



Welcome to the March 2023 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: fluctuating capacity and emotional dysregulation;
- (2) In the Property and Affairs Report: the Court of Protection divorce, refreshed deputy standards and relevant legislative developments;
- (3) In the Practice and Procedure Report: ‘closed hearings’ guidance and Forced Marriage Protection Orders;
- (4) In the Wider Context Report: covert medication guidance, an updated litigation capacity certificate, the malign influence of Andrew Wakefield, and changes afoot in Ireland;
- (5) In the Scotland Report: a Scottish perspective on the Powers of Attorney Bill and implementation of the Scott Report.

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.

This report also marks an important transition, Hayden J having served his term as Vice-President of the Court of Protection and being replaced by Theis J. We hope that our readers will join us in thanking Hayden J for his tireless service during undoubtedly the most tumultuous and difficult years of the Court’s life; Alex will certainly never forget some of the meetings of the HIVE group that Hayden J convened in the early months of the pandemic, nor the speed with which Hayden J (together, we know he would want it to be emphasised, with the other members of the judiciary and the court staff), managed to recast the court and its practices to keep it going against all the odds.

Editors

Alex Ruck Keene KC (Hon)
Victoria Butler-Cole KC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
Rachel Sullivan
Stephanie David
Nyasha Weinberg
Simon Edwards (P&A)

Scottish Contributors

Adrian Ward
Jill Stavert

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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Fluctuating capacity, emotional dysregulation and public protection: a swansong for Hayden J

A Local Authority v H [2023] EWCOP 4 (Hayden J)

Mental capacity – assessing capacity

Summary

The case of *A Local Authority v H [2023] EWCOP 4* concerned a young adult, H, described by Hayden J as a “natal male who now identifies as female” (and hence female pronouns are used here). H had experienced profound trauma and abuse in childhood and adolescence, giving rise, the judgment states, to global developmental delay; attention deficit hyperactivity disorder; executive dysfunction; developmental trauma disorder; possibly emotionally unstable personality disorder. H also had traits of autism spectrum condition, extremely disordered attachment and highly disrupted emotional regulation. Critically, at times when ‘dysregulated’, H’s behaviour was described as being “extreme and present[ing] harm, both to herself and others.” H also presented what was described as a real risk of sexual harm to children, both in contact with them and online.

In consequence, H had been subject to substantial restrictions upon her liberty in what appears to have been a supported living placement for some 3 years prior to the date of

the judgment.¹ She was described as having progressed strikingly well, with a very significant reduction in the incidents of violent behaviour. As Hayden J noted (at paragraph 5):

H has become remarkably compliant with a level of restriction that would be intolerable to most people. The psychiatrist was plainly concerned, as am I, that H has become so used to these arrangements that far from feeling them to be invasive of her privacy, she has come to regard them as integral to her safety and security. When the psychiatrist prepared her first report, H’s circumstances were very different. There had been incidents of her string out at others, destroying property, self-harming, threats of suicide. Physical restraint had been used where necessary.

The issue before the court was as to H’s capacity to make decisions as to residence, care/support, contact with others (both adults and children), as well as use of the internet and social media. Hayden J took the opportunity to set out a helpful review of the case-law relating to capacity. He then turned to its application on the specific facts of H’s case, noting (at paragraph 26) that:

It is very clear from the evidence, that when she is dysregulated, H is unable to take capacitous decisions. As I

¹ It is not clear from the judgment whether this had been authorised at any point prior to the hearing.

understand it, there is no dispute about this nor, to my mind, could there be. Inevitably, this has led to consideration of "fluctuating capacity", which always presents a challenge to general assessment of capacity. In *Re JB*, Lord Stephens said at [64]:

"Capacity may fluctuate over time, so that a person may have capacity at one time but not at another. The "material time" within section 2(1) is decision-specific (see para 67 below). The question is whether P has capacity to make a specific decision at the time when it needs to be made. Ordinarily, as in this case, this will involve a general forward looking assessment made at the date of the hearing. However, if there is evidence of fluctuating capacity then that will be an appropriate qualification to the assessment."

With specific reference to residence, Hayden J (at paragraph 29) endorsed the approach of the expert, Dr S, who emphasised that:

*In respect of H's capacity to take decisions about her residence, Dr S emphasised that such decisions are best categorised as longitudinal rather than single issue. It is not just a question of whether H wants to be at the home or not, it requires a balance of the options. H can do this in a capacitous fashion when calm and engaged but is unable to achieve this at times of emotional dysregulation. This is as Lord Stephens indicated in *Re JB* (supra), "an important qualification to capacity".*

On the evidence, Hayden J was satisfied (at paragraph 30) that:

In each of the spheres of capacity that have been analysed i.e., residence, care/support, contact with others (both adults and children), use of the internet and social media, I agree with the psychiatrist that the presumption of H's capacity is rebutted by cogent evidence.

I also agree that H plainly has some insights into her behaviour but that it remains incomplete. Her co-operation with the plans for her care is one of a number of factors, which I have referred to above, which gives rise for optimism for the future. It is important that H hears me say this and that she recognises the tribute to her resolve and hard work. The philosophy of the care plan, which is being amended in light of the evidence, is to focus upon developing H's sense of agency, to use the psychiatrist's words. In other words, the plan is geared to enabling H to develop her own autonomy.

Entirely separately, an issue arose as to attendance at the hearing, which had been conducted as a hybrid hearing. As Hayden J identified at (paragraph 31):

Understandably, and rightly, the public have come to expect that they will be admitted. It is important that the difficult decisions this court is required to take are subject to public scrutiny. Occasionally, however, the compelling arguments for transparency are required to yield to the equally compelling need to protect the most vulnerable.

The particular factors in H's case gave rise, Hayden J considered, to a situation which required a modification to the usually applied transparency provisions, and (in a situation more familiar to those before the family courts), he permitted only accredited journalists and legal bloggers to attend the hearing. He also prevented any reporting until the end of the case and:

36. [...] delivered this judgment in order that the parties can understand my reasoning and to establish an identified baseline to the future progress of the case. I recognise the legitimate public

interest in these highly sensitive issues and have endeavoured to put them into the public domain in a way which is carefully designed to protect H's identity becoming known. It is for this reason, by way of example, that I have referred to the expert instructed as 'Dr S' and pared away any detail of H's life that might reveal who she is. In this way, I have sought to achieve proportionality in "the ultimate balancing test".

Comment

It is a fitting irony that the last reported decision of the Vice-President in his current role is one that captures many of the trickiest issues that have arisen during his tenure, including the complexities of fluctuating capacity, the concept of executive dysfunction, the balance between protection of the person and protection of others in the concept of best interests, and navigation of the demands of transparency in a partly online world. His successor, no doubt, will have to grapple with cases in which capacity and gender are squarely in issue (which have already started to emerge, but so far only in unreported cases).

Welfare in the balance

A Local Authority v MF & Ors [2022] EWCOP 54 (Sir Jonathan Cohen)

Best interests – residence

Summary

MF was 40 years old and had diagnoses of a moderate learning disability and schizoaffective disorder. He lived with his mother, GF. MF's sister, VM, and her partner, Dr A, were also involved in proceedings. The local authority made an application to remove MF from the family home, which was strongly opposed by his family. The judgment records that there had been a long history of non-engagement with services by MF's family, dating back to his time

in school. MF left school in 1997, and his family repeatedly declined involvement from mental health services in subsequent years despite numerous concerns about MF's welfare. Neighbours repeatedly made reports about MF being tied to radiators by his family, and their landlord raised concerns that there had been 14 incidents of radiators being broken in the home. Sporadic contact between MF and authorities continued to raise concerns, such as an incident in 2009 when MF was found in the community barefoot, unkempt and thought disordered.

In 2016, MF's father died suddenly. MF was found in the home "*naked from the waist down, covered in faeces, with buckets of urine and a dirty mattress in the room. The room was in darkness as there were no light fittings*" (paragraph 23). He was taken to hospital, where he was found to be thought disordered, minimally verbal and unable to use a toilet. He had scratches on his arms and chest and an older wound which had been sutured (it appears outside of hospital).

After leaving hospital, MF was taken to a residential care home, PH, where he stayed from 2016-2020. His mother and sister did not support his move there, but professionals considered that MF made good progress at PH, learning to feed himself, converse with others and attend to self-care. However, the court noted that "[b]y around 2019/2020, it appeared that M found the regime of PH oppressive. My impression was he had 'outgrown' the need for it, in that his development made the restrictions in place at PH unnecessary" (paragraph 28).

In March 2020, MF went for a home visit and never returned to PH, staying at his mother's home. The local authority agreed a protection plan with MF's family, which included daily visits by carers to administer medication (including for MF's schizoaffective disorder) and support MF with activities, regular visits by social workers

and bereavement therapy for MF. The family stopped visits from carers and bereavement therapy five months later, with carer visits eventually resuming on a reducing schedule of four visits per week. However, engagement was sporadic, and by the time of the judgment in December 2022, carers had not been able to take MF out of the house for five months. Social workers reported that they had to wait for up to thirty minutes before the door was opened during their visits. When in the house, they considered that MF's mother sought to obstruct their access by insisting that he eat during for the duration of their visits even though he was not hungry.

At the hearing, MF's mother and sister followed the lead of VM's partner, 'Dr A', who acted as a family spokesman. The court was plainly concerned about Dr A's influence on MF's welfare. Dr A did not accept any of MF's mental health diagnoses, and was preoccupied with MF's finances. Dr A also attempted to produce evidence which he claimed had been written by MF, though MF contradicted this. Dr A also repeatedly attempted to remove the Official Solicitor as MF's representative and block access to MF. Dr A's conduct towards an independent advocate was similar, insisting that the family must be present when MF was speaking to her. The judgment records that Dr A had cancelled many carers' appointments, particularly those of significance for the administration of MF's medication. On a review by MF's psychiatrist, concerns were raised that Dr A's actions towards MF "were controlling, hostile and coercive and it felt like M was reprimanded for voicing wishes and feelings" (paragraph 68).

The court considered both capacity and best interests. The findings in respect of capacity did not appear to be contested, and the court found (after reviewing the report of independent expert

Dr Claudia Camden-Smith) that MF lacked capacity to conduct proceedings, and make decisions as to his residence, care, contact with other and property and affairs.

In respect of best interests, the local authority argued that MF should move to a supported living accommodation, EL, which was in close walking distance to his family home. The placement was described as being 'less regimented' than PH. The local authority considered that MF had 'unrealised potential,' noting his interests and skills as a musician and artist, his developing positive relationships with peers after leaving home in 2016, and his having left school at a young age. The local authority considered that with appropriate assistance, MF could progress to independent living in a warden-assisted property. MF's wishes were to continue to live with his family, but also "to do more and not be at home so much. He told me that he would be keen to go on courses to help with art and with music" (paragraph 82).

After an extended period of seeking to support MF to expand his life while living at home, professionals took the view that this would not be possible due to the conduct of his family and Dr A. It was accepted that MF would be upset to be moved out of the family home (and it was not anticipated that his family would support him in this process). However, the court accepted the views of the professional witness that such a move would be in his best interests:

91. M has an opportunity to develop and achieve needed skills for the future. He should be able to learn in a way that he could not at home, because his family have shown themselves unwilling to accept outside help. M can do so much more than he is now doing.

92. I have tried very hard to see if there is a way to avoid having M moved. Unfortunately, his family are not open

to him having the opportunities that living elsewhere would provide to him.

93. M knows nothing other than his home and PH and he is quite right in not wanting to go back to PH. However, he saw a different supported living home, similar to EL, in 2021. He liked it but was worried that his mother and the family would be upset that he was taken to visit the home. I believe they were told about it in advance but perhaps did not realise the visit was to happen on that day.

94. During the course of their evidence, the family were asked if they would visit EL, to look at it but they refused. That was not helpful.

The court considered the possibility of having MF remain at home with injunctive orders that he attend college and that professionals have unfettered access to him. The local authority submitted that the court should not adopt this approach for the following reasons:

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- i) The family have shown that they will not comply with court orders;*
- ii) The family are convinced they know best;*
- iii) The family repeatedly turn away carers and have put obstacles in the way of social workers having uninterrupted meetings with M;*
- iv) M feels disempowered, his views are dictated by his family;*
- v) The family are stuck in their views, with no insight into M's condition;*
- vi) This is the only chance for M to reach his potential and he should not be denied it.*

The court accepted these arguments, and ordered that MF should move after spending the Christmas holidays with his family. The court made further orders that MF's family must

permit him to go to EL, and that Dr A and VM not be present on the day of MF's move.

Comment

This judgment does not raise any novel issues of law, but it is a good example of a careful and balanced consideration of person's welfare in a difficult situation. Akin to *ZK (Landau-Kleffner Syndrome: Best Interests)* [2021] EWCOP 12, the person at the centre of the case had had limited opportunities for much of his life, and had rapidly grown and progressed in his horizons after leaving the family home. However, and notably, MF was clear that he did wish to remain in the family home to which he had returned, but to have greater freedom to pursue his own interests and assert his independence. From the judgment, it is clear that the court considered Dr A's influence in particular had been an oppressive one, and there was no realistic prospect of MF being able to freely engage with people outside of his family while the situation continued. While the judgment did not give effect to MF's stated wish to remain in the family home, it appears that the plan approved was designed to give effect to MF's wish 'to do more' with his life than he had been able to previously.

Editors and Contributors



Alex Ruck Keene KC (Hon): alex.ruckkeene@39essex.com

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



Victoria Butler-Cole KC: 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. 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 and created the website www.lpslaw.co.uk. To view full CV click [here](#).



Arianna Kelly: Arianna.kelly@39essex.com

Arianna has a specialist practice in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in matters relating to the inherent jurisdiction of the High Court. Arianna works extensively in the field of community care. To view a full CV, click [here](#).



Nicola Kohn: nicola.kohn@39essex.com

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 2022). To view full CV click [here](#).



Katie Scott: katie.scott@39essex.com

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](#).



Rachel Sullivan: rachel.sullivan@39essex.com

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](#).



Stephanie David: stephanie.david@39essex.com

Steph regularly appears in the Court of Protection in health and welfare matters. She has acted for individual family members, the Official Solicitor, ICBs and local authorities. She has a broad practice in public and private law, with a particular interest in health and human rights issues. She appeared in the Supreme Court in *PJ v Welsh Ministers* [2019] 2 WLR 82 as to whether the power to impose conditions on a CTO can include a deprivation of liberty. To view full CV click [here](#).



Nyasha Weinberg: Nyasha.Weinberg@39essex.com

Nyasha has a practice across public and private law, has appeared in the Court of Protection and has a particular interest in health and human rights issues. To view a 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: adrian@adward.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.



Jill Stavert: j.stavert@napier.ac.uk

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

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](#).

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.

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Chambers UK Bar
Court of Protection:
Health & Welfare
Leading Set

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com

The Legal 500 UK
Court of Protection and
Community Care
Top Tier Set

clerks@39essex.com • **DX: London/Chancery Lane 298** • 39essex.com

LONDON

81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER

82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE

Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR

#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085

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