



Welcome to the December 2019 Mental Capacity Report – our 100^{th*}. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an important guest article from Inclusion London, and reflections from Tor and Alex on 100 issues;

(2) In the Property and Affairs Report: a report of an interview with HHJ Hilder and deputyship refunds;

(3) In the Practice and Procedure Report: the administration of appeals, and important judgments shedding light by analogy on fact-finding, costs and vulnerable witnesses;

(4) In the Wider Context Report: assisted dying, Article 2 obligations and informal patients, and reports of developments in Northern Ireland, Jersey and wider afield;

(5) In the Scotland Report: an important judgment on guardianship and deprivation of liberty, a judicial review of conditions of excessive security and further observations on the operation of 'foreign' powers of attorney in England & Wales from the Scottish perspective.

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#). If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the [Small Places](#) website run by Lucy Series of Cardiff University.

Happy holidays, and we will return in February 2020.

* Confession: there was a numbering glitch a long way back which means that this is no.99 in this series, but in our defence no.1 in fact represented the formalisation of informal updates Tor and Alex had been doing for several months.

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Annabel Lee
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Katie Scott
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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.

Contents

Deputyship refunds 2

Senior Judge Hilder interview 2

Deputyship refunds

Refunds are being offered to those who were charged more than necessary for certain deputyship services for any period between 1 April 2008 and 31 March 2015. Current deputies acting for existing clients do not need to apply for the refund, as the Office of the Public Guardian for England and Wales will be in touch with them. However, where a deputyship has ended, either because the vulnerable person has died or is now able to make their own decisions either themselves or via an attorney, the refund will need to be applied for. The refund can be applied for [online](#) and there is also a dedicated refunds helpline on **0300 456 0300**. The scheme will be open until 4 October 2022; the OPG estimates that most refunds will be less than £200 (together with 0.5% interest).

Senior Judge Hilder interview

Senior Judge Hilder recently took questions at the BABICM (British Association of Brain Injury Case Managers) 2019 annual conference in Birmingham. They have been reported in [NR Times](#), a neurorehabilitation magazine.

The questions included one about delays. The Senior Judge accepted that the time it takes for some applications to be dealt with is not acceptable. She pointed, however, to the fact that CoP now had deputy district judges who had been deployed to help clear up a backlog and

that there was funding to increase authorised court officers from 5 to 8. She also said that CoP was not to be part of the court reform programme, which was a mixed blessing as that would have carried with it investment but at least there would be stability. This means that CoP will not be getting online filling.

She was asked about difficulties faced by lay deputies. She acknowledged the complexity of the application process and pointed to the existence of the telephone enquiries team and the slowly growing list of accredited legal representatives who can be asked for help.

She was asked about the potential effect of the new Liberty Protection Safeguards (due 2020) on CoP workload. She was cautiously optimistic pointing to the fact that apocalyptic predictions of work following Cheshire West had never quite materialised.

Lastly, she was asked about “private DoLs” and the apparent unwillingness of local authorities to apply for authorisations when their attention is drawn to them (especially when P is in the community rather than in a residential home). She made it clear that she considers that local authorities should be the applicant (unless, perhaps, where damages have been awarded to include the cost of making the DoL application) and gave examples of cases where the deputy had ended up making the application, in which she had put the relevant local authority on the

spot by requiring the relevant local authority to explain why it should not be substituted for this applicant. So far, she indicated, they had always accepted that they should be, although she recognised that there were cost implications.

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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. To view full CV click [here](#).

**Victoria Butler-Cole QC: vb@39essex.com**

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](#).

**Neil Allen: neil.allen@39essex.com**

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. 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 5th 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](#).

**Simon Edwards: simon.edwards@39essex.com**

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](#).

**Adrian Ward: adw@tcyoung.co.uk**

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

Conferences at which editors/contributors are speaking

Approaching complex capacity assessments

Alex will be co-leading a day-long masterclass for Maudsley Learning in association with the [Mental Health & Justice](#) project on 15 May 2020, in London. For more details, and to book, see [here](#).

Other conferences of interest

Safeguarding and the Care Act 2014 - Self-neglect

Continuing the SALLY (safeguarding and legal literacy) series, this day-long seminar at Keele University on 31 January focuses on self-neglect. For more details, and to book a free ticket, 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 February 2020. 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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