



Welcome to the June 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: substance over form in DoLS authorisations, complex questions of coercion in medical treatment, and the limits of fluctuating capacity in the context of sex;

(2) In the Property and Affairs Report: a brisk dismissal of an attempt to appeal a judgment of Senior Judge Hilder about charging by a deputy, and easy read guides to making LPAs;

(3) In the Practice and Procedure Report: an important rapid consultation on hearings and the judicial view of remote hearings;

(4) In the Wider Context Report: the CPR responds to vulnerability, strengthening the right to independent living, capacity in the rear view mirror and the ECHR and the CRPD at loggerheads;

(5) In the Scotland Report: the Mental Welfare Commission on hospital discharges, change at Scottish Government (but how much) and welfare guardianships and deprivation of liberty.

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#), where you can also find updated versions of both our capacity and best interests guides. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, [here](#); Alex maintains a resources page for MCA and COVID-19 [here](#), and Neil a page [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.

### Editors

Alex Ruck Keene  
Victoria Butler-Cole QC  
Neil Allen  
Annabel Lee  
Nicola Kohn  
Katie Scott  
Katherine Barnes  
Arianna Kelly  
Simon Edwards (P&A)

### Scottish Contributors

Adrian Ward  
Jill Stavert

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

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### Short note: permission to appeal refused in deputy charging case

In *Riddle v Public Guardian* [2021] EWCOP 38, Lieven J politely but firmly refused the deputy permission to appeal from this [judgment](#), a very long and scrupulously careful decision of Senior Judge Hilder where she considered at considerable (necessary) length the ability of a professional deputy who is not a solicitor to charge fees at the solicitors' rate, concluding, broadly, that the deputy could not.

In coming to that conclusion, the Appeal Court usefully reminds us of the hurdles appellants face when trying to overturn a first instance judge's evaluative decision:

*36. In my view this argument is bound to fail and doesn't come anywhere close to reaching the threshold for permission being granted to appeal. In deciding what weight should be given, the Judge needed to have some benchmark or comparator in undertaking the exercise. It was entirely reasonable for the Judge to look at a Local Authority and test against that, what rate would be reasonable in the circumstances. It seems to me to be significantly over forensic to argue that the Judge had to approach her analysis on what was the appropriate rate in any particular way, or that taking the comparison of the Local*

*Authority was the wrong approach, or that she was starting in the wrong place. The judgment shows that the Judge had very carefully considered what services Mr Riddle was offering, and what rate was appropriate. I cannot see any arguable case on that point.*

*37. In truth, Mr Riddle's argument is a result of being in disagreement with the Judges' evaluative judgement and the weight she attached to various evaluative matters. Those are things for the first instance judge, and subject to any misdirection (of which there was none), this is not a matter that the appeal court should interfere with. It is further relevant in this particular regard to consider the experience of Her Honour Judge Hilder and her expertise in this field, and how she very carefully considered the facts of the particular cases before her.*

### Mencap publishes guides for the execution of LPAs

Mencap has just published a suite of "easy read" guides to the making and use of health and welfare LPAs, available [here](#). They give easy to follow guidance on the setting up of such an LPA and then separate guidance to the attorney as to how the attorney should operate the LPA.

They are:

- The Supporter's Guide to the Health and Welfare Lasting Power of Attorney
- Easy Read Guide and Record for Making a Health and Welfare Lasting Power of Attorney
- Easy Read Guide for Sections 8 and 9 of a Health and Welfare Lasting Power of Attorney
- The Certificate Provider's Guidance: Health and Welfare Lasting Power of Attorney
- Guidance for a Health and Welfare Attorney

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## Editors and contributors

**Alex Ruck Keene: [alex.ruckkeene@39essex.com](mailto:alex.ruckkeene@39essex.com)**

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

**Victoria Butler-Cole QC: [vb@39essex.com](mailto: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. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributor to 'Assessment of Mental Capacity' (Law Society/BMA), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click [here](#).

**Neil Allen: [neil.allen@39essex.com](mailto:neil.allen@39essex.com)**

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

**Annabel Lee: [annabel.lee@39essex.com](mailto:annabel.lee@39essex.com)**

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](#).

**Nicola Kohn: [nicola.kohn@39essex.com](mailto:nicola.kohn@39essex.com)**

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

**Katie Scott: [katie.scott@39essex.com](mailto:katie.scott@39essex.com)**

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

**Rachel Sullivan: [rachel.sullivan@39essex.com](mailto:rachel.sullivan@39essex.com)**

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



**Stephanie David: [stephanie.david@39essex.com](mailto:stephanie.david@39essex.com)**

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

**Arianna Kelly: [arianna.kelly@39essex.com](mailto:arianna.kelly@39essex.com)**

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

**Simon Edwards: [simon.edwards@39essex.com](mailto: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](#).



## Scotland editors

**Adrian Ward: [adw@tcyoung.co.uk](mailto: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; 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](mailto:j.stavert@napier.ac.uk)**

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



## Conferences

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

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

Neil is doing a DoLS refresher (by Zoom) on 29 June 2021. For details and to book, see [here](#).

Neil and Alex are doing a joint DoLS masterclass for mental health assessors (by Zoom) on 12 July 2021. For details, 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.

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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](mailto:marketing@39essex.com).

**Sheraton Doyle**  
 Senior Practice Manager  
[sheraton.doyle@39essex.com](mailto:sheraton.doyle@39essex.com)

**Peter Campbell**  
 Senior Practice Manager  
[peter.campbell@39essex.com](mailto:peter.campbell@39essex.com)



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[clerks@39essex.com](mailto:clerks@39essex.com) • [DX: London/Chancery Lane 298](https://www.39essex.com) • [39essex.com](https://www.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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