



Welcome to the March 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: two cases each on vaccination, how long to keep going with life-sustaining treatment and obstetric arrangements, and important decisions on both family life and sexual relations;

(2) In the Property and Affairs Report: Mostyn J takes on marriage, ademption and foreign law, and updates from the OPG;

(3) In the Practice and Procedure Report: reasonable adjustments for deaf litigants and a new edition of the Equal Treatment Bench book;

(4) In the Wider Context Report: DNACPR guidance from NHS England, NICE safeguarding guidance, reports on law reform proposals of relevance around the world and (an innovation) a film review to accompany book reviews and research corner;

(5) In the Scotland Report: Scottish Parliamentary elections, Child Trust funds and analogies to be drawn from cases involving children.

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#), where you can also find updated versions of both our capacity and best interests guides. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, [here](#); Alex maintains a resources page for MCA and COVID-19 [here](#), and Neil a page [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.

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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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New edition of Equal Treatment Bench Book

The 2021 edition of the Equal Treatment Bench Book was published on 24 February 2021.

There is new and expanded content on:

- The impact of the COVID-19 pandemic on different groups and how to conduct remote hearings (on audio or video platforms) fairly;
- Welsh/English bilingualism and the right to speak Welsh in courts and tribunals in Wales;
- Reducing jargon and legalese;
- Assisting a litigant who has difficulty reading or writing;
- Extended guidance in relation to litigants-in-person;
- New entries in the disability glossary;
- Confidence in the courts of minority ethnic communities;
- Sensitivity if a witness is experiencing menopausal symptoms.

It should be noted that the book maintains (at p.357) the error of previous editions of stating that the:

The United Nations Convention on the Rights of Persons with Disabilities is directly applicable in the UK and provides that ‘persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’

The correct status of the CRPD was best described by Cobb J in Re A (Capacity: Social Media and Internet Use: Best Interests) [2019] EWCOP 2 as follows

While the UNCRPD remains currently an undomesticated international instrument, and therefore of no direct effect (see Lord Bingham in A v Secretary of State for the Home Department [2005] UKHL 71; [2006] 2 AC 221 at [27]), it nonetheless provides a useful framework to address the rights of persons with disabilities. By ratifying the UNCRPD (as the UK has done) this jurisdiction has undertaken that, wherever possible, its laws will conform to the norms and values which the UNCRPD enshrines: AH v West London MHT [2011] UKUT 74 (AAC); [16] (See R(Davey) v Oxfordshire CC & others [2017] EWCA Civ 1308 at [62], and Mathieson v SS for Work and Pensions [2015] UKSC 47, [2015] 1 WLR 3250 at [32]). I am satisfied that I should

interpret and apply the domestic mental capacity legislation in a way which is consistent with the obligations undertaken by the UK under the UNCRPD.

Short note: reasonable adjustment for a deaf party to proceedings

A Local Authority v M, F, A and B [2021] EWFC 10 is a judgment given in family proceedings considering whether two young children should be placed in long-term foster care or for adoption. We cover the judgment because useful lessons were identified which can be carried across to ensuring effective participation in Court of Protection proceedings. The mother ('M') was profoundly deaf and had previously been assessed as having a learning disability, with extremely low cognitive ability, and lacking capacity to conduct care proceedings. However, subsequent expert evidence established that this was wrong on both counts. Moreover, there was no evidence that the professionals conducting the pre-birth assessment of M's parenting ability had the skills suitable to her needs as a deaf parent.

The judgment provides guidance on the type of reasonable adjustments to be considered where a party to proceedings is deaf. The judge observed that deafness was a disability for Equality Act 2010 purposes, section 20 of which requires public authorities (including the courts) to make reasonable adjustments to provisions, criteria or practices that place the disabled person at a substantial disadvantage. This can include providing information in an accessible format and securing effective and fair participation in proceedings, as expanded upon in the Equal Treatment Bench Book. In this case, the mother was supported by a lip-speaker and

an intermediary, there were regular breaks, and the judge prepared a simplified version of the judgment which was read aloud to the mother with their assistance.

The main lessons learnt, potentially applicable to the Court of Protection are:

1. Professionals working with a deaf person must be aware of their obligations under the Equality Act 2010 and the need for reasonable adjustments. They (including those supervising contact arrangements) should receive adequate and timely deaf awareness training, to include information about how to provide information in a clear and appropriate way to a deaf person who also has communication difficulties.
2. The person's needs must be identified, with expert advice as necessary, and corresponding support be made available, provided by professionals with suitable skills. A cognitive and capacity assessment undertaken by a suitable specialist at the outset of proceedings can prove instrumental, both in terms of determining the person's mental capacity but also for reasonable adjustment purposes.

We commend the relevant Advocate's Gateway [Toolkit](#) which informed the judgment. More broadly, the court's [Equal Treatment Bench Book](#) is an incredibly helpful resource when considering how to promote a person's participation in proceedings (whether that is P or a party to proceedings). Appendix B provides useful examples of reasonable adjustments for a whole range of protected characteristics which COP practitioners can draw from to promote participation.

We also commend the [post](#) about this case by Abigail Bond on the Transparency Project, which also links to a recent but more unusual care case involving a deaf parent, see *A Local Authority v X & others* [2020] EWFC 36, where the mother had neither litigation capacity nor the capacity to give evidence in court but was assisted to participate as fully as possible in the proceedings by a bespoke DVD 'interview' process devised and undertaken by Dr Austen.

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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 and the European Court of Human Rights. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website 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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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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Rachel has a broad public law and Court of Protection practice, with a particular interest in the fields of health and human rights law. She appears regularly in the Court of Protection and is instructed by the Official Solicitor, NHS bodies, local authorities and families. To view full CV click [here](#).

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**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](#).

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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 are regularly presenting at webinars arranged both by Chambers and by others.

Alex is also doing 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](#).

Adrian is speaking at a webinar organised by RFPG on 25 May at 17:30 on Adults with Incapacity. For details, 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.

Our next edition will be out in April. 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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