



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

- (1) In the Health, Welfare and Deprivation of Liberty Report: holding the risk in medical treatment cases; capacity to marry under the spotlight; and mental health conditions, cancer investigation and capacity;
- (2) In the Property and Affairs Report: the general costs rule in property and affairs cases under pressure, and a guest post on appointeeship;
- (3) In the Practice and Procedure Report: fact-finding in the Court of Protection and recommendations about mediation in medical treatment disputes;
- (4) In the Mental Health Matters Report: progress of the Mental Health Bill, community mental health services under pressure and a new website with Nearest Relative resources;
- (5) In the Children's Capacity Report: brain stem death testing and procedural fairness, and children in complex situations at risk of deprivation of liberty;
- (6) The Wider Context: suicide prevention and assisted dying / assisted suicide;
- (7) In the Scotland Report: questionable attorneyship.

We have also updated our unofficial update to the MCA / DoLS Codes of Practice, available [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](#).

We will be taking our usual break for the January report, but will be back in February; any urgent things requiring dissemination will be available via Alex's [website](#). In the meantime, for a gentle provocation, you may care to watch this '[in conversation with](#)' between Alex and Professor John Coggon as to whether mental capacity law is, in fact, law.

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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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### Inappropriate use of guardianship proceedings, but order questionable for other reasons

ABG applied to Perth Sheriff Court for appointment of herself as guardian to her husband AAG ("the adult"), with both welfare and financial powers, and appointment of the adult's second son EFG as substitute welfare and financial guardian. CDG, the adult's elder son, by Minute opposed the appointment of the applicant to be financial guardian, and sought appointment of himself. He did not oppose the appointment of the applicant as welfare guardian. The case was heard and decided by Sheriff Donald W Ferguson, whose judgment dated 13<sup>th</sup> August 2025 now appears on the scotcourts website as [ABG, Applicant v CDG, Minuter, \[2025\] SC PER 83 \(Court Reference PER-AW163-24\)](#).

The background to the Minuter's opposition emerged at proof. The judgment narrates that the applicant is the adult's third wife, who had been married to him for 28 years by the time of the hearing, when she was aged 75 and he was aged 90. Each had three children by previous marriages. The matrimonial home had been in their joint names. By Will in 2015 the adult left his one-half share in life interest to the applicant, and thereafter to his three sons (the judgment refers to the applicant having executed such a Will, but it is clear that it was the adult who did so). However, in 2020 he disposed his one-half share in the matrimonial home to the applicant. The

sheriff appears to have penetrated to the heart of the matter at [9] of his judgment:

*"Whilst understanding the minuter's frustration and annoyance (and this was to some extent echoed by EFG in evidence) at what had transpired with the disposition of the one half share of the matrimonial home, that is not really the issue. The primary issue is whether the applicant is a suitable person to be financial guardian as well as the welfare one."*

The sheriff then identified the contradiction in the Minuter's position:

*"In evidence he said that 'we' (not clear) offered that there should be a codicil to reverse matters- 'and then the world is perfect'. It struck me that the minuter wanted things his way, ie, that a share of the house be left to him and his brothers and if that was done he would not have opposition to the applicant being the financial guardian. If one analyses that, it is a somewhat contradictory position because either a person is to be considered suitable or not within their own merits and that suitability should not be dependent on them doing something that you want them to do."*  
[10]

The sheriff granted the guardianship order as craved. One might quibble with the sheriff's apparent application of the same tests for suitability for both welfare and financial matters:

*"If the applicant was thought to have probity, the ability, the competence and the trust of others to be a suitable welfare guardian, it seems somewhat strange that no longer applies when financial arrangements are considered."*  
[3]

That would appear to be a *non sequitur*: a satisfactory welfare guardian might lack suitable financial management skills, depending in part upon the nature of an adult's assets and affairs.

In other ways, however, apparent deficiencies in the judgment potentially give rise to significant concerns. Disappointingly, these are concerns that still seem to arise, and to merit comment, despite the extent to which such concerns have been identified, analysed and discussed in other cases recently. There is nothing in the judgment to suggest that the sheriff proceeded in accordance with the mandatory provisions of section 1 of the Adults with Incapacity (Scotland) Act 2000. There are indications that he did not. For the purposes of the jurisdiction under the 2000 Act, a "best interests" approach, suitable for children but not for adults, was rejected in favour of the section 1 principles. Nevertheless, the sheriff wrote in his judgment that:

*"I am satisfied that it is in the best interests of the adult that the applicant should be appointed both as welfare and financial guardian ..."* [12]

Moreover, the first three welfare powers granted were in the following terms:

*"(a) [to] decide what care and accommodation may be appropriate for the adult;*

*"(b) [to] require the adult to reside in a particular residential establishment including a locked unit if necessary;*

*"(c) [to] return the adult to such an establishment should the adult leave and to prevent removal without prior consent of the guardian;*

*..."*

The adult was not present, nor represented, nor was a safeguarder appointed. The only consideration of the adult's "past and present wishes and feelings" appears to have been that when interviewed by the mental health officer:

*"In broad terms he confirmed that he wished the adult to be his guardian".*

The powers narrated above clearly amounted to blanket authorisation to deprive the adult of his liberty, but there appears to be nothing in the order to ensure compliance with Article 5 of the European Convention on Human Rights in relation to any deprivation of liberty in fact authorised by the guardian. On the contrary, the order was granted for 10 years without any provision for mandatory review of those powers (among other failures to comply with Article 5). There is no narration of "cause shown", in terms of section 58(4) of the Adults with Incapacity (Scotland) Act 2000, for exceeding three years in terms of that section. It is doubtful whether even as much as three years in any case of deprivation of liberty would comply with Article 5.

*Adrian D Ward*

### **(In brief) Grant of guardianship order appealed**

In the [October Report](#) we expressed concerns, not entirely dissimilar to those in the immediately preceding item of this Report, regarding the decision at Edinburgh Sheriff Court in a contested application for a guardianship order by City of Edinburgh Council in respect of the adult "B", contested by the adult's son "M". We understand that the decision in that case has

been appealed. We shall endeavour to report the outcome of that appeal in due course.

*Adrian D Ward*

### **(In brief) AWI reform**

The work of the Expert Working Group and of the Ministerial Oversight Group, established by Scottish Government towards submitting necessary legislative reforms to the Parliament, continues as outlined in recent Reports. The Expert Working Group is currently addressing the priority workstreams in relation to deprivation of liberty, and updating of the principles of the 2000 Act. We are pleased to report that we have been advised that following the scheduled December meeting of the Ministerial Oversight Group (due to take place after this December Report went to press), Tom Arthur MSP, the Minister for Social Care, Mental Well-Being and Sport, who personally chairs all meetings of the Ministerial Oversight Group, intends to offer a guest contribution for publication in the next future issue of the Report (likely to be in February 2026).

*Adrian D Ward*

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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 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.

**How to observe remote hearings in the Court of Protection**  
A one-hour webinar  
Monday 12<sup>th</sup> January 2026, 5.30pm-6.30pm

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- Or scan the QR code:

*"Extremely clear and engaging"*  
(Abi Cheeseman, Clinical Psychologist)

*"The webinar really brought home how vital transparency is in keeping the Court of Protection accountable. I found the buddy system inspiring, as it gives new observers the confidence to get involved and contribute meaningfully through the blog"*  
(Shirley Vels, LLB, LLM)

*"Great webinar - good reminder of the importance of transparency, fairness and accountability in court of protection hearings. As a social care professional, observing more hearings will be invaluable for my professional development"* (Karen Barnes - Principal Social Worker)

Daniel Amanda

Our next edition will be out in February. 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).

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