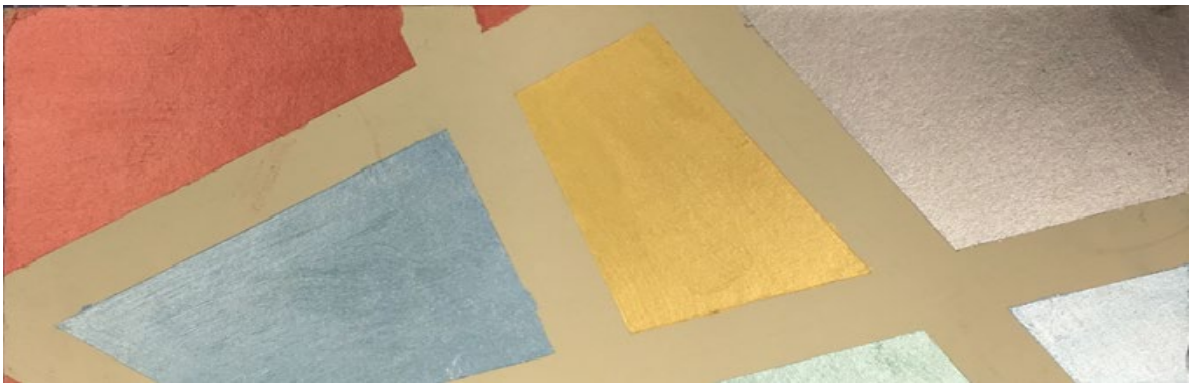

Welcome to the October 2025 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: time-specificity of capacity (again), a Welsh primer on key caselaw and urban myths around s.4B MCA 2005;

(2) In the Property and Affairs Report: two guest articles from new members of the Court of Protection on attorney elephant traps;

(3) In the Practice and Procedure Report: the purpose of transparency and the length of restrictions, and the contempt consequences of being found to have capacity;

(4) In the Mental Health Matters Report: progress of the Mental Health Bill and the CRPD and the United Kingdom in a stand-off;

(5) In the Children's Capacity Report: the Law Commission's Disabled Children's Social Care report and improving the outcomes of children in complex situations.

(6) In the Scotland Report: an update on AWI reform.

We do not have a Wider Context Report this month, but the progress of the Terminally Ill Adults (End of Life) Bill can be followed on Alex's resources page here.

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.

Editors
Alex Ruck Keene KC (Hon)
Victoria Butler-Cole KC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
Nyasha Weinberg

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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Mental capacity – assessing capacity

Summary

This case decided in August 2025, but only published more recently, is another in a now near-continuous stream of cases grappling with complexities of applying the time-specific MCA 2005 in real life.

The facts of the case are disturbing, both in the depths of the despair that they illuminated on the part of the young person involved, and also for the fact that they are by no means uncommon. They also, to the extent relevant, reinforce the propositions set out in the Law Commission's Disabled Children's Social Care report that something is clearly not working as regards those moving towards adulthood and whose needs straddle the social and health care divide.

The young person in question, AW, having been the subject of inherent jurisdiction proceedings during her late adolescence, had now turned 18. At that point, her capacity to make relevant decisions assumed a new importance. The independent expert, Dr Ince, opined as follows at paragraph 34:

> a. *AW has capacity to conduct the proceedings. Dr Ince applies the presumption of capacity and notes that on the three occasions he assessed AW she was able to*

understand, retain and use and weigh the relevant information.

b. *AW has capacity to make decisions on her residence. The presumption of capacity is not rebutted.*

c. *In relation to care, AW is able to understand and retain the relevant information. However, in response to specific triggers, AW was unable effectively to use and weigh the relevant information. However, those periods, if she is supported, should be broadly avoidable or if they do occur, will be short lived. This is not a pass on a fluctuating capacity. However, Dr Ince asserted that there is on an "interim basis" sufficient evidence to rebut the presumption of capacity as a consequence of contextually predictable episodes in which AW displays executive function secondary to her trauma and neurodevelopment disorders.*

d. *In relation to contact as a global and general decision, AW's capacity is not absent. However in moments of emotional arousal, mistrust or relational stress her ability to appraise information is impaired and episodically disrupted. On this decision, AW's presentation is consistent with trauma related executive disfunction and the known difficulties that autistic individuals may experience when navigating relational ambiguity, safeguarding intervention and emotionally nuanced social context. "It would be a categorical error to interpret her minimisation or brief responses as a lack of capacity per say; rather, these must be seen as context and communication patterns that require sensitive interpretation."*

e. *In relation to contact with SP and NY, Dr Ince concluded that AW lacks capacity to make the decision on contact with both.*

f. *AW has capacity to engage in sexual relations.*

35. Dr Ince concluded that AW has a confirmed diagnosis of ASD. In relation to this diagnosis AW's presentation is characterised by sensory sensitivity, cognitive rigidity, marked difficulties with transitions and relational boundaries and atypical executive function. There is evidence of difficulties with interoceptive awareness, a concrete thinking style and emotional processing deficits all consistent with the autistic profile. AW also meets the criteria for Complex Post Traumatic Stress Disorder. The experiences which have led to this traumatic stress disorder results in an affective instability, a negative self-concept, relational hypervigilance and a pattern of maladaptive coping strategies to include self-injury, disordered eating and social withdrawal. AW also presents with disordered eating behaviours, most closely aligned with Atypical Anorexia Nervosa.

36. Dr Ince concluded that overall, AW presents with a constellation of interacting difficulties, to include Autism, developmental trauma, effective instability and relational risks. The conditions do not exist in isolation and her presentation is not adequately captured by one diagnostic label. AW's functional profile varies significantly depending on emotional state, environmental stability, relational safety and perceived autonomy. These factors

form the causative nexus between the diagnostic and the functional test.

37 Dr Ince provided a further report on the 6 May 2025 responding to a significant number of questions of clarification which had been raised. In summary:

a. *Dr Ince repeated his findings that AW lacked* [note, this must be a typo for 'did not lack'] *capacity to conduct the proceedings but if subject matter capacity is compromised (such as on care) then AW may not have capacity and this would be caused by episodes of dysregulation.*

b. *AW's starvation has significant impact on cognitive functioning and emotional regulation. The cumulative effect of proposed nutritional deprivation likely impaired her ability to use and weigh relevant information effectively during periods of acute malnutrition. However, AW's decision not to eat or take nutrition were rooted in authentic, consensually rational decision making informed by lived experience. The evidence suggests that this decision reflects a capacity as to decision making.*

c. *There are periods when AW has capacity to make decisions on care and support and contact and periods when she does not. These periods are not random but contextually predictable arising in specific identifiable circumstances such as relational rupture and perceived threats to her autonomy.*

Importantly, Dr Ince considered that:

> *Anticipatory declarations could be operationalised effectively for AW provided that the care team is furnished with a clear, objective criteria and is supported by ongoing training to maintain vigilance and procedural accuracy.*

The reference to "anticipatory declarations" was a reference to the body of case law (summarised helpfully by Henke J) in which the Court of Protection has concluded that it has jurisdiction to make declarations about the lawfulness of actions to be carried out when a currently capacitous person ceases to have that capacity.[1]

However, ultimately, the parties before Henke J – and the judge herself – considered that this was not a case in which such declarations could be made. Whilst she accepted that had the jurisdiction to do so, she declined to do so:

> *57. In this case I have jurisdiction to make anticipatory declarations, but I decline to do so. Sections 5 and 6 MCA can be used to manage the circumstances of this case and any future crisis that AW may suffer. Whilst AW has put herself at risk in the past, I have reminded myself that I must guard against any suggestion that unwise decision-making is analogous to decision-making without capacity. Capacitous adults may make wise or unwise decisions. The point is that they have the capacity to choose and make informed decisions however unwise. I have reminded myself that I must guard against the protection imperative and*

[1] Although, as per Hayden J in *GSTT & SLAM v R* [2020] EWCOP 4, any declarations as to the lawfulness of deprivation of liberty arising in such periods have to be made by the High Court exercising its inherent jurisdiction.

> *paternalistic decision-making. I must respect AW's autonomy. I have carefully considered whether the evidence establishes with sufficient clarity the circumstances in which AW may lack capacity and in the event that AW does, the circumstances in which contingent best interest decisions would need to be made. I have concluded based on the evidence as a whole, of which Dr Ince's evidence is a significant part, that the evidence in this case does not provide that sufficient clarity. Accordingly, I decline to make anticipatory declarations which, on the evidence, would not be practical to implement.*

The application for anticipatory declarations was therefore dismissed.

Henke J observed of AW that:

> *59. She is an intelligent young person who was delighted to have her capacity and thus her autonomy recognised. She remained willing to accept the support offered to her by the statutory agencies and those statutory agencies remained committed to her. AW's parents were in agreement with my decision-making.*
>
> *60. I have written this judgment to enable AW to have a brief record of court proceedings which were before the court for a year. During that time AW was deprived of her liberty first under the Inherent Jurisdiction relating to children (s.100 Children Act 1989) and later in the Court of Protection wherein it was declared in the interim that she lacked capacity in the relevant domains. However, once the expert evidence had been finalised and tested before the court, it became apparent that in her case the evidence did not support the presumption of capacity being displaced. AW is an adult now with capacity, able to make good and bad choices about her own future. I wished her well on 22 May 2025 and I do so again as I end this judgment.*

Comment

This case, as with *Leicestershire CC v P and Another (Capacity: Anticipatory Declaration)* [2024] EWCOP 53, is a very helpful reminder that ss.5 and 6 MCA 2005 are the 'first line' tools established by Parliament to grapple with the care and treatment of those with impaired decision-making capacity. And, within this, it is important to recall that they provide protection from liability (and hence, in effect, a power to act) where the actor 'reasonably believes' that the person lacks the relevant capacity, and that their actions are in the person's best interests. As the Court of Appeal observed in *Commissioner of Police for the Metropolis v ZH* [2013] EWCA Civ 69:

> *40. A striking feature of the statutory defence is the extent to which it is pervaded by the concepts of reasonableness, practicability and appropriateness. Strict liability has no place here. Of particular relevance to the present case is the fact that D is under no liability to P in tort for an act done in connection with the care or treatment of P, if he reasonably believes that it will be in P's best interests for the act to be done; and (in the case of restraint) if he reasonably believes that it is necessary to do the act in order to prevent harm to P; and he is obliged to take into account the views of, amongst others, anyone caring for P, but only if it is practicable and appropriate to consult the carer.*

When the law says 'reasonable belief,' it is the law's code for 'we do not expect perfection, but a coherent explanation.' In the context of a situation such that of AW, where it appears on the basis of the evidence set out in the judgment that crises leading to impaired decision-making

capacity could be unpredictable, it might be thought that this provides exactly the framework required to manage the situation. In AW's case, as in the Leicestershire case, it might also be hoped that those working with AW are able to work with her to set out anticipatory care plans to make clear her wishes in the event that she does experience another crisis, as such then make it even clearer what the 'right' course of action would be at such point.

Entirely separately, the case contains an important reminder that if an expert is not likely to be able to report within the relevant timeframe, it is vital that they let the parties and the court know "so that it may take proactive steps, including instructing an alternative expert" (paragraph 32).

Short note: a Welsh primer in key caselaw

TIRE v Carmarthenshire County Council [2024] EWCOP 81 (T2) is, as far as we know (but we would welcome correction) the first published judgment from the Court of Protection in Welsh (although many will have been delivered orally). As this Practice Direction makes clear, Court of Protection proceedings in or having a connection with Wales must be conducted on the basis that the Welsh and English languages are treated on the basis of equality.

The case itself was a relatively 'routine' s.21A application, although characterised by a very clear desire on the part of HHJ Edwards to understand the perspective of P, and to recognise the impact upon her of the decision that she should remain in a care home[2]. Of particular – wider – assistance is the appendix to the judgment in which the judge set out an agreed translation by the bilingual Counsel involved (Nia Gowman and Lewis Harrison) of the legal framework and key cases concerning best interests.

Short note: sex, capacity and confusion

Re W (Capacity to Engage in Sexual Relations & Marry) [2025] EWCOP 32 (T2) concerned a 32-year-old woman with learning disability in supported accommodation, receiving a total of 21 hours of support per week. She worked two days a week at McDonalds and spent time with friends and family with whom she went on holidays. The issue was whether she had capacity to engage in sexual relations and to enter into a marriage or civil partnership in circumstances where she lacked capacity to make decisions 'about contact with others'.

In a previous judgment in September 2016 the court had concluded that W had been the subject of a forced marriage, which was annulled, and had been the victim of abuse including rape. At that she lacked capacity to engage in sexual relations and to marry. From June 2021, a learning disability nurse had provided sex education, but there had been a number of concerning incidents. The most recent expert evidence was that "Were she to be in a mutually respectful, safe relationship, it is my opinion that she would have capacity to make decisions about engaging in sexual relationships. However, if there is even minor perceived coercion, W is likely to acquiesce with what the other person wishes to happen." The focus of the case was on W's ability to "use" relevant information in circumstances where she was vulnerable to coercion.

In essence, the court decided the best interests decisions as to contact, and taking all practicable steps, would enable W to have capacity to decide

[2] We do not, unfortunately, profess Welsh language abilities – the website used to allow us to navigate through did, perhaps rather tellingly, translate the "Court of Protection" as "the custody court."

on sexual relations and marriage. HHJ Farquhar held that:

> *On the basis of the full cooperation and disclosure that W has exercised to date I am satisfied that the Local Authority would have the ability to play a full role in such decisions in the vast majority of incidents in which W makes contact with an individual. It is likely, in the vast majority of instances that the individuals with whom W would wish to engage in sexual relations would be those with whom she has already had contact. That is a group of individuals over which the Local Authority will have some control bearing in mind the protections in place and the agreed position that W lacks capacity in regard to with whom she has contact.*

Accordingly, W was declared to have capacity but was a vulnerable individual who would need support at appropriate times to be able to effectively exercise that capacity, for which the local authority was to prepare a care and support plan to set out such support.

Comment

This case is interesting in three respects. First, it illustrates the use of *TZ* style support plans which, put bluntly, enable a best interests decision to be made about who P has contact with which provides a 'safe' relationship in which P can make capacitous decisions regarding sex. Second, it adopts the same approach with regards to marriage, despite the person lacking capacity as to the person with whom they would enter the marriage contract. And, third, the evidence hinged upon whether W was unable to use relevant information because her "the eagerness to please is part of who W is and her learning disability means that she finds it more difficult not to act upon it." But with the 'safeguards' of best interests decisions in respect of those with whom she had contact, this would reduce the risk of sexual abuse.

Many people – we suspect potentially including the judge – might consider that the conclusions reached shows that the law in this area requires a wholesale (statutory) reconsideration. For those wanting to think more about these areas, we recommend this book.

Wishing won't make it so – urban myths around s.4B MCA 2005

Alex was contacted, again, by a health care professional who had been told with complete confidence that the new version of s.4B MCA 2005 included in the Mental Capacity (Amendment) Act 2019 was in force. This, in turn, meant that they had been told with complete confidence that it was possible to deprive someone of their liberty in an emergency where they lacked capacity to consent to the steps required to provide them with life-sustaining treatment, or to prevent a serious deterioration in their confidence, and to rely in so doing on the protections contained in s.4B.

If only that was the case. When Alex was at the Law Commission working on the Mental Capacity and Deprivation of Liberty project, the Commission recognised that there was a real gap in the law which led to professionals 'freezing,' and – in extremis – to people dying. Section 4B as it stands only kicks in to provide protection "while a decision as respects any relevant issue is sought from the court" (and other conditions are met). In other words, as was put in *Cardiff and Vale UHB v NN* [2024] EWCOP 61 (T3), it "expressly authorises the deprivation of a person's liberty for the purpose of giving a patient life-sustaining treatment or preventing a serious deterioration in their condition while court authorisation for the same is sought" (paragraph 20). Section 6 MCA 2005 provides protection in relation to restraint, but

only where the steps taken do not cross the line to deprivation of liberty (a line which can be problematically difficult to identify, especially in high octane situations).

The Law Commission therefore proposed that s.4B be amended to provide a 'standalone' provision relating to emergency deprivation of liberty. A somewhat different form of that proposal appears in s.2 of the Mental Capacity (Amendment) Act 2019. However, that section is not in force (nor is any of the rest of the Act, which is primarily the vehicle for implementing the Liberty Protection Safeguards).

We can therefore be unusually categorical:

> You **cannot** rely upon s.4B to deprive someone of their liberty if you are not making an application to the Court of Protection.

If you would like to be able to do so, you need to persuade the Government to bring the 2019 Act into force but that is not a matter for us as mere lawyers.

Section 44 MCA 2005 convictions

Edge Training have very helpfully published the results of an FOI request they have made to seek to establish the number of prosecution and convictions under s.44 MCA 2005 (the offence of ill treating or neglect of a person lacking capacity). They show a consistent downward trend (with one blip) since 2017, and a consistently very low conviction rate. What would be very interesting would be to do the equivalent FOI request in relation to the offences created by s.20-21 of the Criminal Justice and Courts Act 2015 which apply to care workers / care providers which are not capacity specific. If there is a trend of prosecutions under these offences which is upwards, it might mean there is a choice to use a different route; if there is not, there would appear to be a considerable problem.

PROPERTY AND AFFAIRS

Editorial note

We are delighted to publish two guest articles by new members of the Court of Protection team, Alex Cisneros and Matthew Wyard, highlighting different issues relating to Lasting Powers of Attorneys.

Multiple LPAs

We have been asked about situations where a donor has created multiple Lasting Powers of Attorney (LPAs) dealing with the same thing (i.e. health and welfare decisions or property and affairs decisions). The Office of the Public Guardian (OPG) has not issued guidance specifically on the complications that may arise in such circumstances, and so here we attempt to grapple with some of the key issues.

Can you have more than one LPA for the same thing?

There is nothing in the MCA 2005 or in regulations or the Code of Practice which prohibits the creation of more than one LPA. In fact, the Office of the Public Guardian's own materials envisage that this may be desirable in some cases. The LP12 guidance states: *"You may want to make two LPAs for property and financial affairs, one for your personal finances, and another for your business affairs, so that different attorneys can look after different things."*

This makes clear that donors are permitted to execute multiple LPA instruments, rather than being limited to appointing several attorneys within a single document. A common example is the so-called "business LPA," in which a donor appoints someone to manage their company interests, while reserving personal property and financial decisions to family members or close friends.

Issues

While this division of responsibility may make sense in theory, the coexistence of multiple LPAs can be fraught with practical difficulties:

- Confusion about scope – Attorneys may be unclear about who has authority to act in relation to particular decisions. This confusion can make financial institutions, care providers, or others reluctant to accept the attorney's authority.
- Conflicting instructions – Different instruments may contain instructions that pull attorneys in opposite directions. Attorneys would be unable to comply with both simultaneously, leaving them exposed to challenge or the instructions could be severed.
- Increased risk of dispute – Multiple instruments create more opportunities for disagreement between attorneys, family members, or third parties about who should be acting. Such disputes often need to be resolved by the Court of Protection, increasing delay, stress and cost.

Tips

In practice, the following considerations may help donors and their advisers:

- Consider necessity – Ask whether multiple LPAs are really needed, or whether the same objective could be achieved through using tailored instructions within a single instrument.
- Ensure clarity – *"The extent of an attorney's authority turns primarily on the wording of the*

power itself"[3]. This means that if a donor does decide to create multiple LPAs, the drafting must be absolutely clear about the scope of each attorney's authority and how the instruments are intended to work together. The donor should:

1. set out in each instrument exactly which decisions are covered;
2. specify any limits on authority; and
3. consider providing a supporting letter of guidance to explain the practical division of responsibilities.

- Anticipate agency interaction – Different attorneys may need to deal with different organisations in practice. For example, an attorney under a business LPA might need to liaise with the company's bank or accountant, while a personal property and affairs attorney may need to speak with HMRC, social services, or the donor's personal financial adviser.

To avoid duplication or confusion, it is sensible for donors to provide a separate guidance note for attorneys, setting out which agencies each is expected to contact and how information should be shared between them.

Alex Cisneros

Stumbling blocks in revocation cases

The bulk of work coming before the Court of Protection concerns the management of the property and financial affairs of protected parties. One such application which is commonplace, but often fiercely litigated, is an application to revoke a lasting power of attorney ("an LPA") appointed to allow an attorney to manage property and financial affairs ("an LPA PFA"). Many such applications are brought by the Public Guardian following an investigation, but they may also be brought by local authorities or family members. This article will address three key stumbling blocks that often arise in such applications when brought by local authorities and family members.

Stumbling block 1: applying on the wrong basis

The first stumbling block that local authorities often fall at is applying to revoke the LPA on the basis that the appointment is not in P's best interests.

The court's power to revoke a LPA is found at section 22(4) of the Mental Capacity Act 2005 ("the Act"). Read in conjunction with section 22(3) of the Act the court may, if P lacks capacity to do so, revoke the instrument or the LPA, where the court is satisfied that either:

(1) fraud or undue pressure was used to induce P to execute an instrument for the purpose of creating a LPA, or to create a LPA, or

(2) that the attorney (or if more than one, any of them) has behaved, is behaving, or proposes to behave in a way that contravenes his authority or is not in P's best interests.

In order to revoke an LPA therefore, an application must be premised on wrongdoing by another - either in the creation of the LPA in the first place (i.e. where P was fraudulently or unduly influenced in executing the LPA, often but not exclusively by the attorney) – or on an act, or proposed act, of wrongdoing by the attorney in carrying out their functions (i.e. where they have acted beyond the scope of their authority or is acting against P's interests, thereby breaching one of the fundamental principles of the Act).

[3] *The Public Guardian's Severance Applications (DH)* [2017] EWCOP 10 [§11]

Of note for practitioners is what the court does not have the power to do. When considering the revocation of an LPA, the court does not have an unfettered power to revoke an LPA where it feels that the appointment is contrary to P's best interests, something that the court does have when considering an application to discharge a deputyship order (see *CL v Swansea Bay University Health Board & Ors* [2024] EWCOP 22).

The reason for that distinction is straightforward. A deputyship order is made by the court in P's best interests where P lacks capacity to appoint someone to make decisions on his behalf and is, as such, a product of the court's best interest decision making jurisdiction. An LPA on the other hand is executed by a capacious individual having autonomously selected the attorney and, on occasions, restricted the scope of their power to act. Therefore, rather than overriding P's autonomy by revoking an LPA simply because the court disagrees with the choice made by P at a time when he had capacity, the court will only revoke an LPA in order to protect P.

How does a practitioner ensure that any removal application focuses on the correct test? That starts with ensuring that the reasons for wanting to remove an attorney fall within the scope of sections 22(3)-(4) of the Act. Where they do, the allegations should be particularised in sufficient detail within the application witness statement that the attorney can understand them and is in a position to respond to them in due course. Where the allegations are vague statements concerning the attorney's general suitability, rather than specific and evidenced allegations of wrongdoing, then the application may be falling victim to stumbling block 2.

Stumbling block 2: Particularising wrongdoing

The second stumbling block in revocation applications is not understanding what wrongdoing is applicable and only relying on their actions as attorney.

In most cases, the alleged wrongdoing relied upon will be a (sometimes fairly obvious) action taken, or proposed action to be taken, by the attorney on P's behalf in their capacity as attorney. For instance, two examples from my own practice, where an attorney sells P's home and rather than passing the proceeds of sale to P to pay off care home debts, gifts the proceeds to her husband, or where P's son acting in his capacity as attorney spent a considerable sum of P's money on a speed boat.

But what about the less obvious scenario of alleged wrongdoing that is not done by the attorney in their capacity as attorney. For instance, the situation of warring siblings, or where an attorney is hostile towards professionals and those caring for P? It is often thought that such matters are irrelevant in applications to revoke an LPA PFA, but that is not so.

The question of whether actions done by attorneys outside of their role as attorney could be taken into account in revocation applications was considered by HHJ Hazel Marshall QC in *Re: J* [2011] COPLR Con Vol 716. At [73] the court considered the scope of conduct under section 22(3)(b) of the Act, confirming that "*if there is sufficient evidence that the attorney is behaving contrary to P's interests even in a different context… that might well quite reasonably provide a sufficient reason to revoke an LPA*". In considering such conduct, the court considered at [75] that the following process should be followed: (1) identify the alleged offending behaviour or prospective behaviour, (2) look at all the circumstances and context and decide whether, taking everything into account, it really does amount to behaviour which is not in P's best interests and (3) decide whether, taking everything into account, including the fact that

the behaviour is in some other capacity, it also gives a good reason to take the step of revocation.

Therefore, *Re: J* can be relied on as authority for the proposition that behaviour by an attorney acting outside of their capacity as attorney, can be relied upon to revoke an LPA. Accordingly, *Re: J* was relied upon in *Re Harcourt* [2013] COPLR 69 to revoke a LPA due to the failure of an attorney to cooperate with the court. In *Re EL* [2015] EWCOP 30 and *Re RM* [2016] EWCOP 25 the court relied upon *Re J* to revoke an LPA in circumstances where joint attorneys could not work together and that was causing harm to P's interests. In *LCR v SC* [2020] EWCOP 62 the court refused to register a LPA because poor familial relations meant that appointing the attorneys as sought was effectively setting the situation up to fail.

Notwithstanding those example, in my view, *Re J* should be approached with some caution. Firstly, it is a decision by a Tier 2 judge and, as such, has limited precedential value. Secondly, the facts of *Re: J, Re EL* and *Re: RM* all concerned revocation in circumstances where the warring siblings were co-attorneys and therefore the submission that the conflict impeded decision making on P's behalf was straightforward. That situation is not so clear in respect of cases where the dispute is brought by non attorney siblings against an attorney sibling and, as such, decision making may not be so clearly impeded.

Stumbling block 3: Pursuing the matter to trial

The third stumbling block is not understanding the court process in removal applications or, more precisely, not understanding the methods available to the parties to bring about a revocation without a contested final hearing.

The idea of having two parties disputing something but the court preventing a contested trial would be an alien concept to most lawyers. However, in revocation cases it is worth remembering that there are two other options open to parties to bring about a swifter, and often more cost effective, resolution to the dispute.

One, seeking a Dispute Resolution Hearing ("a DRH"). The DRH is a concept enshrined at paragraph 3.4 of Practice Direction 3B. It is a without prejudice hearing at which parties attend to be told the likely outcome of the proceedings by a judge (who will not then hear the final hearing should it be required) before having the opportunity to try and negotiate a settlement of the matter. Similar to a Financial Dispute Resolution hearing in the Family Court, a DRH is most effective when the parties attend at least an hour in advance of the hearing to discuss and narrow the issues, and then where time is made post hearing, but whilst still at court, for further discussion. To allow for that, parties should be mindful of the constraints with listing and, in the author's experience, request at least a 2-hour hearing for the DRH (rather than the one hour typically listed by default). The benefit to the additional hour is that it facilitates inter party discussions post judicial indication and, if needed, allows the parties to return before the court with an agreed order for approval, or for further indications on the merits.

Two, seeking for revocation of the LPA on a summary basis, without a contested final hearing. In revocation applications the court has the power, and often does exercise it, to summarily determine the application without the need for a contested final hearing. The legal basis for the power is proportionality. Rule 1.1(1) of the Court of Protection Rules 2017 ("the CoPR") requires the court to deal with cases justly and at a proportionate cost which includes, as set out at Rule 1.1(3)(a)&(c) expeditiously, fairly and proportionately, whilst Rule 1.3(1) requires the court to further the overriding

objective by actively managing cases. Therefore, in many revocation cases where either the allegations are clearly proven on the documentary evidence, or other factors are at play that mean a contested final hearing would be wasteful and unnecessary, the court should be asked to determine the application summarily. Sometimes such a request will be successful, sometimes not, so any practitioner making such a request should be armed with directions to set the matter down for a contested final hearing or, if more appropriate, a DRH (see above).

Conclusion

The above addresses the three key stumbling blocks that I see arise regularly in practice: (1) not knowing the correct legal basis for revocation, (2) not understanding the breadth of the test and (3) doggedly pursing a contested final hearing in circumstances where resolution can be obtained far easier. Hopefully this will be a useful source of guidance for practitioners making revocation applications in the future.

Matthew Wyard

PRACTICE AND PROCEDURE

Transparency in the Court of Protection – what is it good for and how long should restrictions last?

Re Gardner (Deceased)(Duration of Transparency Order) [2025] EWCOP 34 (T3) (Poole J)

Practice and procedure – transparency

Summary[4]

By accident or design, Poole J appears to have found himself the Tier 3 transparency guru. In *Re Gardner (Deceased)(Duration of Transparency Order)* [2025] EWCOP 34 (T3) he made a range of important observations about (and in passing raised some questions about) the operation of the transparency framework within the Court of Protection.

As Poole J identified at the outset:

> 1. *This is the third judgment I have published in these proceedings. The substantive proceedings have now concluded. They concerned an Advance Decision to Refuse Treatment ("ADRT") made by Carl Gardner, previously anonymised by the Court as AB. The earlier judgments were Re AB (ADRT: Validity and Applicability) [2025] EWCOP 20 (T3) and Re AB (Disclosure of Position Statements) [2025] EWCOP 25 (T3).[5] Following a final hearing of the substantive proceedings on 30 June 2025 I made an order on 4 July 2025 directing Mr Gardner's transfer to a hospice for palliative care in accordance with the choices he had made in his ADRT. He died on 8 July 2025. I have offered my condolences to his family, including to the Third Respondent, Danielle Huntington, his partner and fiancée, and to the Fourth Respondent, his mother who effectively, if not formally, speaks for the whole of Mr Gardner's large family.*
>
> 2. *The order of 4 July 2025, which all Counsel involved at that final hearing had agreed, included a direction that the "Transparency order dated 23 May 2025 shall cease to have effect from 30 August 2025". Mr Gardner was likely to die within a short time of his transfer to a hospice and so the Transparency Order ("TO") was to be discharged after a suitable "cooling off period" following his death.*
>
> 3. *This third judgment concerns the Fourth Respondent's application to extend the TO beyond 30 August 2025. The application was made on 5 August 2025 but could not be heard until after 30 August 2025 and so I made a direction on paper for the TO to continue in effect pending the hearing of the application which took place on 16 September 2025.*
>
> 4. *The Fourth Respondent, represented then, as now, by Leading and Junior Counsel and solicitors, agreed to the discharge date of 30 August 2025 but she and the whole family have now had a change of heart. The TO allows for applications to be made to vary it and she is entitled so to apply. This is a stressful and distressing time for her and all those close to Mr Gardner and I acknowledge how raw feelings are given the prolonged litigation, the hostility that has arisen*

[4] Note: Tor having been involved in the case, she has not contributed to this note.

[5] Note, we understand that the Court of Appeal is still considering an application for permission to appeal this decision.

> *between Ms Huntington and members of the family about the ADRT and associated matters, Mr Gardner's severe brain injury, and his death. For the purposes of my determination on the application, I do not give weight to the fact that the Fourth Respondent, on behalf of the family initially agreed to the TO being discharged on 30 August 2025.*

The cast of those appearing before Poole J in relation to this question varied slightly from those who had appeared before, a notable addition being the joining, as intervener,[6] of Professor Celia Kitzinger, co-founder and co-director of the Open Justice Project.

Poole J identified that the TO in question had been in broadly standard form. He observed that

> *7. The TO is an injunction. It is not a contra mundum (against the world) injunction[7] but it applies widely, not only to the parties and their representatives, but also to witnesses, all persons who attend a hearing, all persons who by any means obtain or are given an account or record of a hearing or who obtain documents and information arising from the application, and any body or organisation and their employees and agents for whom any such person works or is giving evidence. A penal notice is attached to the TO warning that any person who breaches the injunctive parts of the order may be found guilty of contempt of court and may be sent to prison. The injunction prohibits such persons whether orally or in writing, directly or indirectly, from publishing or communicating the identified information or any part of it, or causing, enabling, assisting in or encouraging its publication or communication.*

Poole J analysed the (relative flood) of recent caselaw in this area in some detail, before noting that:

> *19. The standard order, as reflected in the TO in this case, prohibits not just the publication, but even the communication of the specified information. Accordingly, as Mr Patel KC rightly pointed out, even though the Court of Protection ordinarily sits in public, it is standard practice, in accordance with the COP rules and Practice Directions, for the Court to make an order restricting the publication and communication of information from the proceedings. That is a derogation from the principle of open justice but it is justified because the protection of P, the person who is the subject of the proceedings, is required if the Court of Protection is to sit in public. Most Court of Protections hearings involve evidence and submissions about matters which would ordinarily be private and often confidential. Decisions about personal matters are often made by the Court in P's best interests when P does not have the mental capacity to make those decisions for themselves. The identification of P during the course of Court of Protection proceedings would be liable to interfere with the decision-making process. It is only because of their lack of mental capacity that P finds himself or herself in court proceedings with hearings in public. Whilst the*

[6] In passing, it is interesting to note that this is another case in which a person / body has been joined as an intervener, even though the Court of Protection Rules do not, in fact, expressly provide for this.

[7] It is, with respect, not clear that this is true. An order which has the effect of binding any person who obtain the relevant information by any means is, to all intents and purposes, a contra mundum injunction, as it is an order which is not limited in its effect to a specific person or group of people.

decision whether to make a TO, and what its terms should be, is for the Judge, the COP Rules 2017 and Practice Directions assume that, ordinarily, the balance of Article 8 and Article 10 rights weighs heavily in favour of making a TO: it would be contrary to the administration of justice, the purpose of the proceedings and manifestly contrary to P's best interests to allow P to be identified and therefore information about them to be open to the public at large whilst proceedings were continuing. A different approach could be taken but that, at present, is the position prescribed by the law in the form of the COP rules and practice directions.

20. In the very recent Court of Appeal judgment in PMC v Cwm Taf Morgannwg University Health Board [2025] EWCA Civ 1126, the Master of the Rolls, set out a taxonomy of orders:

(i) A withholding order ("WO") to withhold or anonymise the names of a party or a witness including withholding information that would identify that person;

(ii) A reporting restrictions order ("RRO") to restrict the reporting of material disclosed during the proceedings whether in open court or by the public availability of court documents;

(iii) An anonymity order ("AO") to both withhold or anonymise names of a party or a witness and restraining the reporting of material disclosed during the proceedings.

21. Counsel agreed, with some hesitation from Ms Hearnden, that a TO is an RRO. In Hinduja (above) the Court of Appeal referred to the standard TO as an RRO, but it did not have the advantage of the Master of the Rolls' taxonomy from the subsequent judgment in PMC (above). With respect, the standard TO is, in my view, an AO since it both anonymises the names of parties and others and restricts the reporting of material from the proceedings (material likely to identify not only the anonymised persons, but also where they live and where they are being cared for). If so, then it should be acknowledged that, unlike in civil cases where cases are routinely heard in open court without reporting restrictions, it is standard practice in the Court of Protection to make an AO of the court's own motion at the outset of the proceedings. That is a derogation from the principle of open justice built in to the COP Rules 2017 and the Practice Directions and "ordinarily" applied. In other contexts the appellate courts have stressed that a WO or an RRO (and therefore an AO which combines them) may only be made if such an order is strictly necessary in the interests of justice – see Scott v Scott [1913] AC 417, A v BBC [2014] UKSC 25, [2015] AC 588, and Wolverhampton City Council v London Gypsies and Travellers [2023] UKSC 47, [2024] AC 983. This may include the need to protect the identity of a vulnerable person as envisaged by Lord Reed in A v BBC at paragraph [41]. CPR r39.2(4) provides that "the court must order that the identity of any person shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of any person." In contrast, the COP Rules 2017 r4.3

> *does not restrict the Court's discretion to impose restrictions on the publication of the identity of a party or other person or restrict the publication of information relating to the proceedings: the rule merely refers to the relevant practice direction, PD 4C, which provides that the court will ordinarily make an order that an attended hearing will be in public and will ordinarily in the same order impose restrictions in the terms of the standard TO approved by the President of the Court of Protection. Hence, some caution is required when applying appellate case law which concerns civil or indeed criminal proceedings, to the Court of Protection.*

Importantly, given that the family of Mr Gardner were primarily seeking the extension of anonymisation in the case to protect themselves, Poole J then asked himself what the purpose of a standard TO is in the Court of Protection:

> *24. What is the purpose of a standard TO? Is it solely to protect the rights and interests of P or is it also to protect the rights and interests of others? The COP Rules and Practice Directions are not particularly helpful in answering those questions. Paragraph 27 in Part 2 of PD 4A does not apply when a standard TO is made under PD 4C but only when "different or additional restrictions on the publication of information relating to the proceedings are imposed in a subsequent order." (PD 4A, paragraph 3). Paragraph 27 states that the aim of any such subsequent order "should be to protect P rather than to confer anonymity on other individuals or organisations. However the order may include restrictions on identifying or approaching specified family members, carers etc … in cases where the absence of such restriction is likely to prejudice their ability to care for P or where identification of such persons might lead to identification of P and defeat the purpose of the order." Thus an additional RRO made subsequent to or alongside a PD4C TO circles back to P. The aim is to protect P even if the anonymisation of other persons is required to achieve that aim. No such "aim" of the standard TO is set out in PD4C.*
>
> *25. Charles J's judgment in V v Associated Newspapers [2016] EWCOP 21 persuasively demonstrates, in particular at paragraphs [73] to [78], that Court of Protection cases often involve an invasion into family and private life that extends beyond P's life "because it can directly and indirectly engage the family life of other members of P's family …" However, it does not follow that the standard TO made under PD4C is designed to protect the Article 8 rights of anyone other than P.*

Returning to this theme later in the judgment, Poole J identified that:

> *34. I have doubts that the purpose of a standard TO made under PD4C is to protect the interests or Article 8 rights of anyone other than P. The inclusion of family members within the protected information is designed to avoid jigsaw identification of P. No-one would be included in the list of names that cannot be published unless (i) publication of their names would lead to the identification of P, or (ii) their identification would hinder the care given to P or otherwise harm P's best interests, or (iii) some other very specific justification for their inclusion were put forward. I cannot know what was in the mind of the Judge who made the TO at the outset of these proceedings, but I made the TO in May 2025. The continuation of the inclusion of the family members within the protected information was not discussed. It was*

not controversial. There was no debate about the purpose of their inclusion. I do not recall any submissions being made that any specific family member required protection from identification for their own sake. On the other hand they had no need to make such submissions because the order already protected their anonymity in any event. Certainly, whilst the substantive proceedings were ongoing, and whilst Mr Gardner remained alive, it was necessary to protect his right to respect of his private and family life, protect the integrity of the proceedings, and to ensure that his treatment was not adversely affected by publicity or communications about information relating to the proceedings outside the courtroom. With the conclusion of proceedings and Mr Gardner's death, there is no need to protect the integrity of the proceedings nor to protect his own Article 8 rights or his best interests. Those considerations no longer apply. A cooling off period of the kind envisaged in Abbasi has now passed.

35. I accept the observations of Charles J in V v Associated Newspapers (above) that proceedings will often invade the privacy of P's family members and I note that COP Rule r4.3 provides for the Court to make an order imposing restrictions on the publication of the identity of any party, P, any witness or "any other person". Nevertheless, the aim of the standard TO made at the outset of proceedings and before the first attended hearing, is to protect P, not to protect the anonymity of others. The standard order may be varied so as to protect others where there is specific justification to do so, but that is a different matter. In this case, I am satisfied that although the matter was never aired in Court during the substantive proceedings, the aim of the TO was to protect the anonymity, interests and Article 8 rights of Mr Gardner and no-one else. The injunction against identifying family members was to serve that aim and any protection of their privacy was incidental.

As alluded to at paragraph 35 above, the question of the duration of the order could also turn on precisely whose interests were being protected.

29. The Supreme Court in Abbasi recognised that in cases concerning the serious medical treatment of children, which have some similarities to Court of Protection proceedings concerning the serious medical treatment of P, injunctions restraining publication are often made in circumstances of urgency, in proceedings that are not fundamentally adversarial, and when the Court's focus is on the best interests of the subject of the proceedings – see [38] to [45]. But the proceedings are also dynamic and the risk involved with allowing publication of information will change over time. At [142] the Court held that whilst some form of injunction is likely to be justified in the first stage of proceedings and indeed whilst the proceedings remain live,

> *"an order is likely to need to be time-limited, either so as to expire automatically at the end of the proceedings or …. So as to expire at the end of a chosen cooling-off period thereafter; subject, in either case, to further application."*

I am satisfied that the same reasoning applies to TOs made in Court of Protection proceedings concerning serious medical treatment and in particular when it is likely that P will die if certain orders are made to withdraw or withhold life sustaining treatment. I have already noted that Part 2 of PD 4A does

not apply when a standard TO is made, but only when subsequent, different or additional restrictions on the publication of information relating to the proceedings are imposed. But PD 4A, Part 2, paragraph 29 states that:

> *"Orders should last for no longer than is necessary to achieve the purpose for which they are made. The order may need to last until P's death. In some cases a later date may be necessary, for example to maintain the anonymity of doctors or carers after the death of a patient."*

That direction now needs to be read in the light of Abbasi. If it applies to additional reporting restrictions then, as a matter of logic, it ought to apply also to the initial TO. Certainly, Abbasi emphasises that open ended orders made during proceedings are to be avoided.

Taking all this into account:

> *39. Although I consider that the proper approach of any person - be they a clinician in the position of those considered in Abbasi, or a family member, seeking to restrict publication of information after the death of P in Court of Protection proceedings - is to make a freestanding application for an RRO, I shall consider the application before me, including consideration of a variation of the terms of paragraphs 6 and 7 of the TO as well as its duration. In doing so I accept, for the purposes of this application, that in principle the Court of Protection does have the power to make an RRO or AO and/or to continue a TO after the conclusion of proceedings when P has died. I do not need to rule whether such jurisdiction exists in order to determine this application.*
>
> *40. Article 10(2) of the Convention allows for the exercise of the freedom of expression to be subject to restrictions prescribed by law as necessary in a democratic society for the protection of the reputation or rights of others or for preventing the disclosure of information received in confidence. Interference with the Article 10 right to freedom of expression is prescribed by domestic law through the COP Rules 2017 and Practice Directions. Following the structured approach set down in Abbasi I approach the question of whether the interference proposed in the present case is necessary by seeking to strike a fair balance when values protected by the Convention come into conflict, i.e. the values protected by Articles 8 and 10. Neither Article has precedence over the other but I also have regard to the dicta of the Master of the Roles in Tickle and PMC (both above).*

On the particular facts of the case, and as might now be evident from the fact that the judgment refers to Mr Gardner by name, Poole J found that the balance came down in favour of bringing the TO to an end, summing his conclusions as follows:

> *42. In the great majority of cases a TO made in Court of Protection proceedings ought to be discharged upon P's death or within a short period after their death. The appellate courts might say that that should be the rule in all such cases. The purpose of the TO to protect the anonymity of P during the proceedings, or during their life, will have been served. I have considered the competing Article 10 and Article 8 rights in this case. Continuation of the TO, even in a narrower form, would significantly restrict the right to freedom of expression of Ms Huntington and others, including Professor Kitzinger,*

who wish to be free to discuss the important issues raised by the now concluded proceedings without impediment or fear of being accused of contempt of court. There is a strong public interest in them being free to comment on this case in which personal experiences of matters outside the proceedings are so closely linked to the issues raised within the proceedings.

43. I am unable to identify any countervailing interference with the Article 8 rights of members of the family sufficient to justify the continuation of the restrictions on the Article 10 right to freedom of expression that are imposed by the TO or any varied TO. Even if continuation of some form of restrictive order were justified, I cannot identify any form of TO that would effectively maintain the anonymity of members of the deceased's family without causing unjustifiable infringement of the Article 10 rights of others. The protection of Mr Gardner's care, his best interests and his privacy are no longer in issue since his death. The distress and unpleasantness caused by the litigation and the events surrounding Mr Gardner's injury, hospitalisation and death are raw. They will continue to inflict pain on those close to him and I have no doubt that, for some, they would be exacerbated by publicity about the case. But much of that pain is caused by matters and events which arose before the litigation began and which will not now disappear now that it has ended, even if it were never spoken about publicly. Ms Huntington, Professor Kitzinger and others want to speak and write about the important issues and experiences that arise, not just from the litigation, but from the events and experiences surrounding Mr Gardner's injury, his management in hospital, and his death. Continuation of the TO injunctive provisions for years after his death would amount to a considerable and unjustifiable interference with the rights and freedoms of them and others. The balance weighs firmly in favour of discharging the TO and removing any restrictions on communicating or publishing information or material relating the proceedings and the public hearings in this case. I refuse the Fourth Respondent's application and I shall discharge the TO.

Comment

Poole J's observations about the life of TOs after the death of P must be correct, although they do raise the interesting question of how and when others will know that P has died if they made outside the context of cases in which (for whatever reason) it is clear that P will die within a relatively short period of time. His observations about the inaptness of TOs to cover the interests of others are also important, and will assume particular importance when proceedings come to an end in terms of the requirement that active steps are taken (on an appropriate basis – as to which, in relation to professionals involved in treating roles, see *Abbasi)* to obtain an order specifically directed to that end.

Poole J's overview of the transparency provisions in the Court of Protection, and the fact that it takes in the recent caselaw from other jurisdictions (even if, as he notes, it might need to be considered in its own light) really reinforces the fact that there is an increasingly pressing need for a framework that can be applied across the board based on:

1. Appropriate primary legislation (for the reasons explained here, the MCA 2005 has a significant hole, requiring in consequence inordinately clunky orders to be made in each case to protect the interests of P);

2. Consistency of language (are we now in RRO, TO, WO or AO territory?);

3. Consistency of procedural approaches: this is particularly relevant in cases which straddle both the CoP and the inherent jurisdiction (see, for an example of this, *Leeds and York Partnership NHS Foundation Trust v FF & Anor*[2025] EWCOP 26 (T3)). If an RRO, or at least an RRO amounting to an AO, is required in relation to the inherent jurisdiction case being heard in parallel with the CoP case, for instance, does the media have to be notified (whilst conventional understanding might suggest it does, the judgment in *PMC* might suggest not (see paragraph 102)?

4. A consistency of understanding as to the interests in play, and, to the extent that they might differ in the relevant jurisdictions, conscious uncoupling of approaches;

5. A consistency of understanding as to what 'open justice' means, and what is for. In this regard, it is of note that Poole J considered that the TO framework within the Court of Protection represented a derogation from the open justice principle (see paragraph 19 above). However, it also of note that the Supreme Court in *Abbasi* considered that the principle was not infringed in relation to the withholding of information disclosed in proceedings in private (see paragraph 119). Is there actually an infringement of the open justice principle when the Court of Protection simultaneously determines that it will sit in public and imposes restrictions on reporting of information revealed in that public hearing? Nb, before you all write in at once, we am not suggesting that a concept of 'open justice' is in some way irrelevant to the Court of Protection, but simply that, at a conceptual level, clarity is required as to what it means, why it matters, and what protections are required in relation to a jurisdiction where the subject of the proceedings did not choose to be there.

It is unfortunate, in this regard, that the Law Commission's contempt project currently expressly excludes from its terms of reference the substantive law relating to reporting restrictions and anonymity orders. It might be thought that they were the ideal body to look across the piece in the way that is required.

Contempt and the consequences of capacity

Macpherson v Sunderland City Council [2025] EWCA Civ 1159 (Court of Appeal (Asplin, Baker and Birss LJJ))

CoP jurisdiction and powers – contempt of court

Summary

In the latest of a long-running series of cases, Lioubov Macpherson appealed a finding of contempt of court and sentence of imprisonment imposed as a result of that contempt in proceedings in the Court of Protection. Ms Macpherson is the mother of 'FP' and has had "*sharp disagreement with many of the professionals who have treated and sought to assist*" FP (paragraph 2). Mc Macpherson did not accept findings made by the Court of Protection in 2020 that FP lacked capacity to make decisions about her residence, care and contact. That court also made adverse findings against Ms Macpherson, and that the relationship between Ms Macpherson and FP led to FP to become distressed and her mental health to deteriorate. FP was ordered to leave Ms Macpherson's care and move to a care home. Orders were also made restricting Ms Macpherson from recording or publishing material about FP or care home staff. Ms Macpherson's conduct towards FP was said to continue, and in 2022, Poole J suspended Ms Macpherson's face-to-face contact with FP, as well as extending the orders prohibiting making

recordings or publishing them. These orders were made with a penal notice, and Ms Macpherson's appeal against the orders was certified as totally without merit.

A series of committal applications were made in 2022, with Ms Macpherson ultimately admitted breaches of the orders prohibiting filming and publishing records of FP. A suspended, 28-day sentence was given. An appeal of this decision was dismissed in [2023] EWCA Civ 574. Further breaches of orders took place and a second committal application was made in 2024, by which time Ms Macpherson was asserting that she was entitled to act in the manner she had pursuant to her Article 10 ECHR rights. All of these arguments were rejected, and Ms Macpherson was found to have made recordings which were '"*unsettling and troubling*" and…showed the appellant manipulating FP into saying things and into fearing persecution which caused her distress. Although the appellant interpreted FP's distress as being caused by her treatment in the placement, it was clear to the judge that the real cause was the appellant's behaviour. He concluded that the injunctions were breached and that the breaches were a clear contempt of court.' [14] A three-month sentence of imprisonment was made, which was again appealed. The consideration was delayed due to concerns raised by Ms Macpherson's legal representatives about her litigation capacity; she was determined to have litigation capacity in respect of the contempt proceedings ([2025] EWCOP 18 (T3))

The most recent judgment considered Ms Macpherson's appeal against Poole J's 2024 findings of contempt, and imposition of a three-month sentence, with Ms Macpherson acting as a litigant in person. Ms Macpherson filed amended grounds relatively close to the hearing, which she was allowed to rely upon at the hearing. The appeal included a vast range of grounds, including challenges under Articles 6, 8 and 10 ECHR; allegations of procedural irregularities and abuse of process; bias of the judge and expert; the best interests decisions taken were invalid and the deprivation of liberty authorisation was ultra vires; Ms Macpherson did not have a transcript of a challenged hearing; and the injunctions made were arbitrary and disproportionate. In relation to the last ground, this was summarised at paragraph 28 thus:

> *(7) Arbitrary and disproportionate injunctions - The committal order punishes an alleged breach of an injunction that should never have been made. Poole J himself acknowledged that the injunctions were likely to do more harm than good to FP, undermining their legitimacy. Punishing the appellant for breaching such an order is, in these circumstances, perverse. The injunctions failed to protect FP's welfare, served only to restrict the appellant's ability to protest, and lacked any lawful or proportionate basis. This renders the committal order arbitrary, contrary to Articles 8 and 10 ECHR, and an abuse of the court's discretion.*

Ms Macpherson maintained that FP had been harmed by the orders made by the COP; "*that she had been entitled to act in the way she had because no one was listening to her and publishing information online was the only step she could take to protect her daughter*" (paragraph 31); and "*that she had done nothing wrong by posting video recordings of her daughter on social media*" (paragraph 32).

Baker LJ, delivering the unanimous judgment of the court, held at paragraph 33 that:

> *In my judgment, none of these points undermines the central point on this appeal – that Mrs Macpherson knowingly and deliberately broke an*

> *order made by the court. The fact that she profoundly disagrees with the order does not entitle her to disregard it. There is nothing to support her repeated assertions of professional misconduct. Her very strong views have been aired on many occasions in the proceedings, but for the most part have been rejected by judges on the evidence. There is no merit in her assertion that the orders were unlawful. The straightforward position is that she was obliged to comply with the orders and deliberately chose not to do so.*

The Court of Appeal found that her breaches had been flagrant, and the content of the recordings was irrelevant to whether there had been breaches. There was "*no basis for questioning the judge's assessment of the recordings as set out above, and the harm caused to FP which they demonstrate*" (paragraph 34). Ms Macpherson's *'rights under Article 10 have no bearing on the outcome of this appeal. She was ordered not to publish information about her daughter and deliberately acted in contravention of the order*" (paragraph 35). Ms Macpherson did not persuade the court that the contempt hearing had been procedurally unfair due to her lack of legal representation where she did not seek an adjournment for this purpose and was prepared to argue her case. In relation to the proportionality of the sentence, Baker LJ found that Poole J had applied the correct legal principles, and:

> *37.* […] *a sentence of immediate imprisonment was plainly right having regard to the appellant's serious and repeated flouting of the order. She had already been given a suspended sentence on the earlier occasion for breaches of the order, and within a short space of time brazenly repeated the conduct during the period of suspension. Court orders must be obeyed, and although judges are reluctant to send someone to prison, particularly in the context of proceedings of this sort, repeated breaches of orders will almost invariably lead to custodial sentences being passed. The sentence of three months, with the activation of the earlier suspended sentence in addition, was in my view entirely proportionate and appropriate.*

Comment

This case is an extreme example of repeated breaches of court orders, and makes clear that where these are flagrant and persistent, a sentence of imprisonment may be the most appropriate option to address this conduct. They also make very clear that a conclusion that a person has capacity can be just as consequential as a finding that they lack capacity.

MENTAL HEALTH MATTERS

Investigating mental health crises

The Health Services Safety Investigations Body will be launching two investigations to explore the patient safety issues associated with care pathways for people experiencing a mental health crisis who come into contact with urgent and emergency care services. The first relates to the care of patients in emergency departments (launches in October 2025; report in summer 2026) which will:

- Explore the knowledge, skills, and resources available to emergency departments to care for patients in mental health crisis, including access to information held by other services.
- Explore how the physical environment in emergency departments impacts on the care provided to patients in mental health crisis.
- Explore staff decision making about when to admit or discharge patients who have presented in mental health crisis.

This seems likely to reveal the challenges services have in safely handing over the management of risk from the community (eg police service) to hospital staff, the increasing expiry of MHA s136 periods where two doctors recommend admission, but no bed is available, and the challenges facing emergency department staff when using ss5-6 of the Mental Capacity Act 2005 to keep people safe in busy environments.

The second concerns ambulance service response via NHS 111 and 999 (launches in spring 2026; report in spring 2027) which will:

- Explore how ambulance services triage and prioritise calls about patients in mental health crisis.
- Explore ambulance crew education, training, and assessment of a patient's capacity when in mental health crisis.
- Explore ambulance crew decision making on when to convey a patient in mental health crisis to hospital, including access to relevant clinical advice and access to information held by other services.
- This will include consideration of the impact of protected characteristics and health inequalities in this area of care.

It will be interesting to see the extent to which the policy of Right Care Right Person features in both investigations, as well as the quality of capacity assessments in mental health crises. Anyone with an interest is encouraged to express their views at enquiries@hssib.org.uk.

Mental Health Act Statistics (2024-25)

NHS England has published the latest statistics, the key facts being:

- 52,731 new detentions under the Mental Health Act: this is a slight increase on last year, but the overall national totals are likely to be higher due to incomplete data. At the end of March 2025 there were 22,973 people subject to the Act.
- Known detention rates were higher for males (90.1 per 100,000 population) than females (80.0 per 100,000 population).
- Amongst adults, detention rates tend to decline with age. Known detention rates for the 18 to 34 age group (132.2 detentions per 100,000 population) were around 69% higher than for those aged 65+ (78.4 per 100,000 population).
- A black person was more likely to be detained than a white person.

CRPD Committee v United Kingdom

Following its 2017 and 2024 calls for the United Kingdom to repeal legislation and practices that authorise non-consensual involuntary, compulsory treatment and detention of persons with disabilities based on actual or perceived impairment, the Committee on the Rights of Persons with Disabilities received submissions from the government and organisations of persons with disabilities. On 26 August 2025 (but in a document which has appeared publicly more recently), it reiterated its previous recommendations as well as a further recommendation for the government to conduct a comprehensive human rights assessment of the Mental Health Bill 2025 prior to its approval, in close consultation with and with the active involvement of persons with disabilities, to ensure that it is fully aligned with the Convention. The Committee wants the assessment to be informed by its 2016 Guidelines on the right to liberty and security of persons with disabilities and its 2022 Guidelines on deinstitutionalisation and comply, ad minimum, with the ban on deprivation of liberty on the basis of impairment stemming from article 14 of the Convention, the principle of free and informed consent of the person based on articles 12 (legal capacity) and 25 (right to health), as well as remove any language perpetuating the medical model of disability and introduce comprehensive community-based healthcare for persons with disabilities.

Mental Health Bill 2025

The Bill is entering its report stage on 14 October 2025 before third reading. A number of amendments have been proposed, following consideration of which the Bill will move to its final stages of 'ping-pong' between the Commons and the Lords before receiving Royal Assent. The last stages can be followed here.

CHILDREN'S CAPACITY

Disabled Children's Social Care report

On 15 September, the Law Commission published 'Disabled Children's Social Care: Final Report.' A summary of the report is available here.

The review was carried out at the request of the Department for Education following the 2022 Independent Review of Children's Social Care. The Law Commission undertook a broad consultation process in 2024-2025. The review considered disabled children's social care, which the report defines as *'the body of rules which determines:*

- *whether a disabled child can obtain help from social services to meet their needs;*
- *what help they can obtain; and*
- *how they go about obtaining it.'*

The key legislation was s.2 of the Chronically Sick and Disabled Persons Act 1970 and s.17 Children Act 1989. The Law Commission identified three overarching problems with the current legal framework:

- The law had become overly complex, and was now spread across numerous pieces of legislation, making it difficult to navigate.
- Parts of the law were out of date, developed before modern understandings of many conditions disabled children may experience. It is not aligned with approaches in the Equality Act 2010 and the UN CRPD.
- The law is potentially unfair. "*It has been interpreted to allow local authorities to develop area-specific eligibility criteria, to determine which disabled children qualify for services and which do not. This means that disabled children with the same needs get treated differently depending on where they live in the country. That was not the intention behind the legislation*"

The Law Commission also identified concerns of families about the way the system actually operates, including a focus on safeguarding rather than support, a lack of expertise on the part of assessors, setting eligibility criteria too high, overlooking the needs of the family of the disabled child, and lack of joined-up working between services.

The key recommendations of the report are:

- A simplified and unified legal framework for disabled children's social care law, sitting within the Children Act 1989.
- A single, comprehensive piece of statutory guidance on disabled children's social care law, setting out the rights and responsibilities of disabled children, families, and local authorities. This guidance should include material which helps local authorities to ensure that there is an appropriate balance struck between identifying and meeting the needs of disabled children and their families in a non-stigmatising way and safeguarding them from harm and abuse. The purpose of this is to avoid inappropriate stigmatisation of parents and carers.
- An updated definition of disability.
- A single duty to meet the social care needs of disabled children, subject to national eligibility criteria. As a first step toward this national system, we recommend that the Government carry out further work – involving disabled children, families and

local authorities – to decide what the eligibility criteria should be and ensure that they are financially sustainable.

- A right to independent advocacy for disabled children, and for parents and carers, who would not be able to effectively participate in the assessment of their needs without the support of an advocate.
- Rights for disabled children to participate in decisions about their care and support.
- A statutory requirement that planning for disabled children to make the transition to adulthood should start by the age of 14.
- Clarification of the dividing line between health and social care.
- A fair, accessible, independent and effective system for resolving disputes about social care for disabled children.

Alex has recorded a walkthrough of the recommendations, which also gives some more insights into how they came to be developed from his perspective as a consultant on the project. They include specific discussion of some areas likely to be of particular relevance for readers of this Report, including the adoption of the MCA 2005 for relevant decisions/actions by 16-17 year olds and a statutory test for determining competence for under 16s on the basis of the functional limb of the MCA 2005.

Deprivation of liberty: improving outcomes for looked-after children in complex situations

An extremely detailed, and thoroughly depressing report has been published, commissioned by the Department for Education, and written by Research in Practice and the National Children's Bureau (with a case law briefing chapter on deprivation of liberty and children written by Camilla Parker KC (Hon)[8]). The report includes a thematic summary, an evidence review, a case file review, a case study review and a case law briefing.

The authors suggest that "[t] he *evidence this project presents indicates that promising solutions lie in policy and service systems – in health and social care in particular - taking shared responsibility for reducing the complexity that lack of integration generates for these children and young people.*" The bulk of the rest of the report shows just what an uphill struggle this will be given – in very high-level summary – (1) escalating use of Deprivation of Liberty Orders;[9] (2) insufficient early help and fragmented services: (3) complexity of needs and adversity; and (4) placement instability and market failures.

[8] Full disclosure, Alex was on the advisory group for that chapter.

[9] See also here the most recent statistics published by the Nuffield Family Justice Statistics (drawn on in the report).

SCOTLAND

AWI reform: "Better six years late …?"

In the June Report we recorded the widespread outrage at the mixed messages from Scottish Government regarding long-overdue and now urgently-required AWI reform. Nevertheless, our heading for that item "AWI reform into the long grass – but still rolling" has proved to be appropriate. The process of AWI reform is indeed now rolling forward, but reactions continue to be ambivalent. On the positive side, the massive and carefully constructed way in which a programme of improvement and reform is now being rolled forward would probably have received a broad and unqualified welcome if it had happened when it ought to have happened, namely following upon the announcement of the establishment of the Scottish Mental Health Law Review (the "Scott Review") by the then Minister for Mental Health on 19th March 2019. That announcement included the following clear undertaking:

> *"At the same time as the review takes place, we will complete the work we have started on reforms to guardianships, including work on restrictions to a person's liberty, creation of a short term placement and amendments to power of attorney legislation so that these are ready when the review is complete."*

The significant downside is that for such a comprehensive and generally admirable process to begin only now serves to emphasise the point, put bluntly, that for the six years and more since 19th March 2019 Scottish Government did not keep its word. There were appearances of activity, with tediously lengthy consultation processes which generally alienated those who had most to contribute, by making unreasonable demands upon scarce professional and other time. Those processes meandered along for lengthy periods towards inconclusive endings, which now appear to have generated nothing of significant value for the process at last underway. To that extent, what has now been revealed cannot be expected to have dissipated altogether the outrage caused by the First Minister's statement on 6th May 2025, which we reported in June. On the other hand, for those who have the generosity to forgive – if not forget – that six years' delay, the moves at last taking place deserve a welcome, albeit a qualified one.

Positive is the reference to "improvement and reform". Those of us who have consistently pressed the case for reform have at the same time been confronted with the extent to which, 25 years after its enactment, even the basic principles in section 1 of the Adults with Incapacity (Scotland) Act 2000 are often disregarded, and particular provisions of the Act misunderstood and misapplied. One exemplification has been the encapsulation "there is no such thing as an AWI" for the excellent work done by Mental Welfare Commission and Health Education Scotland towards addressing the widespread issues extending across those delivering health and social care. It refers to the use of "there is an AWI in place", as treating certificates under section 47 of the 2000 Act as taking us back to the complete incapacitation of the Mental Health and Lunacy (Scotland) Act 1913, and as authorising any form of non-consensual intervention. One could equally point to the massive recent upgearing in judicial training in response to the many cases which we have reported, up to and including the September Report, where the courts have failed to implement their obligation to apply (and to be seen to apply) the requirements of the section 1 principles, and to recognise that when they effect or authorise interventions they are exercising an

inquisitorial, not adversarial, jurisdiction, in which they must comply with the principles regardless of what is put before them by applicants or others.

We in Scotland are not alone in experiencing what are termed "implementation gaps". They featured significantly in the World Congress on Adult Support and Care in August 2024. One can reasonably assert that the general level of understanding of the 2000 Act is now less than it was in the years immediately following enactment. One could also reasonably link that to the fact that the implementation steering group, covering a wide range of stakeholder interest and overseeing in an advisory capacity all aspects of implementation, continued only until the needs for adjustment, addressed in the Adult Support and Protection (Scotland) Act 2007, had been identified. Any reforming legislation, anywhere, represents a task less than half done by the time that it is enacted. A function similar to that of the implementation steering group established a quarter of a century ago will be necessary, and will require to be sustained.

One has to agree that much can be achieved by improving practice now, even without law reform; but there will require to be continuity through to helping to shape reformed legislation, and then ensuring its proper implementation. If the human rights-based arguments are not persuasive enough for government, the economic imperatives must surely be so. One has to suggest that the massive consequential costs in seriously inefficient demands upon skilled time across the professions is unsustainable. Scotland simply cannot afford not to reduce that drain upon the public purse by investing adequately in needs such as the recruitment, training and retention of at least twice the mental health officer capacity as at present; the ending of the discriminatory practices of Scottish Legal Aid Board highlighted in the September Report, in order to reverse the major reduction in adequate legal support and ensure that applications and other proceedings under the 2000 Act are appropriately prepared and processed; and sufficient support for court processes, to ensure at least the same speed and continuity of proceedings, through to disposal, as is generally the aim for criminal processes – recognising that AWI processes can have an equal or greater impact on individual rights than criminal law processes, with the significant difference that there is no question of fault or alleged fault on the part of those to whom AWI processes are applied (subject only to use of guardianship as a criminal justice disposal).

As to the substance of the process now underway, the Expert Working Group ("EWG") has already met, and its monthly meetings from now on are already scheduled. We intend to provide information on the membership and remit of that group in the November Report. The group is an advisory group, with no decision-making powers, but it will make recommendations to the Ministerial-led Oversight Group ("MOG"), which has also met already, with its next meeting due in December. It is evident in the meantime that the EWG will have a substantial role in shaping, by its recommendations, the work of the workstreams, now extended to 12 from the 10 listed in the June Report. Again, we intend to report more fully on these, with comments as appropriate, in the November Report.

Overall, many readers may remain dubious. What is missing from the written information so far available is any clear target date for introduction of legislation. We nevertheless hope to be able to mitigate that with the further information which I personally expect to be able to report both from the discussions with representatives of government within the EWG, and also the clearly committed personal

engagement in the reform process of Tom Arthur MSP, Minister for Social Care and Mental Wellbeing and Sport, not only in his personal leadership of the work of the MOG, but – for example – in his invitation to me to meet him in-person and one-to-one. The meeting has now taken place. Subject to necessary clearance, I hope to be able to share the outcome in the November Report. For management reasons the deadline for this October Report had to be brought forward, allowing insufficient time to incorporate in this Report all that I now hope to cover in the November Report.

Adrian D Ward

Cross-border practice

All AWI practitioners are likely to be aware of the need for well-informed competence in cross-border matters. Powers of attorney, and guardianship and intervention orders, may address situations where cross-border aspects are known. Even where they are not known, they may arise. Clients' needs may include advice seeking clarity in urgent situations. A significant and increasing proportion of adults who have impairments of capacity, or who may be vulnerable to such impairments, move across borders, temporarily or permanently, or have interests across borders.

Cross-border issues divide into incoming and outgoing, referring to measures from other countries which are potentially operable here, or our own measures crossing borders in the other direction. An increasing number of European states are joining Scotland in having ratified Hague Convention No 35 of 2000 on the International Protection of Adults. Ratification by all European Union states is in the pipeline. The Hague Convention provides clarity as to matters of jurisdiction, recognition, enforcement, cross-border certification, and judicial cooperation.

Disappointingly, Scotland remains the only jurisdiction within the United Kingdom in respect of which the Hague Convention has been ratified. A step forward was the new Judicial Protocol on which we reported in the June 2025 Report. Even more disappointing is that cross-border dealings remain difficult in practice, whatever might be the position in theory.

Against this existing background, it is strongly to be recommended that practitioners be aware of the forthcoming European Union Regulation "on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults". The current draft is available here. This proposal has significance in Scotland for three reasons. Firstly, its terms are likely to dominate future cross-border dealings with EU states. Secondly, non-EU European states are paying close attention to the proposed Regulation, and once it is in force it may have relevance in relation to them. The situation of European states not within the EU is very much "on the radar" of the European Commission, and was one of the topics addressed at a major international conference on the proposed Regulation in Milan on 17th and 18th September 2022 (I record an interest in that I was an invited speaker with the explicit role of offering a viewpoint on the Regulation from outside the European Union). Thirdly, there ought not be significant difficulties and uncertainties cross-border within the United Kingdom, but practitioners frequently encounter them. Some aspects of the proposed regime within the EU could beneficially be applied within the UK. Put conversely, it would be absurd if the UK could not at last "put its own house in order" at least to the standard likely to be achieved within the EU. As regards the EU proposal, it is worth quoting the first sentence of the Explanatory Memorandum:

> *"The EU aims to create, maintain and develop an area of freedom, security and justice in which the free movement of persons, access to justice and the full respect of fundamental rights are ensured."*

As regards the Hague Convention, the Explanatory Memorandum to the EU proposal narrates that the Hague Convention "*is unanimously considered as an efficient private international law instrument that is fit for purpose at global level*". It narrates that ratification of the Hague Convention by EU Member States is essential, and presses the case for all EU states to ratify. The proposed EU Regulation makes direct reference to the corresponding provisions of the Hague Convention where appropriate. The proposal for the Regulation "*builds on the [Hague] Convention to further simplify its rules and improve efficiency in cooperation between Member States [of the EU]*".

One has to read significantly further at the link quoted above, including through 69 Recitals, to reach the actual proposed text of the Regulation. It is clearly and effectively drafted. It retains the terminology of "measure" and "power of representation" in the Hague Convention. The provisions for recognition are robust:

> *"A measure taken by the authorities of a Member State shall be recognised in the other Member States without any special procedure being required" (section 1, Article 9.1).*

Grounds for refusal of recognition are limited and clearcut, substantially mirroring the Hague Convention. The EU already has the concept of an "authentic instrument". These are provided for in Article 16.1:

> *"An authentic instrument established in a Member State shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy in the Member State concerned".*

At least that standard should be provided for within the UK.

The provisions of Chapter 6, section 1, on Central Authorities are important. The Commission appeared to be receptive to my suggestion that states be encouraged to have a single Central Authority for both EU and Hague Convention purposes, as it would be potentially confusing to have separate Central Authorities for each. Note was also taken of the suggestion that in practical operation it could be valuable for persons with an interest to have direct access to a Central Authority in another state, rather than having always to go through respective Central Authorities.

Of particular importance in practical terms will be the provisions for certificates of representation, and concerning registration. Once the Regulation has been finalised, practitioners would be well advised to note the provisions regarding the "European certificate of representation" and the actual style of certificate appended. In practical terms, in cross-border situations it is always wise to seek competent advice from the anticipated receiving jurisdiction, rather than trying to "navigate blindly" through what might be required. It might well enhance practical operability to offer to obtain and provide a certificate in the EU form, albeit from outside the EU. A further worthwhile step would be, at UK level or failing that at Scottish level, to seek to negotiate an agreement with the EU that certificates provided from the UK or Scotland, as the case may be, could be afforded the same

recognition as certificates from within the EU. That would involve applying the EU standards to the issue of certificates, but that would be an advantage rather than a burden. Logically, the same arrangements could be applied cross-border within the UK.

Also worth noting, in this short and selective review of some salient points, are the provisions of Chapter VIII on the Establishment and Interconnection of Protection Registers. The background here is that I was one of a five-person team asked by European Law Institute ("ELI") to respond on behalf of ELI to earlier consultation by the European Commission on this topic. I pointed out the importance of access to information from registers, including cross-border. ELI's proposal was for a centralised register, which overall would be likely to be more cost-effective for each state than operating its own registers and interconnecting with others, and for non-EU states to be able to opt into that system. That was ambitious, but did lead to the existing proposals on establishment and interconnection of registers. Some states do not yet have effective registers at all. One gains the impression that none yet has registration systems, including real-time access to relevant data, along the lines that are being progressively implemented here in Scotland. Nevertheless, while the proposed Regulation as it stands does not contain opt-in provisions, that is something that it would be worth seeking to achieve. Even the question of direct access by persons having an interest still requires to be developed.

There would of course require to be clear recognition by practitioners that cross-border dealings mean accessing another legal system in its entirety, not simply assuming that one is dealing with "like for like". We have an obvious example within the UK. Scottish powers of attorney may be registered at any time after they have been granted, and before any of their provisions become operable. English powers of attorney may only be registered upon evidence of impairment of capabilities such as to trigger the need for operation.

Adrian D Ward

Urgent AWI Practice Update: An RFPG Half-Day Conference

Adrian is speaking at this conference in Glasgow on 8 October organised by the Royal Faculty of Procurators in Glasgow. For more information, see here.

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 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.

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 Vice-Chair of the Court of Protection Bar Association and a member of the Nuffield Council on Bioethics. 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 practices 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 inherent jurisdiction matters. Arianna works extensively in the field of community care. She is a contributor to Court of Protection Practice (LexisNexis). 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 2019). 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.

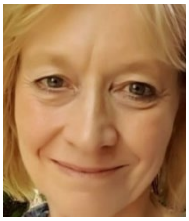
Nyasha Weinberg: Nyasha.Weinberg@39essex.com

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

Scotland editors

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 regularly present at seminars and webinars arranged both by Chambers and by others.

Alex also does 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 November. 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

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

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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