



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

(1) In the Health, Welfare and Deprivation of Liberty Report: the Court of Appeal on belief and capacity, and both sexual and medical complexities before the courts;

(2) In the Property and Affairs Report: a guest post updating deputies and attorneys on important responsibilities;

(3) In the Practice and Procedure Report: which decisions are for doctors, and which for the courts; jury-rigging Article 5(4) compliance in community DoL cases, and transparency under the spotlight;

(4) In the Mental Health Matters Report: a Mental Health Bill on the way, the hard edges of the MHA 1983 and the CQC and Valdo Calocane;

(5) In the Wider Context Report: the limits of Article 3 in the context of the inherent jurisdiction, the CQC and covert medication and Lord Falconer's Assisted Dying Bill;

(6) In the Scotland Report: the Scottish Government consults on legislative measures to respond to the Scott Review and a report from the World Congress on Adult Care and Support.

There is one plug this month, for a [free digital trial](#) of the newly relaunched Court of Protection Law Reports (now published by Butterworths). For a walkthrough of one of the reports, see [here](#).

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.

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CoP Property and Affairs Court User Group minutes

The minutes of the CoP Property and Affairs Court User Group meeting of 10 July 2024 are now [available](#). Two exchanges in respect of the (relatively) new COP3 form perhaps merit particular mention:

Q: Are there any plans for a prescribed or approved list of professionals, professional qualifications or experience that would make a person suitable to complete form COP3? The previous COP3 had some examples on it of who may be a suitable person to complete the form. There have been a few instances reported recently where an assessment by a social worker who is experienced in assessing mental capacity has been rejected and a medical assessment requested. An approved list for both internal and external users of the Court of Protection may prevent any confusion in this regard.

A (Senior Judge Hilder): responded that the review of the COP3 by the Rules Committee which led to the current form of the COP3 specifically considered this question and determined that an exhaustive list was not possible, not least because the landscape of roles in this area is constantly changing. For example, "Physician Associates" are new. (So far, HHJH has not been persuaded that Physician Associates have sufficient expertise/experience to conduct capacity assessment.)

Typically, the appropriateness of an assessor depends on both the expertise/experience of the assessor and the circumstances of the incapacitated person. The decision maker needs to be satisfied that the assessor is appropriately qualified in the circumstances required.

And:

Q: If the old COP3 is on the old form, will it still be acceptable if the content is appropriate.

A: (Senior Judge Hilder): advised that the 6-month window for using the old COP3 had now expired. If an old COP3 form is to be relied, there will need to be explicit confirmation that circumstances have not changed.

Court of Protection deputyship and attorneyship update

[This is a guest post from [Caroline Bielanska](#)]

At a recent meeting with the Court Manager, it was suggested that the Court's Practice Directions which are held on the Judiciary website, could be embedded into the gov.uk website to make it easier for those not familiar with the court process. The Court Manager is to consider this further.

Since January 2023, applications for the appointment of a property and affairs deputy can be made on line via the gov.uk website. Since then the process has been adapted to make it

easier for users and the court administration. Most recently, the process has removed the need to complete and upload form COP1A (information about property and affairs), as the process allows applicants to include this information during the online journey. However, for professionals the process still uses form COP1A to collate the data, meaning they input the same information twice: once when they are collating it and secondly when they use the online process. When the file is costed, the time taken will not be fully recoverable because of duplication. The Court Manager has confirmed that users have a choice as to how to submit this information—either directly online or upload form COP1A. This is good news for professionals who will certainly want to continue with standard usual practice.

There are still about 30% of professional users who are not making their deputyship applications online. There is likely to be a change to Practice Direction 9H which may result in professionals being prevented from having their costs paid from the person's funds if they make a paper application. The court is making contact with professional applicants to remind them to make the application online. This has the advantage that they will receive their order quicker. It is important that this is shared within practices, particularly if it has branch or regional offices.

Clarity on Ministry of Justice's position for Certificate Providers

The OPG has the power under paragraph 11(1) of Schedule 1 of the MCA to determine that an instrument is not made in accordance with Schedule 1 and so has not been validly executed. In that context, the OPG may request relevant information from the Certificate Provider to verify the circumstances in which the LPA certificate was provided.

Following a recent conversation with the policy team responsible for the implementation of the Modernisation of Lasting Powers of Attorney project (MLPA) at the Ministry of Justice (MoJ), they have confirmed that the Certificate Providers will not be legally required to respond to inquiries made by the OPG.

The Powers of Attorney Act 2023 is yet to come into effect, but it and its underlying regulations will realise the MLPA project. It had been hoped that the planned amendment LPA regulations would expressly make provision for Certificate Providers to respond, particularly as the OPG will become responsible for investigating any concerns raised by any person prior to the registration of the LPA, without the need for the concerned party to make a court application.

The MoJ policy team confirmed they would be happy to include a line in the Certificate Provider Form to encourage people to comply with any future requests from the OPG in circumstances where a dispute about an LPA has been raised. While this would have no legal enforcement under the MCA, it may increase understanding of the role and enhance protections for the donor.

Solicitors who act as a Certificate Provider who respond to the OPG's inquiries will be in breach of rule 6.3 of the Solicitors Regulation Authority's Code of Conduct.

The rule requires they keep the client's affairs confidential unless disclosure is required or permitted by law or the client consents. Disclosure is permitted if a solicitor knows that a crime or fraud is being committed. However, it would be extremely hard to imagine a situation where a solicitor who acted as a Certificate Provider, which in part confirms their opinion this is no fraud, would subsequently

consider there was a crime being committed at that point.

To avoid breaching rule 6.3 solicitors should obtain advance consent from their client when acting in relation to the making of an LPA. To help solicitors, here is an example of advance consent.

**ADVANCE CONSENT
TO DISCLOSE CONFIDENTIAL INFORMATION
RELATING TO YOUR LASTING POWER(S) OF
ATTORNEY**

When you make a Lasting Power of Attorney, it must be signed by an independent person who has formed an opinion that:

1. you have the mental capacity to make the power;
2. you understand the scope and purpose of the power;
3. you are not being put under undue pressure to make the power;
4. it is not being fraudulently made; and
5. there is nothing else which would prevent you from making the power.

Concerns can be raised with the Office of the Public Guardian who can investigate. The Office of the Public Guardian acts to safeguard people from making lasting powers where they do not have capacity or are being tricked or pressured into making a power. They may ask the person who acted as your Certificate Provider to answer questions as to how they formed their opinion. The outcome of the investigation might result in an application to the Court of Protection for a judge to be decide what should happen.

Where a solicitor is to act as a Certificate Provider it is necessary for you to give your consent to them answering questions. This is because solicitors are required by their Regulations to keep your information confidential.

It is very rare for concerns to be raised, but please can you sign the attached consent form, which will permit the certificate provider to answer questions should they be made.

**ADVANCE CONSENT
TO RESPOND TO QUESTIONS
RAISED BY THE OFFICE OF THE PUBLIC
GUARDIAN**

I [insert client’s full name and address] give my consent to:

[insert legal practice’s name and address] (the legal practice) which includes any successive or amalgamated practice which has resulted in a change of its name or address:

To disclose any confidential information held or known in respect of me relating to the making of my lasting power(s) of attorney, to the Office of the Public Guardian and the Court of Protection.

I understand that any confidential information disclosed will be limited to what is considered by the legal practice at the time to be necessary and appropriate.

Signed.....
.....
Dated.....
.....

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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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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She is Vice-Chair of the Court of Protection Bar Association and a member of the Nuffield Council on Bioethics. 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 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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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 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 European Law Institute Annual Conference in Dublin (10 October, details [here](#)).

Peter Edwards Law have announced their autumn online courses, including, Becoming a Mental Health Act Administrator – The Basics; Introduction to the Mental Health Act, Code and Tribunals; Introduction – MCA and Deprivation of Liberty; Introduction to using Court of Protection including s. 21A Appeals; Masterclass for Mental Health Act Administrators; Mental Health Act Masterclass; and Court of Protection / MCA Masterclass. For more 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.

Our next edition will be out in October. 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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