



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

- (1) In the Health, Welfare and Deprivation of Liberty Report: LPS on the shelf; fluctuating capacity and the interface under the judicial spotlight;
- (2) In the Property and Affairs Report: the new surety bonds structure and an update on the Powers of Attorney Bill;
- (3) In the Practice and Procedure Report: reporting restrictions and the Court of Appeal, and costs in serious medical treatment cases;
- (4) In the Wider Context Report: DNACPR notices and disability, litigation capacity, the new SCIE MCA database, and Ireland commences the 2015 Act;
- (5) In the Scotland Report: problems of powers of attorney in different settings and a very difficult Article 5 choice.

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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Short note: habitual residence under the spotlight

The decision in *Aberdeenshire Council v SF & Ors* [2023] EWCOP 28 serves both as a helpful reminder that Scotland is a foreign jurisdiction insofar as capacity matters are concerned, and also an example of a careful application on the facts of the approach to determining the habitual residence of a person with impaired decision-making capacity. As the opening paragraph makes clear, the case is also likely to raise some interesting questions about the extent to which Scottish Guardianship orders comply with Article 5 ECHR:

SF is a 44 year old woman from Scotland who has been treated in a psychiatric unit and then cared for in supported living for a total of seven and a half years in England. She has a lifelong diagnosis of moderate intellectual disability, autism spectrum disorder, associated periods of severe anxiety, and a diagnosis of difficult to treat schizoaffective disorder (bipolar type). It is not in dispute that she lacks capacity to conduct this litigation and to make decisions about residence and care. She is the subject of a Scottish Guardianship Order [‘SGO,’ made in favour of her parents] which the Applicant Council applies to be recognised and enforced in England.

The Third Respondent Council, in whose area SF is currently cared for, was concerned that the SF was being deprived of her liberty in her current placement without lawful authority and made an application to bring the matter before the Court of Protection. In March 2023 Aberdeenshire Council made its application for recognition and enforcement and HHJ Scully ordered that they should become the Applicant and Sunderland City Council should become the Third Respondent.

As Poole J identified:

*12. The issue before me is a preliminary issue in the application by Aberdeenshire Council for recognition and enforcement of the 2021 SGO. Given my determination that in June 2021, upon making the renewed SGO, the Sheriff must have been satisfied that SF was habitually resident in Scotland and that therefore the court had jurisdiction to make the SGO, it follows, applying Baker J's approach [in *The Health Service Executive of Ireland v PA & Ors* [2015] EWCOP 38] and the recognition and enforcement provisions of MCA 2005 Schedule 3, paragraphs 19 to 24, that there is no power to challenge the finding made in Scotland in June 2021 that SF was habitually resident in that country. There is no challenge to the*

measure itself. It might be contended that the determination of habitual residence for the purposes of jurisdiction to exercise the powers under the MCA2005 is not part of the "process to recognise and enforce a provision in this country" [Baker J, above] but the determination of habitual residence for the purposes of the application by Aberdeenshire Council, is for the purpose of that process and the court has ordered that Aberdeenshire Council be made the Applicant in these proceedings. That is therefore the application in which the determination of habitual residence is being made. In any event, it would be unfortunate for the court to be bound by the finding of habitual residence at a particular point in time for one purpose, but to come to a different finding about habitual residence at that same time for another purpose. As it is, I am bound by the finding of habitual residence made by the Scottish court in June 2021.

13. I am not bound to find that SF remains habitually resident in Scotland. Indeed, there have been some changes in her position since June 2021, in particular she has been discharged from detention in hospital under MHA 1983 s3 into supported living. Accordingly, I shall review the authorities on the correct approach to determining habitual residence for adults who lack capacity, consider the particular evidence in this case, and state my conclusions.

Poole J proceeded to do exactly that, and ultimately concluded that, whilst the issue of habitual residence was finely balanced, the evidence showed that SF remained habitually resident in Scotland. He concluded at paragraph 23 with an important reminder that:

Although the principles to be applied are common to determinations of the

habitual residence of a child who is the subject of an application under the 1980 or 1996 Hague Conventions, and an incapacitous person who is the subject of an application under the 2000 Hague Convention or the MCA2005, this case highlights the significant differences in the evidence and factors that the court may have to consider when applying those principles.

Court of Protection payments for local authorities

As of 1 July 2023, the Court of Protection is no longer accepting cheques and card payments from Local Authority applicants. Instead, payments will have to be made via Payment by Accounts portal. More information can be found [here](#).

Short note: contempt and the Court of Appeal

In *MacPherson v Sunderland City Council* [2023] EWCA Civ 574, the Court of Appeal heard Mrs Macpherson's appeal against an order of Poole J in the Court of Protection dated 20 January 2023 committing her to 28 days' imprisonment, suspended for 12 months, for five contempts of court.

Not least as Mrs Macpherson was acting in person, the Court of Appeal set out a number of broad principles of law, the two key principles relating to contempt being:

15. *As some of the Appellant's submissions appear to be directed to showing that she should not be found guilty of contempt of court even though the breaches were admitted, the case of R v Tredget* [2022] EWCA Crim 108; [2022] 4 WLR 62 *provides some assistance by way of analogy. In that case the Court of Appeal Criminal Division reviewed the basis on which an appellant might appeal against conviction after a plea of guilty. Three*

main categories were identified. These were: (1) the guilty plea was vitiated either because the plea was equivocal or because impermissible pressure had been exerted on the appellant; (2) there was an abuse of process because there had been entrapment, for example; and (3) where it could be shown that the appellant had not as a matter of fact committed the offence. The court made it clear that the categories were not closed.

16. In *Her Majesty's Attorney General v Timothy Crosland* [2021] UKSC 15; [2021] 4 WLR 103 [44] the court set out the proper approach to sentencing for contempt of court. The court should adopt an approach similar to that in criminal cases and assess the seriousness of the conduct and the harm caused, intended or likely to be caused. The court should consider whether a fine would be a sufficient penalty. If the contempt were so serious that only a custodial sentence would suffice, the court should impose the shortest period of imprisonment which reflects the seriousness of the contempt. Weight should be given to mitigation, including any genuine remorse and previous good character. There should be a reduction for an early admission of contempt. Once the appropriate term has been decided, consideration should be given to suspending the term of imprisonment.

Peter Jackson LJ's short concurring judgment explains pithily why, on the facts of the case, Mrs Macpherson's appeal failed:

34. *The way in which the judge has conducted these sad proceedings cannot be faulted. The orders which the Appellant admitted breaching were clearly necessary in FP's best interests. The Appellant's disagreement with those orders has been carefully considered by the Court of Protection on*

several occasions in decisions upheld by this court when refusing permission to appeal. The Appellant maintains her entrenched opinions which have repeatedly been found to be gravely misguided. In the circumstances, a sentence of 28 days' imprisonment suspended for one year was, in my view, entirely appropriate. No valid ground of appeal from this order has in the end been placed before us. Accordingly, the appeal is dismissed.

Court of Protection statistics

The most recent set of statistics (covering January to March 2023) show the following;

- There were 1,554 applications relating to deprivation of liberty made in the most recent quarter, which is a decrease of 7% on the number made in the same quarter in 2022. However, there was an increase by 58% in the orders made for deprivation of liberty over the same period from 656 to 1,035.
- Of the 1,554 applications, 145 were s.16 applications, 537 were s.21A applications, and 872 COPDOL11 ('Re X' or 'community DoL' cases). We note that this means that 65% of the applications would not have attracted non-means-tested legal aid for P (if P were joined as a party, which may not necessarily be the case, especially in 'Re X' cases).
- There were 8,948 applications made under the MCA more generally between January to March 2023, up by 3%. Of those 34% related to applications for appointment of a property and affairs deputy. During the same period there were 12,803 orders made, up by 14%.
- In January to March 2023, there were 269,537 LPAs registered, the highest in its

series and up 33% compared to the equivalent quarter in 2022

Transparency orders, reporting restriction orders and different courts

Hannah Taylor of Bevan Brittan and Alex have worked up a table seeking to set out the (complicated) map of statutory provisions applying in different courts considering the welfare of child and adults. It is a work in progress, and Alex welcomes feedback.

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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. 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. She is Vice-Chair of the Court of Protection Bar Association and a member of the Nuffield Council on Bioethics. 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 2022). 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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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](#).



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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 leading a masterclass on approaching complex capacity assessment with Dr Gareth Owen in London on 1 November 2023 as part of the Maudsley Learning programme of events. For more details, and to book (with an early bird price available until 31 July 2023), see [here](#).

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 September. 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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