomy and mental capacity; but there is no need to pick sides between them. Instead, they can be combined into a coherent account as follows:

> *An adult in England and Wales has a legal right to be treated as autonomous with regard to a particular matter if:*
>
> *1. They have capacity and are not a vulnerable person subject to coercion or undue influence (from the insufficiency account); or*
>
> *2. They lack capacity but the character of their wishes and feelings is such that it determines their objective best interests (from the survival account)*

On this account, mental capacity is not autonomy's gatekeeper. It is, however, still part of the legal threshold for a right to be treated as autonomous. A person's capacity or incapacity creates one of two presumptions. If someone has capacity, then they will be presumed to be autonomous, but that presumption may be rebutted if they are found to be vulnerable and subject to undue influence or coercion. If someone is found to lack capacity, then they will be presumed not to be autonomous, but that presumption will be rebutted if their wishes and feelings determine their best interests.

A disclaimer is in order here. Even this coherent account simplifies the relationship between autonomy and capacity: in particular, the Mental Health Act 1983, criminal law, and law pertaining to children all complicate matters further. The sheer complexity of this relationship has its own implications. One of the original aims of the MCA was to simplify the law, but it does not appear to have done so. More than this, the wide range of factors that judges are responsive to when assessing a person's autonomy are all things that it is appropriate to be responsive to. Capacity is relevant; but so, for example, is coercion. In other words, it may be good that the MCA has not simplified the law.

Paul Skowron

Research Associate on the Wellcome Trust funded Mental Health and Justice project, working at the York Law School. This is a summary of an article that will appear in Medical Law Review. An advance copy of the full article is available here (paywalled)

The Learning Disabilities Mortality Review Annual Report 2017

The Learning Disabilities Mortality Review (LeDeR) programme, led by the University of Bristol and commissioned by the Healthcare Quality Improvement Partnership (HQIP) on behalf of NHS England, has published its most recent report, which makes thoroughly depressing reading.

From 1st July 2016 to 30th November 2017, 1,311 deaths were notified to the LeDeR programme. Key information about the people with learning disabilities whose deaths were notified to the LeDeR programme includes:

- Just over half (57%) of the deaths were of males
- Most people (96%) were single
- Most people (93%) were of White ethnic background
- Just over a quarter (27%) had mild learning disabilities; 33% had moderate learning disabilities; 29% severe learning disabilities; and 11% profound or multiple learning disabilities.
- Approximately one in ten (9%) usually lived alone
- Approximately one in ten (9%) had been in an out-of-area placement

The full 2016/2017 report is available here.

The third largest category of the learning and recommendations related to the need for a better understanding and application of the MCA. Reviewers identified problems with the level of knowledge about the MCA by a range of professionals, and concerns about capacity assessments not being undertaken, the Best Interests process not being followed, and Deprivation of Liberty Safeguards (DOLS) not being applied. National recommendations include that:

> *local services strengthen their governance in relation to adherence to the MCA, and provide training and audit of compliance 'on the ground' so that professionals fully appreciate the requirements of the Act in relation to their own role. The findings from the LeDeR mortality reviews echo the House of Lords post-legislative scrutiny of the Mental Capacity Act conclusion that there is a lack of awareness and understanding about the MCA, principally within the health and social care sectors. They commented: 'For many who are expected to comply with the Act it appears to be an optional add-on, far from being central to their working lives…the prevailing cultures of paternalism (in health) and risk-aversion (in social care) have prevented the Act from becoming widely known or embedded….The duties imposed by the Act are not widely followed.' (p.6).*

Extension of personal healthcare budgets

The government's recently opened consultation into extending personal health budgets closes in a month's time, on 8th June 2018. The Department of Health and Social Care and NHS England are inviting views on the proposed extension of personal health and integrated personal budgets to wider patient groups.

Definite entitlement to having a personal health budget is currently limited to two groups: adults in receipt of NHS continuing healthcare ("CHC") and children receiving continuing care. There is provision in some parts of the country for personal health budgets to be offered to additional groups based on local need, including people with a learning disability and/or autism but this is at the discretion of individual CCGs. Single integrated personal budgets are also available in some areas, combining personal health budgets and personal budgets in social care.

The consultation is about extending the "right to have" a personal health budget. The consultation is proposing widening the group with entitlement to include:

- People with ongoing social care needs who regularly use NHS services;
- People eligible for mental health aftercare under s.117 Mental Health Act 1983, and those with ongoing mental health needs who regularly use community based NHS mental health services;
- People leaving the Armed Forces, who are eligible for ongoing NHS services;
- People with a learning disability and/or autism who are eligible for ongoing NHS care;
- People who access wheelchair services whose posture and mobility needs affect their wider health and social care needs.

This extension could have far-reaching implications for people with mental health needs and learning disabilities. Disability Rights UK and a number of other bodies will be responding. The government is seeking views, particularly on whether the right groups have been identified and whether or not they will benefit – as the government believes they will – from the extension of the scheme.

Vulnerable adults – another opportunity for change?

As many will know, Alex spent a considerable part of 2017 seeking to persuade the Law Commission to take forward a project on vulnerable adults as part of their 13th programme of Law Reform. Alex was, ultimately, unsuccessful, although the material that was sent to me in response to various calls for help – for which he is very grateful – reinforced me in my belief that the intensely complex issues that arise are crying out for proper consideration (and you can hear Alex talk about them here).

The reason that Alex (together with the Association for Real Change and Autism Together, who joined in my bid) did not succeed was, as the Law Commission explained, that the *"for any project the Commission wishes to undertake we must have support from the Government under a Protocol agreed in 2010. This states that the Government must have a serious intention to take forward law reform in the*

relevant area of work. In the case of your project, the Commission was unable to secure Protocol support from Government."

However, law reform is now being proposed by Government that is so closely related that Alex will be trying again, and, again, invites your help, although in a slightly different fashion to before.

As we reported on before, the Home Office and Ministry of Justice are consulting on "Transforming the response to domestic abuse," the consultation closing on 31 May. Alex's proposal, in response to this consultation, is a modest one, namely to suggest that alongside domestic abuse should be recognised a concept that he is (perhaps inelegantly) calling "proximity abuse." Alex should emphasise that he is not, in this, seeking to distract from the vitally important work that is being done in relation to domestic abuse. Rather, he is asking us to recognise that the work that has been done over time to recognise the patterns and consequences of this abuse and the insights that have been gained can – and should – be applied in the context of those vulnerable adults who are subject to abuse and exploitation at the hands of those who are either living in close proximity to them, or who have been groomed or otherwise manipulated into believing that the perpetrator has their interests at heart when the opposite is self-evidently the case.

Alex's draft answer to the consultation question on the proposed statutory definition of statutory abuse is here. If you agree with its basic thrust, do please feel free to adopt / adapt it for purposes of putting in your own response, whether personal or corporate (but do please note that Alex may well be refining this over before he submits, so you may want to check back every so often to make sure you've got the most recent version).

SCOTLAND

End of an era: beginning of another?

Sandra McDonald will cease to be Public Guardian on 27th July 2018. Her service to the whole subject of adults with incapacity throughout her 14 years' tenure has been outstanding. The current review of the legislation can be traced back to her 2011 paper on graded guardianship, itself a response to the predictable challenges arising from the combination of increasing workload, inefficiencies in the systems required by statute, and constraints upon resources; but at a deeper level driven by the empathy of a former nurse (and herself a carer in her own family setting) for the human realities, in all their variety, encapsulated within the provisions of statute, regulations and codes of practice.

She has constantly sought to achieve practical solutions, or at least marginal improvements, right across her remit. She addressed the former chaotic situation over bonds of caution by negotiating and putting in place the option of a semi-automated systems with a provider who would accept all cases. She analysed areas of risk and targeted supervisory and investigative resources accordingly. She pioneered, then introduced, electronic registration of powers of attorney. The huge year-on-year increase in applications for registration nevertheless presented one of her major challenges. Because of the evident advantages of encouraging people to grant powers of attorney, and the demonstrable savings to the public purse by doing so, she gave full support to the "mypowerofattorney" campaign as it gradually extended to further parts of the country. Her powers of persuasion were nevertheless required to secure the resources necessary to make inroads into the inevitable backlog of registrations. She introduced special arrangements for professional guardians dealing with a volume of guardianships and willing to undergo relevant training.

Outreach and engagement have been constant themes of her tenure. It would be interesting to know, if the calculation has been made, how many conferences and seminars she has addressed, and how many total hours at lunch and coffee breaks she has spent at such events in close engagement with individual practitioners and small groups.

Her post has already been advertised, though it is understood that some adjustment in responsibilities is envisaged. It is apparently intended to re-focus the role of Public Guardian, with more concentration on the change programme that the Office faces over forthcoming years (though change has been a constant feature for many years already). It is however likely to be helpful to the new appointee that some of the present responsibilities of the Public Guardian may no longer be included in that role.

The good news is that Sandra intends to remain active in the subject to which she has already contributed so hugely, probably as an independent adviser and trainer.

Those of us responsible for this Scottish section of the Mental Capacity Report are particularly grateful for the assistance which she has never hesitated to provide, along with the benefit of her wisdom and experience.

Adrian D Ward

Review of adults with incapacity legislation

The period for response to the Scottish Government consultation on reform of adult incapacity law ended on 30th April 2018. Responses of key bodies are available online, including the Law Society of Scotland, the Mental Welfare Commission for Scotland, the Equality and Human Rights Commission, Edinburgh Napier University's Centre for Mental Health and Capacity Law and the Faculty of Advocates. The Scottish Government team conducting the review have arranged an invitation event on 28th June 2018 to report on the responses to consultation. We expect to be able to report on that event in July.

Adrian D Ward

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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.

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

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Adrian is a recognised national and international expert in adult incapacity law. While still practising he acted in or instructed many leading cases in the field. 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; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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Conferences

Conferences at which editors/contributors are speaking

Conferences at which editors/contributors are speaking

Medical treatment and the Courts

Tor is speaking, with Vikram Sachdeva QC and Sir William Charles, at two conferences organised by Browne Jacobson in London on 9 May and Manchester on 24 May.

Other conferences of interest

UK Mental Disability Law Conference

The Second UK Mental Disability Law Conference takes place on 26 and 27 June 2018, hosted jointly by the School of Law at the University of Nottingham and the Institute of Mental Health, with the endorsement of the Human Rights Law Centre at the University of Nottingham. For more details and to submit papers 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 June. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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