



Welcome to the June 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on the Mental Capacity (Amendment) Act; the Court of Appeal on sex and social media; life-sustaining treatment in a 'pro-life' care home; an important Strasbourg case on deprivation of liberty; and the former Vice-President of the Court of Protection on the MHA 1983/MCA 2005 interface in the community; .

(2) In the Practice and Procedure Report: a richly deserved award for District Judge Eldergill; and civil restraint orders in the presence of impaired litigation capacity;

(3) In the Wider Context Report: a summary of the recent developments relating to learning disability, seclusion and restraint; inquests, DoLS and Article 2 ECHR; and international developments including a ground-breaking report on the right to independent living;

(4) In the Scotland Report: the Chair of the newly established review of the Mental Health (Care and Treatment) Act 2003 provides his initial thoughts; and the Stage 1 report of the Independent review of learning disability and autism in the Mental Health Act.

For lack of sufficient relevant material, we have no Property and Affairs Report this month.

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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District Judge Eldergill

The Legal Aid Practitioners Group has announced that it will present District Judge Anselm Eldergill with an LAPG Special Awards, at the Legal Aid Lawyer of the Year awards ceremony on 10 July 2019. This is only the third time the LAPG Committee has chosen to make Special Awards. In a press release LAPG CEO Chris Minnoch said:

LAPG Special Awards are reserved for truly exceptional individuals who have achieved incredible things, often alongside of their day to day legal practice. Anselm was a mental health lawyer for 25 years, and is a true legend in this field. He now sits as a District Judge in the Court of Protection, and has been responsible for developing the law in relation to people with impaired capacity, in ways far beyond his formal status as a judge. He has made an incomparable contribution to the protection of those with mental illness. Through his 1997 book 'Mental Health Review Tribunals', he shared his expertise, and equipped many practitioners to represent the most vulnerable clients in a way that would not otherwise have been possible in what was a developing area of law. It explicitly recognised the Tribunal as a way of enforcing civil rights and had a transformative effect. Now that he is on

the bench, Anselm has lost none of his approachability, and remains vigilant to ensure people can exercise their rights.

We would whole heartedly endorse this!

Short note: permission test for appeals

In *R (A Child)* [2019] EWCA Civ 895, Lord Justice Peter Jackson and Lord Justice Baker had cause to consider what the test for permission to bring an appeal. Applications for permission to appeal to the Court of Appeal, the High Court, Family Court or the Court of Protection are governed by CPR r.52.6(1), FPR 30.3(7)) and COPR 20.8(1)(a) respectively. All these rules provide that the test to be applied is whether the appeal has 'a real prospect of success'.

The court had no difficulty rejecting the interpretation of the test as set out by Mostyn J in *NLW v ARC* [2012] 2 FLR 129, FD, where he held that a 'real prospect of success' meant it was more likely than not that the appeal would be allowed at the substantive hearing: "*anything less than a 50/50 threshold could only mean there was a real prospect of failure*". Instead and unsurprisingly, the court confirmed the test was as stated in *Tanfern v Cameron-MacDonald (Practice Note)* [2001] 1 WLR 1311 CA at [21], which itself follows *Swain v Hillman* [2001] 1 AER 91 CA, that there must be a realistic, as opposed to fanciful, prospect of success. "*There is no*

requirement that success should be probable, or more likely than not."

Short note: litigation capacity and civil restraint orders

In *Adelaja v LB of Islington* [2019] EWHC 1295 (QB) (not available on Bailii, but only on Lawtel, which we consider problematic), Jeremy Baker J has clarified the circumstances under which it is appropriate to make a civil restraint order against a person whose impairments render them incapable of conducting proceedings.

This case concerned a long-running dispute between a local authority and Mr Adelaja, whose wife, Sybil, suffered from mental health problems. The local authority had financial safeguarding concerns about Mr Adelaja which resulted in them taking over as his wife's appointee. Mr Adelaja was unhappy about this decision and had instigated numerous sets of legal proceedings against the local authority and one of its officers, including a claim for £1million in damages and multiple judicial review applications.

The local authority sought an extended civil restraint order against Mr Adelaja, which the court was easily satisfied should be made, noting that he had made numerous applications without any discernible basis in law and which were totally without merit, and that the order was needed to protect Mrs Adelaja and the resources of the court.

The local authority also sought an extended civil restraint order against Mr Adelaja's wife - although she had not been personally involved in decisions to issue the various claims and applications, some had been issued with her as

a named separate Claimant, and the local authority was anxious to ensure that Mr Adelaja did not circumvent the extended civil restraint order made against him by simply continuing to issue claims in his wife's name and purportedly on her behalf.

The Official Solicitor was appointed as her litigation friend, and evidence was filed that showed she did not want her husband to issue proceedings for her, and that she had signed some of the court forms under pressure from him. The Official Solicitor accepted that the court could make an order against her, in principle, but raised concern that she may not have capacity to understand the effect of the order, as required by *Wookey v Wookey* [1991] Fam 121. Jeremy Baker J observed that the fact that she lacked litigation capacity did not necessarily mean that she lacked the necessary understanding of the nature and requirements of the order. He decided that an extended civil restraint order should be made against Mrs Adelaja, since it was needed to achieve the objectives of protecting both her and the court from further spurious claims, it accorded with her wishes (to the extent she understood what was happening), and the local authority was not applying for a penal notice in respect of her, only her husband.

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

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

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

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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](#).

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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](#).

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Katherine has a broad public law and human rights practice, with a particular interest in the fields of community care and health law, including mental capacity law. She appears regularly in the Court of Protection and has acted for the Official Solicitor, individuals, local authorities and NHS bodies. Her CV is available here: To view full CV click [here](#).

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

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

**Adrian Ward: adw@tcyoung.co.uk**

Adrian is a 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; 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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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

Conferences at which editors/contributors are speaking

Medical decision-making and the law

Tor is giving a speech at Green Templeton College in Oxford on 20 June on medical decision-making and the law. For more details, and to book (tickets are free but limited), see [here](#).

Human Rights in End of Life

Tor is speaking at a free conference hosted by Sue Ryder on 27 June in London on applying a human rights approach to end of life care practice. For more details, and to book, see [here](#).

Essex Autonomy Project summer school

Alex will be a speaker at the annual EAP Summer School on 11-13 July, this year's theme being: "All Change Please: New Developments, New Directions, New Standards in Human Rights and the Vocation of Care: Historical, legal, clinical perspectives." For more details, and to book, see [here](#).

Liberty Protection Safeguards: Implementation of the Mental Capacity (Amendment) Act 2019

Alex is chairing and speaking at a conference about the LPS on Monday 23 September in London, alongside speakers including Tim Spencer-Lane. For more information and to book, 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 edition will be out in July. 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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