



Welcome to the July 2017 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: important decisions grappling with the meaning of best interests in the contexts of religious practices and delusional beliefs, and (finally) detailed statistics about s.21A/*Re X* cases;

(2) In the Property and Affairs Report: a new approach to severance and gifts;

(2) In the Practice and Procedure Report: changes to – and extension of the scope of – the Transparency Pilot and comments sought on a mediation pilot project;

(3) In the Wider Context Report: post-*PJ* problems, problems with care homes and capacity assessments and are moves really under way to change mental health laws?;

(4) In the Scotland Report: draft rules from Strathclyde Sheriff's Court concerning AWI applications.

We are taking a break over summer, but will be back in early September. In the interim, you can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#), and our one-pagers of key cases on the SCIE [website](#). Alex will also provide updates on truly critical matters on his own [website](#) (where you can also find the [talk](#) that he gave about the big issues facing the MCA 2005 at our recent 10<sup>th</sup> birthday party for the Act – thank you to all those who attended and made it such a success).

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Victoria Butler-Cole  
Neil Allen  
Annabel Lee  
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Nicola Kohn  
Simon Edwards (P&A)

#### Scottish Contributors

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

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### Draft Rules for North Strathclyde

The Sheriffdom of North Strathclyde has issued for comment a draft of a proposed Act of Court to deal with various procedural matters. Proposed Rules 3.01 and 3.02 deal with applications under the Adults with Incapacity (Scotland) Act 2000. They specify in helpful detail the information and averments required for various of the main types of application under Part 6 of the 2000 Act. However, proposed Rules 3.01 and 3.02 refer to all applications under the 2000 Act, but in fact address only applications under Part 6, and not the various other forms of application provided for by the 2000 Act. Of particular need for amendment is proposed Rule 3.02(e), which reads: “The Initial Writ must contain details of the names and addresses of all known next-of-kin of the adult, or, if there are no known next-of-kin, averments to that effect”. The 2000 Act does not define “next-of-kin” nor refer to them. Applications should specify the “nearest relative”, the “primary carer” and any “named person”, all as defined in the Act. There are issues over definition and “where to draw the line” regarding relatives other than the nearest relative, as defined. There can be a close relative with little interest in the adult, and a more distant relative very much involved in the adult’s life. The same can apply to people who are not relatives. A non-relative may be as important, or more important, in an adult’s life than any relative. Any “tick-box” approach is likely to fail

more often than it succeeds. To assist the court in exercising its responsibility to comply with the principles and other provisions of the 2000 Act in any one case, it may be better to continue to rely – as hitherto – on the professionalism of experienced solicitors who adequately inform themselves of the adult’s whole circumstances and make a fair judgement about who should receive intimation. That includes anyone who might reasonably be expected to claim an interest in the matter.

Given the rising levels of criticism of great differences in practices and procedures across Scotland, there would be advantages in harmonising such Rules across the country except only for matters of a truly local nature.

*Adrian D Ward*

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Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He 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 Wellcome Research Fellow at King's College London, and created the website [www.mentalcapacitylawandpolicy.org.uk](http://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. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click [here](#).



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Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click [here](#).



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Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. To view full CV click [here](#).



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Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. 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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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 4<sup>th</sup> edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click [here](#).



**Adrian Ward:** [adw@tcyoung.co.uk](mailto:adw@tcyoung.co.uk)

Adrian is a Scottish solicitor and a consultant at T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: "*the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law,*" he is author of *Adult Incapacity, Adults with Incapacity Legislation* and several other books on the subject. To view full CV click [here](#).



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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, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. 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

### Conferences at which editors/contributors are speaking

#### Deprivation of Liberty Safeguards: The Implications of the 2017 Law Commission Report

Alex is chairing and speaking at this conference in London on 14 July which looks both at the present and potential future state of the law in this area. For more details, see [here](#).

#### The Legal Profession: Back to Basics

Adrian is a speaker and panellist on “The Legal Profession: Back to Basics” at the Annual Conference of the Law Society of Scotland at Edinburgh International Conference Centre on the afternoon of Tuesday 19<sup>th</sup> September 2017. For more details, and to book, see [here](#).

#### JUSTICE Human Rights Law Conference

Tor is speaking on the panel providing the Equality and Human Rights Update at JUSTICE’s Annual Human Rights Law Conference in London on 13 October. For more details, and to book, see [here](#).

#### National IMCA Conferences

Alex is speaking on both litigation friends and a potential Vulnerable Adults Bill at the two National IMCA Conferences (North and South) organised by Empowerment Matters and sponsored by Irwin Mitchell. The [northern conference](#) is in Sheffield on 20 October; the [southern](#) is in London on 10 November.

#### National Advocacy Conference

Alex is speaking on advocacy as a support for legal capacity and doing a joint workshop with Jess Flanagan on advocacy and available options at the National Advocacy Conference in Birmingham on 19 October. For more details, and to book tickets 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 Report will be out in early September. 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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