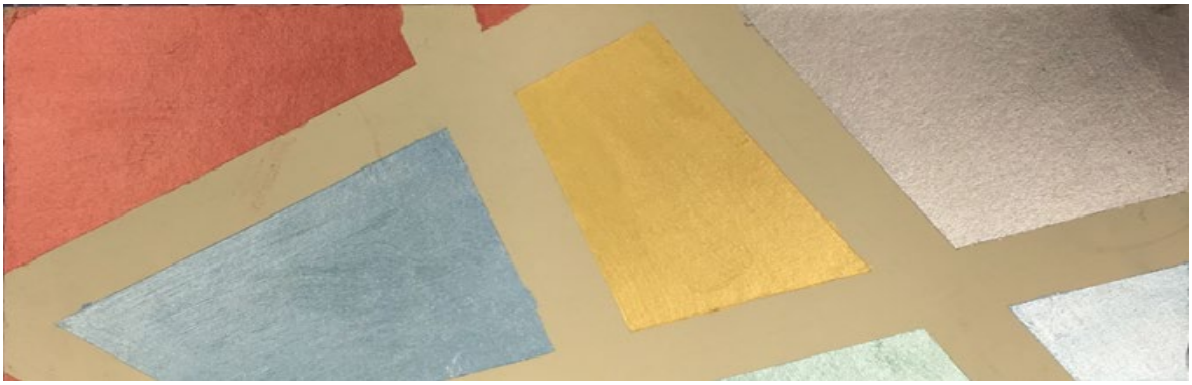

Welcome to the September 2025 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on *Cheshire West 2*, non-withdrawal of treatment in two very different contexts and SCIE sounds the alarm;

(2) In the Property and Affairs Report: the OPG annual report and increases to LPA fees;

(3) In the Practice and Procedure Report: the Court of Protection (Amendment) Rules 2025, a route map for anorexia cases relating to detained patients, and taking evidence from abroad;

(4) In the Mental Health Matters Report: the police, Article 2 and suicide risk, and an evaluation of the HOPE(S) programme;

(5) In the Children's Capacity Report: *Gillick* does not provide a universal test, and jurisdictional issues in the making of deprivation of liberty and wardship orders;

(6) In the Wider Context Report: anonymity, vulnerability and the open justice principle, and learning disability and social murder;

(7) In the Scotland Report: an apparently open and shut guardianship case and an update on Adults with Incapacity Act reform.

The progress of the Terminally Ill Adults (End of Life) Bill can be followed on Alex's resources page 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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Terminally Ill Adults (End of Life) Bill

Second Reading of this Bill in the House of Lords is set for 12 September. The progress of the Terminally Ill Adults (End of Life) Bill can be followed on Alex's resources page here, and a set of briefings / amendments (including in relation to capacity) that he has worked on with other members of the King's College London-based Complex Life and Death Decisions group can be found here.

2023 LeDeR report published

As we went to press, and after a considerable delay the Government has blamed on data quality issues, the 2023 *Learning from Lives and Deaths – people with a learning disability and autistic people* report was presented to Parliament. The report shows that the percentage of "avoidable deaths" — where death occurs in someone under the age of 75 to a condition deemed preventable, treatable, or both — has fallen from 46 per cent in 2021 to 39 per cent in 2023, but the rate remains almost double that of avoidable deaths in the general population (21 per cent).

The analysis also found that 37 per cent of cases reported some form of delay in care or treatment, while 28 percent reported instances where diagnosis and treatment guidelines were not met.

Researchers found that, compared to those coming from White backgrounds, those from minority ethnic backgrounds had a significantly lower median age of death. Between January 2021 and December 2023, the median age of death in those from Asian and Asian British backgrounds reported a median age of death of 43 – a 20 year difference when compared to those from White backgrounds.

Further analysis found that, where 44 percent of people from White backgrounds were aged 65 and above when their deaths were reported, the same percentage of people from Asian backgrounds were in the 24 – 49 age category.

Researchers also analysed the data available for people with a severe or profound learning disability, approximately one third of the reported cases since 2021 fall into this category. Analysis established that those individuals have a younger median age of death (57 vs 64) and are more likely to have a treatable cause of death due to conditions such as pneumonia or seizures, while those with mild or moderate learning disability were more likely to have

preventable causes of death, such as those related to heart disease or cancer.

Anonymity, vulnerability and the open justice principle (1)

PMC v A Local Health Board [2025] EWCA Civ 1126 (Court of Appeal (Sir Geoffrey Vos MR, Warby and Whipple LJJ)

Other proceedings – civil

Summary

The Court of Appeal has taken another run at how to balance open justice with the protection of the vulnerable in *PMC v A Local Health Board* [2025] EWCA Civ 1126, in the context of the grant of anonymisation orders and reporting restriction orders in clinical negligence cases brought by children and protected parties and in proceedings brought to seek the court's approval of settlements in such cases. Nicklin J at first instance – and to the consternation of many, given that they had thought this issue had been settled by the Court of Appeal in the *Dartford* case – had questioned the jurisdictional basis upon which such orders were made. Following an extensive and detailed review of the case-law – including the decision of the Supreme Court in *Abbasi* (postdating the first instance decision in *PMC*), the Court of Appeal had little hesitation in finding that the common law did allow for such orders to be made.

As Sir Geoffrey Vos MR, giving the sole reasoned judgment, noted at the outset (paragraph 2):

> *The terminology for the orders sought in these cases has not always been clear. I shall use the terms in the following fashion: An order sought within court proceedings to withhold or anonymise the names of a party or a witness, including withholding information that would identify that person, will be referred to as a withholding order (WO). An order sought within court proceedings which has the effect of restricting the reporting of material disclosed during those proceedings whether in open court or by the public availability of court documents will be referred to as a reporting restrictions order (RRO). An order made within court proceedings which has the effect of both withholding or anonymising the names of a party or a witness and restricting the reporting of material disclosed during those proceedings whether in open court or by the public availability of documents will be referred to as an anonymity order (AO).*

Sir Geoffrey helpfully set out his conclusions in headline terms at the outset of the judgment as follows:

> *8. In outline, I have determined the jurisdictional questions as follows. The authorities demonstrate that there is a limited common law power to derogate from the principle of open justice in civil or family court proceedings by making, within court proceedings, both a WO and an RRO. This kind of RRO takes effect as an order preventing publication of specified material disclosed during proceedings whether in open court or in documents placed before the court. It is not, however, in the same category as an equitable injunction granted against the world, generally in relation to matters occurring outside court proceedings, preventing the identification of people or information, and now founded on section 37 of the Senior Courts Act 1981. Section 11 was enacted because there was uncertainty about the common law power to grant an RRO. Its enactment did not, however, resolve that common law question in itself. It simply established that RROs may be granted in the specific cases to which the restricted terms of section 11 apply.*

> *9. Secondly, I have determined that, in large part, Dartford remains good law, and is binding on us. But Dartford dealt only with AOs made in approval applications under CPR Part 21.10, which is not this case. It was, however, a case where proceedings had been started before the application for approval was made. The same principles apply, as explained below, to applications for AOs in personal injury actions brought by children or protected parties.*
>
> *10. Thirdly, I would respectfully disagree with the dictum of Lord Judge CJ at [14] in In Re Press Association [2012] EWCA Crim 2434, [2013] 1 WLR 1979 (Press Association) to the effect that it was a "pre-condition to the making of the order on the basis of section 11 that the name of the defendant should have been withheld throughout the proceedings". I see no reason, as a matter of jurisdiction, why an AO should not be made, relying on either the common law power or section 11, even if a WO was not made at the beginning of the proceedings.*

On the facts of the particular case, Sir Geoffrey considered that the judge had been wrong to refuse an application for an anonymity order in a personal injury claim brought by a severely injured child through their litigation friend. However, he noted, the terms could only be prospective, rather than retrospective, because of the previous publicity that the case had attracted.

Although, as set out above, Sir Geoffrey broadly followed the *Dartford* case, he nuanced the guidance given in the following fashion:

> *99. The first thing that I would respectfully suggest should be changed about Moore-Bick LJ's guidance is the suggestion [at 35(i)] that the application for an AO at an approval hearing should be listed under the name of the child or protected party. It seems to me that it would be better to avoid publicity being given to the name before the application for an AO is determined. The application can and should be listed either as "an application under CPR Part 21.10" (or similar formulation) or by reference to a threeletter pseudonym suggested in the application. The latter course has the advantage of giving the case a nearly unique identity. By listing the case anonymously, the name and identifying details of the claimant would not be mentioned in open court unless the application was dismissed. I entirely accept that the application under CPR Part 21.10 itself should be heard in open court.*
>
> *100. Secondly, I would be inclined to clarify the process suggested by Moore-Bick LJ. The judge suggested that Moore-Bick LJ was introducing an inappropriate presumptive priority for anonymity over open justice and reversing the burden of proof. I think he was doing no such thing. What he was doing, however, was seeking to introduce a simple and effective way of resolving the many applications for anonymity that are made in the context of approval applications under CPR Part 21.10. Moore-Bick LJ said at [34] that the court should normally make an AO in favour of the claimant without the need for any formal application, and that the press should file and serve on the claimant a statement setting out the nature of its case if it wanted to oppose such an order. Moore-Bick LJ was not saying that the applicant did not have to apply for an order, or that the order sought would be made automatically. He had already made it clear at [17] and [27] of his judgment that any derogation from the open justice principle had to be justified on grounds of strict necessity. What Moore-Bick LJ was trying to do, I*

think, was to streamline the process for cases where it was likely that the court would consider such a derogation strictly necessary.

101. Thirdly, the evidence that needs to be adduced in support of an application for an AO in an approval context depends, in my view, on the case. The essential circumstances of the case must, of course, be set out in the evidence. There are no presumptions about the outcome of the application and no special rules exempting the applicant from producing the best available evidence in support of the application. The circumstances of the case may be sufficient to make it clear where the balance lies, and the minimum steps that are strictly necessary to protect the claimant in the interests of justice. I do not think, however, that the evidence needs to speculate as to future specific risks to the claimant. As Lords Reed and Briggs said at [138] in Abbasi SC, the fact that the risks to the party in question lay entirely in the future might mean that there would have to be reliance on generic evidence based on the adverse effects of publicity in earlier comparable cases (see [77] above). I do not think that Moore-Bick LJ was encouraging the determination of these applications on the basis of rival generalities as the judge suggested.

102. With the exception, therefore, of [35(i)] of Dartford (concerning the listing of the application – see [99] above), I endorse the guidance in that paragraph. I agree that, in a case where the parties are aware that the media or other non-parties have published information about the case or have shown a specific interest in doing so, those nonparties ought to be notified of the court's consideration of the application so they can be heard if they wish. Where the media are present at an approval hearing, they should be afforded an opportunity to be heard on anonymity questions (see [35(iv] in Dartford). I cannot, however, see why, in cases where no third party is known to have an existing interest in the case, the media needs to be notified in advance of an anonymity application being made. The media will become aware immediately after an AO is made because of the provisions of CPR Part 39.1(5) requiring a copy of the court's order to be published on the Judiciary's website (see [39] above). The media can then apply speedily, if they wish, to set aside the AO.

At paragraph 107, Sir Geoffrey noted that:

> *Whilst I have made clear that the judge went wrong in rejecting the common law power to grant an RRO and in doubting the Court of Appeal's decision in Dartford, the judge was right to emphasise the critical importance of the common law principle of open justice and its applicability in both the situations under discussion in this case. He was also right to make clear that the principle of open justice, even in these situations, should only be departed from where it is strictly necessary to do so in the interests of justice.*

He then set out the starting point for the process to be followed, which he identified as being found in Lord Reed's judgment in A v BBC, which Sir Geoffrey summarised as follows:

> *i) First, the interests of justice are not confined to the court's reaching a just decision on the issue in dispute between the parties.*
>
> *ii) Secondly, the administration of justice is a continuing process.*
>
> *iii) Thirdly, the court can, therefore, take steps in current proceedings in order to*

> *ensure that the interests of justice will not be defeated in the future.*
>
> *iv) Fourthly, anonymity may be necessary in view of the risks posed in the circumstances of the case. Those identified in the case law to date include: (i) risks to the safety of a party or a witness, (ii) risks to the health of a vulnerable person, and (iii) risks of a person suffering commercial ruin. AOs may also be made to protect a party to proceedings from the painful and humiliating disclosure of personal information about them where there was no public interest in its being publicised. Not all categories can be envisaged in advance.*
>
> *v) Fifthly, the application of the principle of open justice may change in response to changes in society and in the administration of justice*

Sir Geoffrey note that the standard form PF10 (approved by the Civil Procedure Rule Committee for use in relation to applications for anonymity orders in connection with approval applications under CPR Part 21.10) seemed inappropriate in light of the judgment, and invited the Civil Procedure Rule Committee to consider how it should now be revised.

Comment

The judgment applies not just to children, but those lacking capacity to conduct proceedings due to cognitive impairment. Whilst it does not apply directly to the Court of Protection, it reinforces the proposition that the fact that a court is exercising a protective jurisdiction is a relevant consideration in the mix when it comes to the operation of the open justice principle.

Anonymity, vulnerability and the open justice principle (2)

SA v Secretary of State for the Home Department and Associated Newspapers [2025] EWCA Civ 1065 (Court of Appeal (Baker, Arnold and Andrews LJJ)

Other proceedings – civil

Summary

This judgment relates to an application made by Associated Newspapers ("AN") to discharge all the orders that had been made by the Court of Appeal, the Upper Tribunal (Immigration and Asylum Chamber) ("the UT") and the First Tier Tribunal ("FtT") anonymising the subject matter of immigration proceedings concerned with whether or not to revoke her refugee status. The subject matter of these proceedings was anonymised throughout as 'SA'.

The Court of Appeal's reasons for anonymising SA, are set out at paragraph 14 of the reserved substantive judgment dismissing the appeal:

> *The appellant is a protected party who is represented in these proceedings by a solicitor who was appointed by the Court of Protection as her Deputy on 8 June 2018. She has suffered from serious mental health issues for many years, and in consequence she lacks the capacity to litigate. For this and other reasons there are anonymity orders in place.*

AN's application centred on the Court of Appeal's order (being the only one AN was in time to challenge) and the issue under consideration was whether *"in the present circumstances and on the evidence as it now stands, there is a sufficient justification for continuing to derogate from the fundamental principle of open justice."*

The Court of Appeal noted that SA had initially been afforded anonymity by the FtT and the UT on the basis that she was entitled to lifetime anonymity under section 1(1) of the Sexual

Offences (Amendment) Act 1992 by virtue of her claim to have been the victim of forced child marriage in Saudi Arabia. As this claim had subsequently been found to be false (on the basis of compelling evidence), the factual foundation for that justification had fallen away. Accordingly, the Court (having set out the principle that derogations from open justice, including orders for anonymity and concomitant reporting restrictions, can be justified as necessary on two principal grounds: maintenance of the administration of justice, and harm to other legitimate interests and noting that SA's case falls within the latter category) carried out a balancing exercise between the two rights in play. Those being SA's right to respect for her private life under Article 8 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR") against the rights of the media and the public to freedom of expression under Article 10 ECHR). The Court of Appeal reminded itself that the balancing exercise must be performed with "*an intense focus on the comparative importance of the specific rights being claimed in the individual case*", per Lord Steyn in *Re S (A Child)* [2005] AC 593 at paragraph 17.

Giving the sole reasoned judgment, Andrews LJ held at paragraph 12 that:

> *the balance comes down firmly in favour of maintaining the order for anonymity. That is so notwithstanding the arguments advanced by Ms Palin which centred around the fact that a substantial amount of information about SA is already in the public domain. In my judgment, non-disclosure of her identity is still necessary to secure the proper administration of justice and in order to protect her interests, see CPR 39.2(4).'*

The reasons for this are set out at paragraph 44:

> […] *SA is an individual falling outside the ordinary class of persons to whom litigation and any ensuing publicity about it would be likely to bring about a degree of mental discomfort which would be an acceptable price to pay for open justice. She is seriously mentally unwell. Her condition is chronic and incurable. She has lacked the capacity to look after her own financial affairs and to litigate for some years, and although the resumption of medication appears to have helped to overcome some of the more disturbing features of her illness in early 2023, the Consultant Psychologist who had the advantage of treating her from December 2019 to March 2021 has expressed a professional view that lifting the anonymity order would present a serious risk to her psychological stability. That is not generic evidence, it is focused, it makes sense, and in my view it is compelling.*

Of particular interest is the fact that the Court of Appeal found SA's article 8 rights outweighed AN's article 10 rights even thought it would be possible for someone reading the most recent judgment to work out who SA is by putting certain pieces of information together based on what is already in the public domain from previous litigation. This is because even against this background the Court of Appeal was of the view that this did not render "*the order worthless or unworkable or that it places the press at an unfair disadvantage*" (paragraph 45).

It is perhaps unsurprising that this court came to the view that it did given the evidence it had from both SA's treating psychiatrist and psychologist as to the very serious mental illness from which she suffered, the impact that previous proceedings had had on her, and the likely impact that granting AN's application would have on her in the future. This is particularly so given

the case law such as *Tickle v Surrey County Council* [2025] EWCA Civ 42 which provides that the Article 8 threshold can be reached if there is a real risk that a person's physical or psychological integrity might be undermined.

It is interesting to note that the Court of Appeal did not trouble itself with the question as to where the power comes from to make an anonymity order – rather they assumed it does exist, and then focussed on the justification for it being used i.e. whether the balancing exercise between Article 10 and Article 8 has been conducted correctly in order to justify the derogation from open justice. This is at complete odds with the approach taken by a differently constituted Court of Appeal in the *PMC* case (noted above) which carried out an in-depth analysis of the jurisdictional basis for such orders. That was a case concerned with the anonymity of a child personal injury claimant, also in circumstances where there was considerable material in the public domain.

AN also sought disclosure, under the principles established in *Cape Intermediate Holdings v Dring* [2019] UKSC 38; [2020] AC 629 of (i) an unredacted version of the FtT's decision; (ii) the evidence SA filed in relation to her appeal to the FtT against the revocation order; and (iii) the skeleton arguments filed by the parties in the tribunal proceedings and in the Court of Apeal. The application for skeleton arguments (albeit in an anonymised and redacted form) was agreed.

The Court of Appeal dismissed this second part of AN's application swiftly, on the basis that it "*is unnecessary for journalists to have access to that evidence in order to have a full and fair understanding of the issues involved in the appeal or of the case being advanced by the parties to that appeal. The decision of the FtT is lengthy and detailed, and sufficiently describes the evidence that it has taken into account in making its various findings. The principle of open justice is satisfied by ANL having redacted copies of the FtT's decision and of the skeleton arguments that they have requested*" (paragraph 47).

This is consistent with yet another of the Court of Appeal's recent judgments (1st July 2025) *Re HMP* [2025] EWCA Civ 824, in which the limits of open justice are emphasised (in that case in the context of care proceedings under the Children Act 1989). In that case, the Court of Appeal had been clear there are two main purposes of the open justice principle: (i) to enable public scrutiny of the way in which the courts decide cases so as to provide public accountability and secure public confidence; and (ii) to enable public understanding of the justice system. The corut emphasised that the principle did not extend further than this (in that case, to enable the BBC to interrogate the workings of a public body).

As can be seen from the fact that the Court of Appeal has handed down three judgments concerned with open justice in the space of two months, this is a rapidly evolving area of the law, seemingly impacting on all areas of civil litigation.

Permission to Appeal refused in *Thiam v Richmond Housing Partnership*

In our May 2025 Wider Context Report, we reported on the case of *Thiam v Richmond Housing Partnership* [2025] EWHC 933 (KB), in which Swift J considered an appeal in possession proceedings on the basis of Ms Thiam's hoarding behaviour.; In that judgment, Swift J considered and rejected an argument that the landlord ought to have "*taken steps to involve organisations with special experience of working with hoarders to tackle situations such as the one that existed in this case*" (paragraph 15). Swift J had rejected this argument at paragraph 25, stating:

> *This evidence, which was tested before the Judge but not undermined, shows the lengths that RHP went to when seeking to address the hoarding problem. In the abstract, it will always be possible to say that something more could have been tried, but the section 15(1)(b) proportionality test must be applied in context. The context here was that RHP was a landlord. The extent of its powers of control over the tenant were set by the terms of the tenancy agreement. RHP could seek to persuade the tenant to address the problem. I am satisfied that it did attempt to persuade the tenant. RHP could seek to involve others such as the local authority social services department who had wider powers to assist the tenant. RHP did that too. I do not consider that the obligation to act proportionally imposed by section 15(1)(b) of the 2010 Act required RHP itself to engage specialist help for the tenant. Taking such a step would go well beyond anything ordinarily or, in the circumstances of this case, reasonably within the ambit of a landlord and tenant relationship. It was entirely consistent with the section 15(1)(b) obligation for RHP to submit that interventions of that sort should be the responsibility of the social services department rather than the landlord. Mr Strelitz, counsel for RHP, also pointed to the likely cost of such specialist services and the finite resources of a social landlord such as RHP. That too is a material point.*

Ms Thiam, through her litigation friend, the Official Solicitor, sought permission to appeal, expressing particular concern about paragraph 25 of the judgment. Permission to appeal has been refused by Newey LJ, who stated:

> *…The appellant has expressed concern that other judges might follow paragraph 25 of Swift J's judgment. However, that paragraph cannot and should not be taken as laying down any legal principle. It represents no more than part of Swift J's analysis of how the law falls to be applied in the specific circumstances.*
>
> *On top of that, the appeal would have no real prospect of success. Both Swift J and HH Judge Luba KC have provided reasoned explanations of why they consider the respondent to have done enough. There is no likelihood of the appellant persuading this Court to interfere with either the factual findings (which anyway are not the subject of express challenge) or the Judges' evaluations of whether the respondent acted proportionately. While the grounds of appeal assert errors of law, the complaints are in substance about how the Judges have applied to the law to the facts.'*

Learning disability and 'social murder'

Professor Sara Ryan – the mother of Connor Sparrowhawk aka "Laughing Boy" – has published a new book, which pulls no punches. Its title may be *Critical Health and Learning Disabilities*, but its subtitle is starker: *People with learning disabilities, erasure and social murder*. Although all those involved, in whatever way, with working with those with learning disabilities, should purchase a copy, Professor Ryan has also published a (free) downloadable summary available here. We reproduce the opening section here:

> *In England people with learning disabilities die around 20 years earlier than people without learning disabilities. Many of these deaths could have been stopped. People are treated poorly by health and social care staff and members of the public because they are not seen as human. People with learning disabilities do not receive the same*

treatment as other people. The harm caused by this lack of care is not always noticed by health and care staff, or is noticed and not dealt with. When people without learning disabilities die early, action is taken to stop it happening to someone else. We know why people with learning disabilities die and yet the government does nothing to stop it happening. There is no action. Social murder happens when you know why people die early and do nothing about it. Social erasure is when people are not seen as people in their communities which means they lead poor lives.

Research Corner: *Support for decision-making guidance in England: a pragmatic review*

A very useful recent article by Jill Craigie and others in the Medical Law Review looks at guidance relating to support for decision-making. As the authors put it in the abstract:

Law and policy concerning personal decision-making increasingly recognizes a role for support to enable greater autonomy and legal recognition for adults whose decision-making ability may be limited. Support for decision making (SFDM) is embedded in England and Wales under the Mental Capacity Act 2005 (MCA). It has also gained traction internationally through the UN Convention on the Rights of Persons with Disabilities (CRPD), to which the UK is a signatory. However, these two legal reference points diverge in their understanding of SFDM, which presents challenges for putting it into practice. A pragmatic review methodology identified 40 resources containing SFDM guidance, providing insight into its implementation and conceptualization in England. An analysis indicates the need for authoritative guidance that provides more multifaceted advice, recognizing key variables including: the nature of the decision, source of decision-making difficulties, and the relationship of the supporter. Gaps in guidance provision are also identified for decision-makers, third parties, and the mental health context. The resources largely conceptualize SFDM as a means to enable mental capacity. However, recent developments propose a CRPD-aligned approach that includes SFDM in the context of substituted decisions. This generates a dualistic model of SFDM in England, raising new questions in this area.

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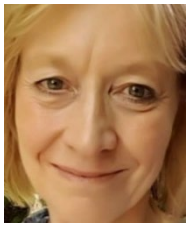

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Conferences

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

Alex also does 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 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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