



Welcome to the June 2024 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: when no option is a good one, snapshots from the frontline, and are we listening closely enough to the person in the context of deprivation of liberty;

(2) In the Property and Affairs Report: the Powers of Attorney Act 2023 on election hold, contesting costs in probate cases and guidance on viewing LPAs online;

(3) In the Practice and Procedure Report: post-death costs, what does it mean to be an expert in the person, and procedure in brain stem death cases;

(4) In the Mental Health Matters Report: the MHA 1983 under strain in police cells and the hospital setting;

(5) In the Wider Context Report: the inherent jurisdiction – a case, guidance, and a challenge from Ireland; the older child and medical treatment decisions – mental capacity or competence, and Capacity and contempt proceedings – what is the test?

(6) In the Scotland Report: guardianship under examination before the Sheriff Appeal Court and Scottish Government's Mental Health and Capacity Reform Programme.

There are two plugs this month:

(1) For a [free digital trial](#) of the newly relaunched Court of Protection Law Reports (now published by Butterworths. For a walkthrough of one of the reports, see [here](#).

(2) For Lucy Series' blog post [about mental capacity and voting](#).

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](#).

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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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### Powers of Attorney Act 2023

The general election has put a pause on moves towards further implementation of this Act.

### Costs contested in probate cases

It is well established that CPR 44.2(2)(a) applies in contested probate cases so that the general rule applies to the effect that the unsuccessful party will pay the costs of the successful party though the court may make a different order.

It is also well established that the pre-CPR exceptions to that rule still apply in contested probate cases.

These exceptions were summarised in *Kostic v Chaplin* [2007] EWHC 2909 (Ch) and *Perrins v Holland* [2009] EWHC 2556 (Ch).

The exceptions "*allow good cause to be shewn why costs should not follow the event*" and require the court to ask:

- (1) whether the litigation was caused by the testator or a beneficiary. If so, the court may order the unsuccessful party's costs to be ordered out of the estate;
- (2) whether the circumstances, including the knowledge and means of knowledge of the opposing party, led reasonably to an investigation of the matter. If so, the court may make no order as to costs.

These exceptions and their application to a case

where probate was contested on the grounds of want of capacity and want of knowledge and approval were recently considered and applied in *Leonard and others v Leonard and others* [2024] EWHC 979 (Ch).

In this case, there had been a clearly successful party so that the starting point was that the clearly unsuccessful party should pay the costs.

At paragraph 14 the court (Joanna Smith J) reaffirmed that a positive case premised on one or both of the exceptions must be made out before the court will depart from the general rule (see *Kostic* at paragraph 6 and *Perrins v Holland* at paragraph 3). It is necessary to make out a "*very strong case on [the] facts*" if an unsuccessful litigant is to get his or her costs out of the estate (under the first exception) (see *Re Plant Deceased* [1926] P 139 per Scrutton LJ at 152; cited in *Kostic* at paragraph 17)

Further, in respect of the first exception, "*the trend of more recent authorities has been to encourage a careful scrutiny of any case in which the first exception is said to apply, and to narrow rather than extend the circumstances in which it will be held to be engaged*" (*Kostic* at paragraph 21). This narrowing of the scope of the first exception (reiterated by Henderson LJ in *Royal National Institution for Deaf People v Turner* [2017] EWCA Civ 385 at paragraph 17) is a function of the fact that, firstly, nowadays less importance is attached to the independent powers of the court to investigate the circumstances in which a will was executed than

was the case in Victorian times; and secondly, the courts are increasingly alert to the dangers of encouraging litigation and discouraging the settlement of doubtful claims at an early stage, if costs are allowed out of the estate to the unsuccessful party (*Kostic* at paragraph 21).

Joanna Smith J went on to reaffirm that the same narrowing of scope does not apply to the second exception because "*there is ...still a public interest that where reasonable suspicions are raised about the validity of wills they should be proved in solemn form*" (see *Perrins v Holland* at paragraph 17).

Lastly, so far as general principles were concerned, Joanna Smith J reaffirmed that even where one or both of the probate exceptions applies, the point may be reached where the litigation becomes ordinary hostile litigation, from which point the normal rule entitling the successful party to an order for costs comes into effect (see *Walters v Smee* [2008] EWHC 2902 (Ch) per HHJ Purle QC at paragraph 8).

Joanna Smith J went on to consider the circumstances of the case and held that the first exception did not apply but the second exception did until a failed mediation whereafter the unsuccessful party had to pay the successful party's costs.

The successful party had also made a successful Part 36 offer. It was common ground that Part 36 applied and the unsuccessful party sought only to argue (unsuccessfully) that the offer was not a genuine attempt at settlement. Thus, the Part 36 consequences applied from the expiry of 21 days after the offer was made (which was after the mediation).

The judgment is useful reading as to the way in which the principles are applied as it was a reserved judgment after written submissions from the eminent silks involved. Its length

reflects the fact that the costs had mounted to £1.5m.

### Viewing an LPA

Changes introduced in 2023 mean all LPAs issued on or after 1 January 2016 will be able to be viewed online including any instructions and preferences written by the donor. The OPG has published new [guidance](#) on the "viewing an LPA service," along with [guidance](#) for donors and attorneys, so they understand the process to let companies see an online version of the LPA, instead of the registered paper version.

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Alex 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 Visiting Professor 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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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 and created the website [www.lpslaw.co.uk](http://www.lpslaw.co.uk). 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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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 regularly present at seminars and 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 will be speaking at the following open events:

1. The World Congress on Adult Support and Care in Buenos Aires (August 27-30, 2024, details [here](#))
2. The European Law Institute Annual Conference in Dublin (10 October, details [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 July. 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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