Essex CHAMBERS

MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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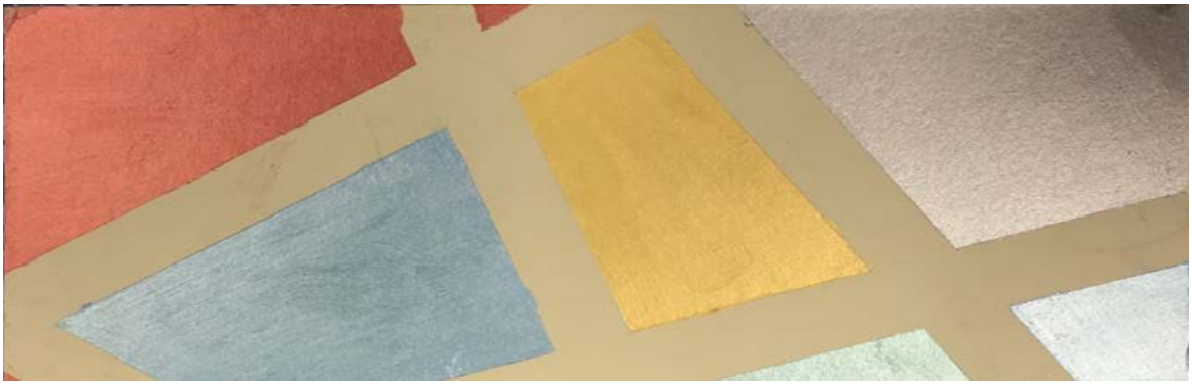

Welcome to the April 2024 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: a very difficult dilemma arising out of covert medication, and key deprivation of liberty developments;

(2) In the Property and Affairs Report: fixed costs for deputies, deputies and conflicts of interest, and the Child Trust Fund saga continues;

(3) In the Practice and Procedure Report: three amended Practice Directions, when (and why) should the judge visit P and fact-finding in the Court of Protection;

(4) In the Mental Health Matters Report: the Government (rather surprisingly) responds to the Joint Committee on the draft Mental Health Bill, and important reports from the PHSO and CQC;

(5) In the Wider Context Report: a snapshot into litigation capacity and Jersey sheds light on the concrete realities of assisted dying / suicide;

(6) In the Scotland Report: the Assisted Dying for Terminally Ill Adults (Scotland) Bill.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

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

Contents

Amended Practice Directions

Amendments to three Practice Directions supplementing the Court of Protection Rules 2017 have been made. In summary the changes are:

- Practice Direction 2A is amended to make provision for circumstances in which circuit judges and recorders may act as Tier 3 Judges.
- Practice Direction 19B is substituted to reflect updates to fixed costs that may be claimed by deputies, and to make other consequential amendments to reflect recent case law.
- Practice Direction 20B is amended to clarify the circumstances in which appeals from a Tier 2 Judge may be heard by the Court of Appeal.

The amendments to the Practice Directions come into force on 1 April 2024.

All the Practice Directions can be found on the Court of Protection Handbook here.

When (and why) should the judge visit P?

Wareham v Betsi Cadwaladar University Health Board & Ors [2024] EWCOP 15 (John McKendrick KC, sitting as a Tier 3 Judge)

Mental capacity – assessing capacity

This case concerned a 36 year old autistic woman, Laura Wareham, who strongly asserted her own capacity to make decisions about the conduct of the proceedings, and in respect of her (i) residence; (ii) care and support; and (iii) contact with others. The judgment of John McKendrick KC, sitting as a Tier 3 Judge of the Court of Protection, is lengthy and detailed in its analysis of the evidence – including that (unusually) of rival expert reports, one prepared on a joint instruction basis, and one on a sole instruction basis, by Ms Wareham's parents. For the reasons set out in the judgment, John McKendrick KC determined that Ms Wareham lacked capacity in the material domains in issue, not least because evidence of the sole expert had materially evolved under cross-examination:

> *She accepted she had not put all the relevant information to Laura. Her view was that this was for the treating team to do. She accepted she had overly relied on what Laura had told her and had not triangulated this with treating clinicians. She accepted her reports did not set out in writing the conversations she had had with Laura when discussing the functional tests in any detail. She also accepted that*

> *her conversations with treating clinicians had not been set out in any detail in her reports. As I have set out above, on each decision, she ultimately was not asserting that Laura had capacity* (paragraph 87)

Of wider relevance are the following points.

First is the useful self-direction that the judge set himself at paragraph 76 as regards the determination of capacity (footnotes omitted:

a. *A purpose of the MCA is to promote autonomy and this applies to both the concepts of capacity and best interests.*

b. *There is a statutory presumption Laura has capacity unless it is established otherwise.*

c. *Laura is not to be treated as unable to make a decision unless all practicable steps have been taken to help her to do so without success.*

d. *Laura is not to be treated as unable to make a decision merely because she makes unwise decisions.*

e. *It is for the Health Board to prove on the balance of probabilities that it is more likely than not Laura lacks capacity in respect of each identified decision. Laura and her parents need not prove anything.* [note that in relation to situations outside court, the question for purposes of s.5 MCA 2005 is whether the person carrying out the act has a reasonable belief that the individual lacks capacity, and belief is different to proof: see by analogy *Barnet Enfield And Haringey Mental Health NHS Trust & Anor v Mr K & Ors* [2023] EWCOP 35 at paragraph 57]

f. *Whilst two experts have opined, the decision is mine having regard to all the evidence, attaching what weight I consider appropriate.*

g. *I am assessing Laura's capacity as against the identified decisions in February 2024.*

h. *The assessment of Laura's capacity is decision specific which requires formulations of the matters to evaluate whether Laura is unable to make the decisions.*

i. *I should first identify the decisions which fall to be considered.*

j. *In respect of each decision it will generally be necessary to identify the relevant information.*

k. *The identification of relevant information must be made "within the specific factual context of the case."*

l. *The information relevant to the decision includes information about the "reasonably foreseeable consequences" of a decision, or of failing to make a decision.*

m. *I should not overlook Laura's 'values and outlook' and the weight she attaches to relevant information in the decision making process, if I consider she is able to weigh and use the information.*

n. *The previous case law identifying relevant information is a useful guide but each case turns on its own facts and previous lists should be appropriately tailored to*

the decision in question on the facts of the case.

o. *It is then necessary to consider whether Laura can make a decision in respect of the matter for the purposes of section 3 – by understanding, retaining and using and weighing the relevant information.*

p. *It is not necessary for Laura to understand and/or use and weigh all peripheral information but only the salient information.*

q. *If Laura is unable to make a decision in respect of the matter, it is necessary to consider whether Laura has an impairment and/or disturbance of the mind or brain.*

r. *Thereafter I must consider whether this impairment and/or disturbance causes Laura to be unable to make the decision.*

s. *It is not necessary for the court to have a formal diagnosis or to formulate precisely the underlying condition(s) to consider the causative question between the inability to make a decision and the impairment/disturbance. This it is a question of fact for the court to consider against all the evidence.*

Second is the reminder (at paragraph 69) for those concerned with DoLS that:

> [t]*he issue of residence is distinct from the decision in respect of the mental capacity qualifying requirement in Schedule A1 - namely whether the person has capacity "in relation to the question whether or not he should be accommodated in the relevant hospital or care home for the purpose of being given the relevant care or treatment" – see paragraph 15 of Schedule A1, MCA. In A Primary Care Trust v LDV & Ors [2013] EWHC 272 (Fam) Baker J (as he then was) indicated that the relevant information in answering the DoLS test includes – in essence – the core elements of the confinement to which the person is subject.*

Third is John McKendrick KC's observation in relation to the suggestion that the decision in relation to contact included Ms Wareham's attempts to contact medical specialists, the Food Standards Agency, the Office of the Public Guardian and the Equality and Human Rights Commission. At paragraph 80, he noted that the evidence did not deal with these organisations, and that:

> *In any event, I would need some considerable persuasion that the Court of Protection should be making declarations that P lacks capacity to contact others to grant itself a best interests jurisdiction to make an order that it is not in P's best interests to contact regulatory agencies. That issue seems very much a matter for the agencies to manage and not the court.*

Fourth and finally is the detailed discussion of the reasons that a judicial visit to see Ms Wareham in advance of the hearing. As there is so little judicial discussion of this difficult area, we set out his reasoning in full:

> *6. At previous hearings, prior to the start of the hearings, I have had the pleasure of conducting remote judicial visits to Laura. Such visits have been conducted with the agreement of the parties, consistently with Laura's wish*

to meet the judge, and have taken place in compliance with the Practice Note on Judicial Visits found at [2022] EWCOP 5, dated 10 February 2022. The previous hearings have largely determined case management and interim best interests decisions.

7. I have been asked to meet with Laura in advance of this hearing. Her solicitor set out a written plan for Laura's participation in this hearing. It anticipated I would meet with Laura in advance of this contested three day capacity hearing. I indicated, in an email to the parties sent in advance of the hearing, that whilst I would welcome the parties' submissions on the issue, my preliminary view was that I would meet with Laura at the conclusion of this stage of the decision making process to explain the outcome and to permit her to engage with the person (me) who is making decisions on her behalf.

8. I was concerned that there was no directly meaningful purpose to meeting with Laura in advance of the hearing. It would not be to elicit her wishes and feelings, in a section 4 MCA sense for obvious reasons and I am aware her view is that she has capacity to make the decisions with which this application is concerned. Nor am I carrying out an assessment, formally or informally, of Laura's capacity. Instead I am required to read and hear the written and oral evidence on these issues and the apply the law to the evidence to reach determinations.

9. Not only was there no obvious reason to meet with Laura in advance, I was concerned a judicial visit with Laura may influence my decision making one way or another, based upon my own observations which could not necessarily be fully communicated in her solicitor's written note of the meeting. The non-verbal communication and observation undertaken may have provided additional information that would be incapable of being communicated in a written note. Not only is there a risk of unconscious bias; a visit may cause an unfairness to the parties who are deprived of the context and non-verbal communication. Whilst judges are used to hearing evidence and then excluding it, my experience is that a judicial visit can leave a lasting impression.

10. In terms of the law, I note that section 4 (4) of the MCA places a duty on the court: "so far as reasonably practicable, [to] permit and encourage [Laura] to participate, or to improve her ability to participate, as fully as possible in any act done for her and any decision affecting her." However this must be interpreted consistently with the language and purpose of the MCA. Section 4 (4) is set out within section 4 which is concerned with best interests. The heading to section 4 is 'best Interests'. I consider the qualified duty on the court to ensure Laura's participation in these proceedings is principally directed at best interests decision making. Sections 2 and 3 which deal with capacity do not provide for a similar qualified duty. Whilst I accept that the court's determination of the capacity issues is a "decision affecting [Laura]" the common sense reading of this duty is that it relates to best interests. The Practice Note on Judicial Visits does not envisage judges conducting remote visits to P in respect of contested capacity. That is

not to say such visits are prohibited. They are not. However, the decision whether or not, or how, and when, a judicial visit to P should be carried out is a case management decision which should be undertaken consistently with the Court of Protection Rules and in particular in compliance with Rule 1.1 (the over-riding objective) which requires decisions to be made inter alia 'justly' and by 'having regard to the principles contained in the Act' which of course includes the qualified section 4 (4) MCA duty). Regard must also be had to Rule 1.2 which deals with the participation of P in the proceedings. This issue was largely dealt with by Cobb J in the normal way at the outset of the proceedings, but I have kept that matter under review.

10. I also remind myself that in the context of the Family Court[3], there is an increasing focus on the concept that a meeting between a child and a judge is a visit for the child to meet the judge; and not for the judge to meet the child. There is something of a read-across of this concept into this adult welfare jurisdiction. For the avoidance of doubt, I did not meet Laura (or hear from her in open court) for the purposes of my need to meet her to consider her capacity, or otherwise.

11. I have not overlooked Laura's participation in these proceedings which determine decisions affecting her. First, she is a party. Secondly, I have already met her on at least three occasions (each at her request to meet the judge). I have that background firmly in mind. Thirdly, she is represented in these proceeding by experienced solicitors and counsel. Fourthly, I have ensured there is a hybrid link so she is able to follow the hearing from her placement (and I delayed the start of the hearing for around an hour as various technical problems were worked through to ensure Laura could hear and see the proceedings). Fifthly, I determined to meet with Laura to explain my decision, although I emphasise this was for her to meet me to hear the outcome before others.

13. Lastly, I was persuaded to accede to Mr Brownhill's suggestion that Laura address the court at the conclusion of the evidence. Laura wanted this opportunity and no party opposed it. She spoke in public with members of the public watching her. She was not daunted by this although I do harbour doubts about the appropriateness of an incapacitated person choosing to address the court from her hospital bed in respect of intimate aspects of her life. As was apparent, whilst she was mostly calm, she appeared distressed before the short adjournment on day three and I quickly rose to provide her with a break. As I communicated to the parties after the adjournment, I was giving active thought, of the court's own motion, to making the case management decision to sit in private for the purposes of protecting Laura[4]. I indicated I would hear submissions from the parties and from any member of the public observing before making such a decision. Thankfully, this was unnecessary and Laura presented as calm and collected.

Fifth is the question of the extent to which it can really be right that (irrespective of the undoubted excellence of the representation) Ms Wareham was represented by the Official Solicitor required, ultimately, to argue a case directly contrary to

what she wished.[1] The court undoubtedly benefited hugely from the expertise of Counsel (and the solicitors) instructed by the Official Solicitor, but on the face of it this might well be thought to be a paradigm case in which the truly right course of action would have been for P to be represented by a person charged with advancing her case. To the extent that the court required the assistance of experienced lawyers whose sole duty was to assist it, rather than juggle that duty with a duty to a client, the Official Solicitor could have been invited to act as Advocate to the Court.

Fact-finding and the Court of Protection

An ICB v G LF, GR and CJ [2024] EWCOP 13 (Hayden J)

Practice and Procedure – fact finding

This is the latest episode in the long running and highly contested proceedings concerning G, a 29-year-old woman, suffering from a profound, degenerative neurological condition.[2] The earlier judgments can be found at [2021] EWCOP 69) (judgment on 13 December 2021 when G was still living in a Childrens Hospital) and [2022] EWCOP 25 (Court of Appeal judgment regarding injunctive relief).

This judgment is the culmination of a fact-finding hearing that took place over 19 days between July and November 2023. The evidence before the court was extensive, including a 17-page Scott Schedule produced by the ICB with a 9 page counter-Scott Schedule of countervailing allegations of negligence or malpractice, prepared by LF (G's father's team). The judgment runs to 213 paragraphs. A summary of the highly detailed findings on the disputed factual allegations is beyond the scope of this report, but it is important to note that the allegations made against the family were extremely serious and included allegations that they had tampered with G's equipment including her ventilatory support.

Hayden J observed that

> *42. Scott Schedules have been prepared in this case because they were considered to be the appropriate framework by which to attempt to marshal a very large body of evidence, requiring scrutiny of human behaviour as well as extensive documentation. However, I consider that the reservations expressed about Scott Schedules, in the Court of Appeal, have clear resonance in this case. What I find myself evaluating is an alleged course of behaviour, manifested in different ways and contested to varying degrees. A great deal of the behaviour in focus relates to interactions between the staff and the family but some of it concerns specified allegations of covert tampering with G's ventilation equipment. Additionally, as I have mentioned, there is a schedule, prepared on behalf of LF, setting out allegations of general negligence against the care home (CH).*
>
> *43. The Court of Appeal recognised that specific pleading of individual incidents in Scott Schedules, in family cases, might too easily divert the focus from the important broader picture and serve, paradoxically, to minimise the seriousness of the allegations by severing them from a course of conduct. The alternative options, however, are elusive. One of the suggestions made involved creating "narrative statements"*

[1] We should emphasise that it is entirely clear that this is what is required by the law as it stands. See, for a recent statement of this, *Gloucestershire Health & Care NHS Foundation Trust v FD & Ors* [2023] EWHC 2634 (Fam).

[2] Nicola being involved in the case, she has not contributed to this note.

> *which it was submitted, would allow there to be consideration of the overall nature of the relationships in focus. It was advanced that such an approach would allow the court to identify the real character of the allegations before then going on to look at the "granular detail". I recognise that the structure of the allegations here is steeped in 'granular detail' and also runs the risk of occluding the significance of the totality of the alleged behaviours and their impact, on both sides. Ms Roper KC, on behalf of the Official Solicitor, suggests that the Court should approach its judgement by "narrative" findings based on an adaptation of the model discussed above. I am not sure whether my judgment reflects Ms Roper's aspiration but I have endeavoured to address the overall picture emerging from the broad evidential canvas as well as its individual parts.*

Hayden J (unsurprisingly perhaps) decided that it was not 'necessary or proportionate' to address each and every alleged "breach" in the Scott Schedule, going on to say "[t]*hat would serve merely to expand this already extensive judgment and further to feed into the high-octane 'lawfare' that this case has become and which I am resolved to stop*" (paragraph 195) What he did do was identify and then consider the 'key incidents'. This approach allowed the court "*properly to evaluate the nature and extent of any future risk and provide a foundation for a forensically objective evaluation of G's 'best interests,' predicated on a substratum of determined facts as opposed to allegations*" (paragraph 195).

Ultimately the ICB proved their case in relation to the key incidents. Hayden J found (amongst other findings) that LF had engaged in a "pattern of sustained, controlling and bullying behaviour' which had caused 'a wounding psychological impact' on the staff at G's nursing home" (paragraph 207). The Court dismissed the countervailing allegations made regarding the key incidents as being entirely without substance.

The last paragraph of the judgment raises an issue that will be familiar to many of us who practice in this area:

> *The court itself has become a theatre of conflict. The family's enthusiasm for litigation, as I find it to be, is a different facet of their behaviour within the care home and earlier in the hospital. It is disruptive, calculated to cause distress. It has, at times, degenerated into 'lawfare' and rather than promoting G's welfare, the court process risks becoming inimical to it.*

Quite what that this judgment means for the contact arrangements for G in the future is difficult to know.

Of wider interest are the paragraphs relating to the approach to Scott Schedules noted above, and paragraph 22, which addresses the matters that the court should consider when deciding whether or not to undertake a fact-finding in the Court of Protection.

> *For my part, I do not think that in this sphere of law, they have quite the same practical utility that they can have in the Family Court. In the Court of Protection, the range of welfare options for P is frequently very limited and unlikely to vary very much in response to a shifting factual matrix. In determining whether a fact-finding hearing should be convened, Judges must consider, rigorously, what real purpose it is likely to serve i.e., from the perspective of informing decisions relating to P's welfare. Such hearings are inevitably adversarial and invariably generate further hostility. This is inherently undesirable. Delay in reaching*

> *conclusions is inimical to P's best interests. In a very pressing and literal way, time is often not on P's side. Delay can only be justified if it is identifiably purposeful.*

The factors in this case that persuaded Hayden J that a fact-finding was required were the gravity of the allegations, the nature of the family's responses and the '*clear resonance for the central welfare issues i.e., as to where G will live and whether or to what extent it will be in her best interests further to promote her relationship with her family*" paragraph 22). This was because this was a family who (at paragraph 209) Hayden J considered could 'soothe and comfort' G in a way that only a parent could, and who when alone with G in the community, provided exemplary care to her. It was therefore their conduct in and around G's placement that gave rise to the very serious risk of harm to G (both physical and psychological), and risked the breakdown of her highly specialised placement. It is inevitable in such circumstances that the court must have a firm factual foundation on which to assess best interests.

Short note: attendance at rehabilitation case management meetings

In *Hadley v Przybylo* [2024] EWCA Civ 250, the Court of Appeal has confirmed that (contrary to the views of Master McCloud) it, in principle, the attendance of fee earners at rehabilitation case management meetings and on deputies are recoverable costs in personal injury litigation. The Court of Appeal did, however, make clear that solicitors should not assume that they are entitled to attend every routine rehabilitation case management meeting, noting (at paragraph 61) that:

> *There was no such default or blanket entitlement, and the Serious Injury Guide and the Rehabilitation Code do not justify a contrary approach. And whilst it is accepted that a damages claim for the costs of rehabilitation can be the subject of a reduction if the judge concludes that they were spent on poor or inadequate case management (see Loughlin v Singh & Ors [2013] EWHC 1641 (QB), where Kenneth Parker J reduced the damages under this head of claim by 20%), so that a solicitor needs to keep an appropriate eye on the rehabilitation plans going forward, that does not justify any sort of default or blanket entitlement either.*

Court of Protection statistics (and High Court child DoL orders)

The statistics covering October to December 2023 have been published.

In October to December 2023, there were 8,581 applications made under the MCA 2005, up by 17% on the equivalent quarter in 2022 (7,319 applications). Of those, 37% related to applications for appointment of a property and affairs deputy. In comparison, there were 13,740 orders made under the MCA 2005, up by 13% on the same quarter in 2022. Of those, 36% related to orders by an existing deputy or registered attorney

Annually, the total number of orders made in 2023 was up 25% compared to 2022. Applications by an existing deputy or registered attorney represented the highest proportion of orders made under the MCa 2005 during 2023, totaling 37% of the 58,530 orders made throughout the year.

Since the Supreme Court clarified the definition of deprivation of liberty in 2014, there has been a significant increase in the number of applications. There were 15 applications in January to March 2013 which increased to a high of 1,744 in July to September 2020. There were 1,569 applications in October to December 2023.

Of these, 103 were 'straight' s.16 MCA applications, 497 were applications under s.21A and 969 were applications under the *Re X* process (broadly comparable with the quarter before, when 927 applications were made under the *Re X* process).

Whilst deprivation of liberty orders made saw an increase by 70% from 770 last year to 1,311 in the latest quarter, higher than in previous quarters due to efforts being made by the courts to increase the number of orders made and clear backlogs.

Annually, the total number of applications in 2023 was 6,210 which is similar to the 6,265 deprivation of liberty applications in 2022 and a slight fall from the peak of 6,286 applications made in 2021. Deprivation of liberty orders in contrast almost doubled (increase of 95%) compared to the previous year, with 5,276 orders made during 2023, the highest in its series.

Separately, the statistics show that there were 289 applications made between October and December 2023. Most of these children were teenagers; 57% aged between 13 and 15 and 31% aged between 16 and 18 years.

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Alex 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 Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. 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 and created the website www.lpslaw.co.uk. To view full CV click here.

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Arianna practices in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in inherent jurisdiction matters. Arianna works extensively in the field of community care. She is a contributor to Court of Protection Practice (LexisNexis). To view a 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 2022). 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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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

Members of the Court of Protection team regularly present at seminars and 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.

Adrian will be speaking at the following open events: the World Congress on Adult Support and Care in Buenos Aires (August 27-30, 2024, details here) and the European Law Institute Annual Conference in Dublin (10 October, details here).

Peter Edwards Law has announced its spring training schedule, here, including an introduction – MCA and Deprivation of Liberty, and introduction to using Court of Protection including s. 21A Appeals, and a Court of Protection / MCA Masterclass - Legal Update.

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 May. 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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