



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

(1) In the Health, Welfare and Deprivation of Liberty Report: the Sexual Offences Act, care workers, and paying for sex; and obligations that cannot be avoided in the context of decisions about serious medical treatment;

(2) In the Property and Affairs Report: an important consultation on a scheme to enable access to funds held by financial institutions; and guidance about disclosure of medical records to attorneys and deputies;

(3) In the Practice and Procedure Report: a new training video on communication and participation, the use of the inherent jurisdiction overseas, and a systemic approach to unblocking entrenched relationships;

(4) In the Wider Context Report: the CQC's State of Care report, vaccination and children, and a new research report on accessible legal information;

(5) In the Scotland Report: an important reversal of course by the OPG for Scotland in relation to remuneration of professional guardians.

We also say a – temporary – farewell to Annabel Lee as she goes on maternity leave, and welcome to Nyasha Weinberg as the newest member of the team.

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.

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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Small Funds consultation

Families seeking access to small funds belonging to loved ones who lack mental capacity will benefit from a simpler and quicker system, under plans set out by the Ministry of Justice.

A new streamlined process would allow withdrawals and payments from cash-based accounts, up to a total value of £2,500 – without the need to get permission from the Court of Protection.

Currently, if a person lacks mental capacity and as a result cannot manage their finances, a family member or guardian must apply to the Court of Protection to manage these funds. This is to protect vulnerable people from fraud or abuse.

However, concerns have been raised that this can be a disproportionately costly and lengthy process to access relatively small amounts of money. The Government has therefore launched a consultation on a new system to ease the administrative burden on families.

The consultation can be found [here](#).

By way of background, the impetus for this has come about in large part because of issues relating to accessing Child Trust Funds held by

banks in the name of individuals who have now turned 18 and lack the capacity to make decisions about managing their property and affairs. This issue – and the legal complexities to which it gave rise – were discussed by Alex [here](#).

Medical disclosure information to attorneys and deputies

The Office of the Public Guardian has published [guidance](#) around disclosure of medical and care information to attorneys and deputies to enable them to make best interest decisions on behalf of the donor. It is particularly helpful in tracking through the operation of data protection law, which is sometimes seen as a bar to disclosure of information. As the guidance explains, data protection law does not stand in the way of appropriate disclosure to enable attorneys/deputies.

Short note: deputies, ACC and the Care Act

In *Calderdale MBC v AB* [2021] EWCOP 56, Senior Judge Hilder gave judgment – or rather, gave permission to publish the order in the case, having reached determined the issues – that a property and affairs deputy is not the person authorised under the MCA to make decisions

about the person's needs for care and support within the meaning of s.32(4)(a) of the Care Act 2014.

The case arose out of an application for authorisation of AB's community deprivation of liberty made by the local authority. This included an application by the local authority for a clarificatory declaration which in turn stemmed from a query or "concern" raised by the deputy, Mr Lumb.

AB had a local authority funded package of care which was provided by his siblings and paid for via direct payments made to his brother-in-law, DB. Mr Lumb queried whether in fact the management of AB's direct payments should instead fall to him and whether the carers used (ie AB's siblings) should be CQC-registered.

The local authority, in submissions which were apparently unopposed by any other party (the order records AnB and Mr Lumb agreeing with the local authority position; the Official Solicitor taking no position) submitted that where an adult lacks capacity to request their needs be met through direct payments, s.32 of the Care Act 2014 applies. The P&A deputy Mr Lumb, it submitted, was not the person authorised under the MCA to make decisions about P's needs for care and support within the meaning of s.32(4)(a). It argued that the authority to be an "authorised person" under s.32 Care Act was not the authority to "*apply P's funds to meet the costs of care arrangements,*" (as the decisions would not be in relation to P's funds at all, and the money would not become P's own assets); but rather authority to '*make decisions about the adult's needs for care and support*', which would appear to contain within it an

inherent '*determination of P's care needs*'" [order para 5f].

As the deputy was not the authorised person, the decision about direct payments rested with the local authority whose role it was "*to determine whether the person seeking direct payments was a 'suitable person' who would act in the adult's best interests in arranging care and support and is capable of doing so, per s32(4)(c) and s32(7)*" [order para 5h]. There was no authorised person under the Care Act; the ultimate arbiter of suitability as to who might be an appropriate recipient of direct payments therefore rested with the local authority.

As a final coda to the order/judgment, HHJ Hilder drew the parties' attention to paragraphs 52-56 of her judgment in ACC & Ors, in which she set out (the limits upon) the powers of deputies.

This judgment should not, in principle, be 'news' to anyone. It is, however, important for clarifying the interaction between two different forms of statutory authority, granted to different people for different purposes.

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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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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

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 December. 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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