



Welcome to the May 2020 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Court of Protection, COVID-19 and the rule of law; best interests and dying at home; and capacity and silos (again);

(2) In the Property and Affairs Report: further guidance from the OPG in relation to COVID-19 and an unusual case about intestacy, minority and the Court of Protection;

(3) In the Practice and Procedure Report: the Court of Protection adapting to COVID-19; remote hearings more generally; and injunctions and persons and unknown;

(4) In the Wider Context Report: National Mental Capacity Forum news, and when can mental incapacity count as a 'status?';

(5) In the Scotland Report: further updates relating to the evolution of law and practice in response to COVID-19. We also note that 9 May 2020 was the 20th anniversary of the Adults with Incapacity (Scotland) Act 2000 receiving Royal Assent.

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#). Chambers has also created a dedicated COVID-19 page with resources, seminars, and more, [here](#).

If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the [Small Places](#) website run by Lucy Series of Cardiff University.

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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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Office of the Public Guardian: further COVID-19 guidance

The Office of the Public Guardian has issued [guidance](#) about executing a LPA during the restriction period. It was last updated on 29 April and so may well be changed again soon.

The first suggestion is to delay and only make the LPA if necessary. Then there is a reminder that everyone must sign one copy of the LPA and that the rules for witnessing signatures have not been relaxed together with suggestions of how to comply.

The OPG has also published some [advice](#) about how to be a deputy or attorney whilst maintaining social distancing.

These include the obvious ones of using teleconferencing and encouragement of those who are self-isolating to continue in post.

Short note: the Court of Protection, minority and intestacy

An application for an interim payment in a large clinical negligence claim threw up an unusual but interesting issue in *JXM v An NHS Trust* [2020] EWHC 919 QB.

C suffered major brain damage as a result of a serious assault by his father when an infant. The father was imprisoned and the mother convicted

of neglect. C claimed damages against the NHS Trust that had failed to spot broken ribs which were clearly the result of non-accidental injury when C had previously been admitted to hospital and, therefore, failed to take the protection measures that would have protected him from the later assault. Liability and causation had been admitted on behalf of the Trust.

C made the interim payment application to provide adapted accommodation. There was no issue on the application itself.

C, however, was under 18 so the Court of Protection could not authorise the making of a statutory will on his behalf. This raised the possibility that, if C died before the claim had settled, the proceeds of the remaining claim would by the rules of intestacy devolve on his parents.

The judge, Martin Spencer J, addressed the position thus at paragraphs 8-11:

8. There is, however, this complication. The claimant, were he to die before he is 18, would necessarily die intestate because no statutory will can be made on his behalf until he is 18 assuming at 18 that he does not attain capacity, which appears unlikely. The defendant has raised with the court, rightly and responsibly, the issue as to whether the interim payment in particular and the

damages in general would potentially accrue to the claimant's mother and father were he to die before the age of 18, they being his heirs under intestacy. To that end, an application has been made to the Court of Protection for the creation of a trust whereby it is hoped that arrangements could be made for any property of the claimant to be held in trust and to accrue to others other than his heirs on intestacy should he die before the age of 18.

9. In any event, although I have not had any detailed submissions in relation to this, I would expect that upon an application to the court upon the death of the claimant, the court would have the power to make an order that the estate of the claimant be distributed other than on the normal rules of intestacy upon the basis that should either of his parents inherit any money from him, that money would be almost certainly representing the damages payable to the claimant by the defendant as a result of the criminal acts of his parents and, in particular, his father. Therefore, the court would be able to trace the source of the money as being the unlawful acts of his parents and order that they should not gain from their unlawful acts by inheriting.

10. The immediate risk is that the claimant dies before the Court of Protection has the opportunity to make the trust order which has been sought but were that to happen, then the interim payment would be effectively repayable to the defendant subject to the claim for damages which the court could then make in the different circumstances which would apply. It might involve the sale of the house but not if the eventual damages exceed the amount of the interim payment. However, the court

could make an order that the money be held pending an appropriate order from the intestacy court or the court of protection.

11. In the circumstances, I do make the order sought and I simply comment that whilst I do not believe that the concerns of the defendant are likely to result in practice in either of the parents gaining from their criminal activities, I nevertheless recognise that as the partial guardian of public funds and to taking a responsible attitude towards their position as guardians of public funds, the defendant has rightly brought this matter to the attention of the court so the court is appraised of the circumstances and is able to monitor the situation relatively carefully because of the risk which has been identified.

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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 ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals. 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](#).

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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.

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Conferences

At present, most externally conferences are being postponed, cancelled, or moved online. Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

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

Advertising conferences and training events

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

Our next edition will be out in 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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