



Welcome to the October 2022 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: Capacity to make decisions regarding hoarding, parental consent for deprivations of liberty, and Article 2 and informed consent.
- (2) In the Property and Affairs Report: A new guidance notes on selling properties;
- (3) In the Practice and Procedure Report: The Court of Appeal weighs in on the test for injunctions in the Court of Protection, and a new Civil Justice Council working group considers litigation capacity in civil proceedings;
- (4) In the Wider Context Report: Withdrawal of treatment; jurisdiction of the Ombudsman; mental capacity and Article 14 status; and 'Shedinars' galore.
- (5) In the Scotland Report: An update on the Mental Health Law Review

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#), where you can also subscribe to this Report, and where you can also find updated versions of both our capacity and best interests guides.

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The picture at the top, "Colourful," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

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The test for the grant of an injunction, the need for notice, and when is anonymous hearsay evidence acceptable?

Re G (Court of Protection: Injunction) [2022] EWCA Civ 1312 (11 October 2022) (Baker LJ, Phillips LJ, Nugee LJ)¹

Injunctions

In *Re G (Court of Protection: Injunction) [2022] EWCA Civ 1312*, arising out of a difficult and long-running medical treatment case being heard by Hayden J, the Court of Appeal has definitively set out the test that needs to be applied by a Court of Protection judge in deciding whether to grant an injunction. The facts of the case are complicated, and the jurisdictional arguments on the appeal somewhat esoteric, but for wider purposes, the Court of Appeal helpfully summarised the position at paragraph 82 as follows:

The Court of Protection does have power to grant injunctions under s.16(5) of the 2005 Act, both in the case where a deputy has been appointed under s.16(2)(b) and in the case where the Court has made an order taking a decision for P under s.16(2)(a). In doing so, it is exercising the power conferred on it by s.47(1) and such an injunction can therefore only be granted when it is just and convenient to do so.

This requirement is now to be understood in line with the majority judgment in Broad Idea as being satisfied where there is an interest which merits protection and a legal or equitable principle which justifies exercising the power to order the defendant to do or not do something. In the present case [where the injunction was granted in support of a best interests decision in relation to contact between P and family members], as is likely to be the case wherever an injunction is granted to prevent the Court's decision under s.16(2)(a) from being frustrated or undermined, those requirements are satisfied because [P's] interest in the December order being given effect to is an interest that merits protection, and the principle that the Court may make ancillary orders to prevent its orders being frustrated is ample justification for the grant of injunctive relief if the facts merit it.

The Court of Appeal found that the decision of Hayden J to grant injunctions against P's father and mother, had, in fact, fulfilled the 'just and convenient' test, even if he did not spell it out in the terms set out above. However, the position was different in relation to P's grandmother. She had only been joined as a respondent on the first day of the hearing, was not represented, and attend remotely by mobile phone from her granddaughter's bedside. During the course of

¹ Nicola having appeared in this matter, she has not contributed to this note.

the hearing a revised draft order was produced, naming the grandmother as a respondent to the injunction and including a penal notice. The Court of Appeal identified at paragraph 104 that “[i]t does not appear that the grandmother was served with this document and it seems unlikely that she knew of the very significant changes from her point of view, let alone understood their nature and effect.” In the circumstances, the Court of Appeal observed that it was an “understatement” to say that that she had not been given proper notice of the case against her, continuing at paragraph 104 that:

[...] it was obviously unjust and inappropriate to proceed with a full trial as against the grandmother and to have granted a final injunction endorsed with a penal notice against her. Basic principles of fairness required that she be given proper notice of the relief sought against her and the grounds for it. The proper course, in such circumstances, would have been to adjourn the hearing as against the grandmother and, if appropriate, to grant an interim injunction against her, on a without notice basis, with a return date specified. Such a course would have ensured the proper protection of G and her interests, whilst ensuring that the grandmother's rights to a fair trial were also preserved.

Separately, another point of wider importance arose in consequence of Hayden J’s acceptance of anonymous hearsay evidence from 8 nurses as to the conduct of P’s father. P’s father criticised the judge for doing, so but the Court of Appeal rejected this criticism:

93. In our judgment, there is no merit in Mr McKendrick's criticisms of the judge's treatment of the anonymous hearsay evidence. Very properly, Mr McKendrick had made similar submissions at first instance both on the interpretation and application of s.4 of the [Civil Evidence Act 1995] and on the case law, including

the Moat Housing decision. It is evident that the judge accepted those submissions and applied the guidance in the statute and case law when considering the hearsay evidence given by the anonymous nurses. The judge plainly recognised that he had to proceed with caution when assessing the weight to be attached to the evidence and took conspicuous pains to explain his approach and analysis. There was clear evidence from Nurse T and Dr B, accepted by the judge, demonstrating, as suggested by Brooke LJ in the Moat Housing case, the route by which the anonymous evidence had emerged and why it was neither reasonable nor practicable to identify and adduce direct evidence from the nurses. The fact that they are professionally qualified, trained and supported within the Trust, and accustomed to working with the families of patients did not obviate the need for anonymity in this case, given the evidence about the father's attitude provided by Nurse T, Dr B and the father himself.

Comment

The Court of Appeal’s confirmation of the test to grant an injunction is helpful, and it is particularly helpful that that they made clear that it is in line with the “just and convenient” test applied by the High Court when deciding whether to grant an injunction, such that there is no need for another line of jurisprudence to have to develop to identify whether and how “just and convenient” differs to “necessary and expedient” (the words that appear in s.16(5) MCA 2005). It is equally helpful that the Court of Appeal recognised that the mere fact that the individuals concerned were professionals did not obviate a need for the protection of anonymity. Given the hoops that need to be jumped through before weight can be placed upon anonymous evidence, this should not be seen as licence for the creation of anonymous professional whispering campaigns,

but rather a recognition that professionals can and do have their own rights.

Procedure for Determining Mental Capacity in Civil Proceedings: CJC Working Group

The Civil Justice Council has approved the creation of a working group 'to look at a procedure for determining mental capacity in civil proceedings. The working group was created as a result of a request to the Council by a legal practitioner.'

Its terms of reference are as follows:

The Working Group will consider how the Civil Courts approach mental capacity. It will have regard to the procedure and common practice in use for determining whether a party lacks capacity to conduct proceedings (i.e. is a protected party within the meaning of Part 21 CPR).

It will seek to make recommendations to improve rules, practice directions, or other matters relating in this regard. The Working Group will consider the following areas in particular:

1. *How the issue as to a party's mental capacity is identified and brought before the court.*
2. *The procedure for investigating the issue.*
3. *The procedure for determining the issue.*
4. *The position of the substantive litigation pending determination of the issue.*
5. *The particular issues that arise in relation to these issues as regards:*
 1. *Litigants in person*
 2. *Parties who do not engage with the process of assessment of capacity*

The Working Group may also find it necessary to consider wider aspects of the procedure and experience of protected parties (i.e. after the determination of protected party status) which appear of relevance during the course of its work.

The CJC announcement states that '[t]he Working Group will seek to engage with relevant groups. If you wish to get in touch, please email cjc@judiciary.uk'

Representation Before Mental Health Tribunals: Practice Note

The Law Society has published and updated Practice Note on Representation before Mental Health Tribunals. The note covers:

- *communicating with and taking instructions from your client*
- *your duties of confidentiality and disclosure*
- *the representation of children and young people*
- *good tribunal practice*

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Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click [here](#).

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Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). To view full CV click [here](#).

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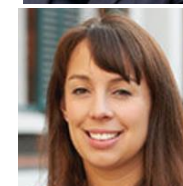
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Steph regularly appears in the Court of Protection in health and welfare matters. She has acted for individual family members, the Official Solicitor, Clinical Commissioning Groups and local authorities. She has a broad practice in public and private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

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



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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click [here](#).



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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.



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Conferences and Seminars

Forthcoming Training Courses

Neil Allen will be running the following series of training courses:

30 November 2022	BIA/DoLS Update Training
13 January 2023	Court of Protection training
26 January 2023	MCA/MHA Interface for AMHPs
16 March 2023	AMHP Legal Update
23 March 2023	Court of Protection training

To book for an organisation or individual, further details are available [here](#) or you can email [Neil](#).

25 October 2022: Understanding the Law around Dementia

Are you a carer or partner of someone with dementia in the North West of England? Neil Allen with university students and lawyers from Simpson Millar solicitors will be offering free legal information and advice from 1-4pm at the Greater Manchester Law Centre. There will be four talks and drop-in advice clinics (and refreshments!). No need to book, but please do come along for what will be a super afternoon. Further details are available [here](#).

National Mental Capacity Forum new series of webinars: starting 20 October with DNACPR and the MCA

NEVER STOP LEARNING ABOUT MENTAL CAPACITY:

The National Mental Capacity Forum is pleased to announce the launch of a second series of National Mental Capacity Webinars, produced in collaboration with the Autonomy Project at the University of Essex, and with support from the MoJ and DHSC.

ABOUT THE SERIES:

Born of necessity during the COVID-19 pandemic, National Mental Capacity Webinars provide a forum for free training and discussion for anyone involved in applying the Mental Capacity Act in practice. These 1-hour webinars bring together experts to address specific challenges relating to the MCA, and provide an opportunity for participants to ask questions and raise concerns, shaping the agenda for future webinars. The webinars are designed for new, novice and experienced practitioners. There are many paths to learning and the webinar series will provide learning prompts for individual professionals, professional associations and networks.

The first webinar in the new series will take place on **Thursday, 20 October, 2022, 1-2pm**. It will focus on the application of the Mental Capacity Act to decisions around the initiation of Cardiopulmonary Resuscitation, along with practices concerning DNACPR (Do Not Attempt Cardiopulmonary Resuscitation). We will review existing law regarding DNACPR, launch a new set of educational videos, and address some hard questions about the use of best-interests decision-making in the context of cardiac arrest. Confirmed speakers include: Karen Chumbley (Clinical Lead for End-of-Life Care; Suffolk & North East Essex ICS); Margaret Flynn (Chair, National Mental Capacity Forum); Alex Ruck Keene (Barrister, 39 Essex Chambers); Prof Wayne Martin (Director, Essex Autonomy Project) and Ben Troke (Partner, Hill Dickinson solicitors).

HOW TO REGISTER: Participation is free but places are limited. **Advance registration is required.** To register, please follow [this link](#) and take a few moments to answer the registration questions.

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.

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