



Welcome to the April 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on the Mental Capacity (Amendment) Bill; the DoLS backlog and the obligations on local authorities; capacity and social media (again); best interests and the 'institutional echo;' and judicial endorsement of the BMA/RCP guidance on CANH.

(2) In the Property and Affairs Report: a major new report on supported will-making;

(3) In the Practice and Procedure Report: a pilot designed to get the Accredited Legal Representatives scheme further off the starting block; the need for the early involvement of the court in medical treatment cases; transparency and committal; and DNA testing and the courts;

(4) In the Wider Context Report: oral care and learning disability; important consultations on criminal procedure/sentencing and those with mental disorders; the dangers of assessing in a vacuum; and a round-up of recent useful research articles.

(5) In the Scotland Report: major developments regarding the Mental Health (Care and Treatment) Scotland Act, the Adults with Incapacity Act and the Adult Support and Protection Act and a Scottish perspective on the English MHA review and compliance with the CRPD;

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#). With thanks to all of those who have been in touch with useful observations about (and enthusiasm for the update of our [capacity assessment guide](#)), and as promised, an updated version of our [best interests guide](#) is now out.

### Editors

Alex Ruck Keene  
Victoria Butler-Cole QC  
Neil Allen  
Annabel Lee  
Nicola Kohn  
Katie Scott  
Katherine Barnes  
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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### Supported will-making

*[The Everyday Decisions research project team at the University of Birmingham has published a follow-up to their Everyday Decisions project, exploring how disabled people with impairments that affect their mental capacity could be better supported to make a will. We reproduce, with permission, the executive summary to their Supported Will-Making Report, together with their recommendations for reform]*

This report was prepared to inform the review of the law of wills being conducted by the Law Commission of England and Wales. It is an empirically grounded, socio-legal inquiry into the potential for, and challenges involved in, supported will-making. The report is founded on the Everyday Decisions project and a follow-up study which explored intellectually disabled people’s views about, and experiences of, will-making in more depth. Our research explored how supported will-making works in practice and areas where legal reform, practical changes and shifts in professional attitudes are needed to secure effective levels of support for disabled people.

Our main legal focus has been on how supported will-making would intersect with and supplement existing legal frameworks like testamentary capacity, mental capacity, statutory wills, and intestacy as well as international approaches to supported decision-making following the UN Convention on the Rights of Persons with Disabilities (CRPD). We found that, internationally, supported decision-

making frameworks are becoming increasingly prevalent, and generally operate to formalise existing informal support practice. However, in alignment with our findings in the original Everyday Decisions project (Harding & Taşcıoğlu, 2017, 2018), existing supported decision-making practice is focused on everyday decisions rather than more complex life choices. Overall, we found that while pockets of good practice do exist, there is tendency under the current Mental Capacity Act 2005 (MCA) framework to fall back on best interests decisions, rather than to support people to make their own decisions.

Findings from the Everyday Decisions project revealed that only a small number of care and support professionals had direct experience of supporting their clients to make a will. There was a general lack of knowledge and understanding of wills by frontline care staff who took part in this research. These care professionals often thought that supporting clients with will-making was beyond their competence and identified family members, lawyers and financial deputies as persons responsible for supporting intellectually disabled persons with will-making. There was, further, some evidence of confusion in the approach that care professionals (with appropriate responsibilities to do so) took to assessing testamentary capacity. Overall, we found that wills and will-making were not well understood by care and support professionals. We consider that there is a training need in this area within the care sector.

The experiences of intellectually disabled people with will-making were at the heart of this project. In the report, we introduce key socio-legal issues in will-making by people with intellectual disabilities through two case studies, Penny and Gareth, who have both been supported to make a will. Through this empirical research, we found a gap in access to appropriate support to make a will for intellectually disabled people of modest means, particularly for those whose relationships and networks mean that the intestacy rules do not fit with their wishes and testamentary preferences.

Penny's experience highlights the need to review wills regularly to account for changes in circumstances. Her story also highlights a theme, found across these data, that disability sometimes interrupts normative patterns of succession, with a preference for leaving greater provision to disabled children. This disability difference sometimes creates discord between family members. Penny's story further highlights the need for support from a range of different sources, including legal professionals, family members and advocates to allow disabled individuals to navigate this complex area of law and social relationships, and to have access to a broad range of information.

The importance of appropriate safeguards when making a will cannot be underestimated. Through Gareth's story we emphasise the need for appropriate and effective safeguards to protect vulnerable testators from abuse. This has proven especially challenging for testators who do not have good relationships with their families. We found that safeguarding and ensuring the right to legal capacity is a major challenge for developing CRPD compliant supported decision-making frameworks. Gareth's story also draws attention to the importance of accessible information in helping disabled people to protect themselves from

financial abuse, manipulation or coercion, and the need for solicitors to be able to communicate with disabled people. Gareth's story highlights the failings of the current law in this regard, and offers an important rationale for change.

Additional analysis of the empirical data from the projects provides three guiding concepts for the reform on the law of wills and supported will-making. These are: trust, communication and accessible information. We found that enabling disabled people to be supported by someone that they know and trust holds the key to ensuring that a will reflects their testamentary wishes. We recognise, however, that it is also important to ensure vulnerable testators have sufficient protection from abuse of their trust through non-discriminatory safeguards. Effective communication between all parties is vital to supporting intellectually disabled people to make a will. Failures in communication can lead to inappropriate outcomes, and potentially open up opportunities for abuse of trust. Accessible information is also key to ensuring that intellectually disabled people can make a will that accurately reflects their wishes and preferences, and we recommend the introduction of an Accessible Information Standard for legal services.

In the final part of the report, we evaluate potential policy options for reform to better support will-making by intellectually disabled people, balancing possible options with the safeguards that would be required. We discuss the potential for reform through amendment of the Mental Capacity Act 2005 Code of Practice, the potential of different approaches to a 'bespoke' Supported Will-Making Scheme, and the difference that a formal nominated supporter scheme (our preferred option) could make in this area.

*Recommendations for Reform*

1. Substantive updating of the Mental Capacity Act 2005 Code of Practice is needed to include more examples of how to support decision-making in general, and supporting will-making in particular.
2. Clarification of how the Mental Capacity Act 2005 principles (especially principles 1, 2 and 3), interact with conflicting approaches in common law capacity tests is required.
3. Training for frontline care staff and statutory advocates on the importance and practicalities of will-making is required to better support testamentary choices.
4. Training for legal professionals who provide will-making services (including solicitors, legal executives and will-writers) on effective communication with people with intellectual and sensory disabilities is needed to ensure legal services are accessible.
5. Clear, non-discriminatory, appropriate and effective legal safeguards against abuse are needed to protect vulnerable testators.
6. The introduction of an Accessible Information Standard for Legal Services would be extremely helpful in increasing the accessibility of legal services.
7. The creation of a formal nominated supporter scheme, with supervision from a public body, is likely to be the best way to balance choice, support and safeguards.

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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), 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 has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. 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 5<sup>th</sup> edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). 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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Katherine has a broad public law and human rights practice, with a particular interest in the fields of community care and health law, including mental capacity law. She appears regularly in the Court of Protection and has acted for the Official Solicitor, individuals, local authorities and NHS bodies. Her CV is available here: 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; 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

### Conferences at which editors/contributors are speaking

#### Essex Autonomy Project summer school

Alex will be a speaker at the annual EAP Summer School on 11-13 July, this year's theme being: "All Change Please: New Developments, New Directions, New Standards in Human Rights and the Vocation of Care: Historical, legal, clinical perspectives." For more details, and to book, see [here](#).

#### Local Authorities & Mediation: Two Reports on Mediation in SEND and Court of Protection

Katie Scott is speaking about the soon to be launched Court of Protection mediation scheme at the launch event of 'Local Authorities & Mediation - Mediation in SEND and Court of Protection Reports' on 4 June 2018 at Garden Court Chambers, in central London, on Tuesday, 4 June 2019, from 2.30pm to 5pm, followed by a drinks reception. For more information 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.

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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](mailto:marketing@39essex.com).

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