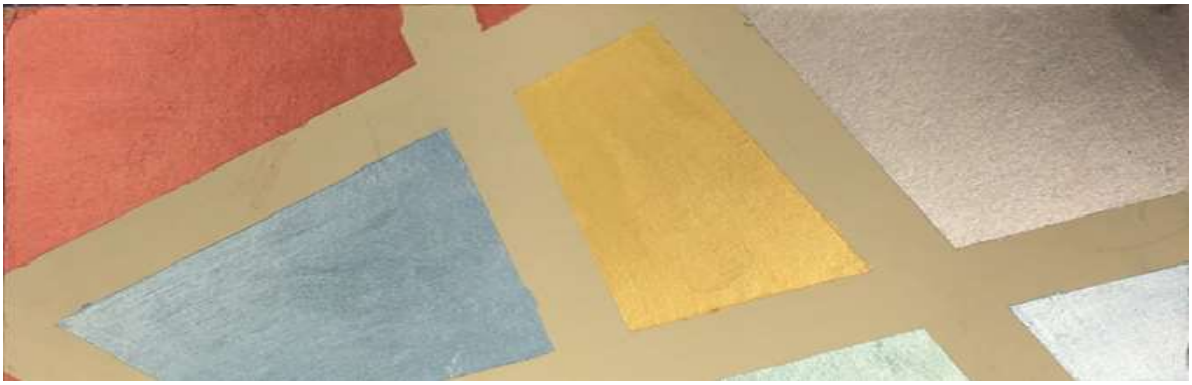
MENTAL CAPACITY REPORT:
PRACTICE AND PROCEDURE
September 2021 | Issue 115



Welcome to the June 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: substance over form in DoLS authorisations, complex questions of coercion in medical treatment, and the limits of fluctuating capacity in the context of sex;

(2) In the Property and Affairs Report: a brisk dismissal of an attempt to appeal a judgment of Senior Judge Hilder about charging by a deputy, and easy read guides to making LPAs;

(3) In the Practice and Procedure Report: an important rapid consultation on hearings and the judicial view of remote hearings;

(4) In the Wider Context Report: the CPR responds to vulnerability, strengthening the right to independent living, capacity in the rear view mirror and the ECHR and the CRPD at loggerheads;

(5) In the Scotland Report: the Mental Welfare Commission on hospital discharges, change at Scottish Government (but how much) and welfare guardianships and deprivation of liberty.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find updated versions of both our capacity and best interests guides. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, here; Alex maintains a resources page for MCA and COVID-19 here, and Neil a page here. If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

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

# Contents



## The Court of Protection is in fact a court

*SM v The Court of Protection and The London Borough of Enfield* [2021] EWHC 2046 (Admin) (High Court (Administrative Court) (Mostyn J)

*COP jurisdiction and powers – interface with civil proceedings*

### Summary

This was a judicial review of a decision of the Court of Protection. The application was brought by SM, mother of RM, against a decision on 12 March 2021 of HHJ Hilder in respect of RM's residence and care arrangements. SM had applied for permission to appeal, which was refused by Keehan J on 12 April 2021, on the basis that there was no reasonable prospect of establishing HHJ Hilder's decision was wrong. Keehan J further found that the proposed appeal was totally without merit. SM had no further right of appeal to the Court of Appeal in respect of HHJ Hilder's decision.

SM then issued an application for judicial review. Mostyn J noted at the outset of his judgment that the application "*is a proxy for a prohibited appeal against the decision of Keehan J, and as such is likely to be an abuse.*" He noted that the application was in any event out of time for challenge HHJ Hilder's decision, and thus the only reviewable decision was that of Keehan J refusing permission to appeal.

Mostyn J noted *R(Cart) v Upper Tribunal (Public Law Project intervening)* [2012] 1 AC 663, which considered "*whether a decision of the Upper Tribunal to refuse permission to appeal a decision of the First-Tier Tribunal was susceptible to judicial review*" (paragraph 8). In that case, the Supreme Court found that *'the judicial review jurisdiction of the High Court over unappealable decision of the [Upper Tribunal] had not been ousted*" (paragraph 13). Mostyn J summarised the finding of the court at paragraph 14:

> *The Supreme Court went on to rule that the test for challenge in judicial review proceedings should be the same as that for a second-tier appeal under s.55 of the Access to Justice Act 1999: see [55] per*

*Baroness Hale and [130] per Lord Dyson. Section 55 provides:*

> *'Where an appeal is made to the county court, the family court or the High Court in relation to any matter, and on hearing the appeal the court makes a decision in relation to that matter, no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that:*
>
> *(a) the appeal would raise an important point of principle or practice, or*
>
> *(b) there is some other compelling reason for the Court of Appeal to hear it.'*

Mostyn J noted that this decision had led to the introduction of CPR 54.7A, but this provision applied only to a refusal of permission to appeal by the Upper Tribunal:

*CPR 54.7A(7) provides:*

> *'The court will give permission to proceed only if it considers –*
> *(a) that there is an arguable case, which has a reasonable prospect of success, that both the decision of the Upper Tribunal refusing permission to appeal and the decision of the First Tier Tribunal against which permission to appeal was sought are wrong in law; and*
> *(b) that either –*
> *(i) the claim raises an important point of principle or practice;*
> *or*
> *(ii) there is some other compelling reason to hear it.'*

*And para (8) provides*

> *'If the application for permission is refused on paper without an oral hearing, rule 54.12(3) (request for reconsideration at a hearing) does not apply.'* (paragraph 16)

The court went on to note the recommendation of the Independent Review of Administrative Law Panel that *Cart* judicial reviews should be abolished, observing their strikingly low rates of success. Mostyn J considered that the reasoning of the panel, while limited to consideration of Upper Tribunal refusals of permission:

> *must apply equally to a Cart-type application seeking to challenge an unappealable refusal of permission to appeal by an appeal judge in the County Court or Family Court. If the Cart jurisdiction is to be abolished, then in my opinion it should be completely abolished* (paragraph 19)

The court asked itself: *'Does the Cart jurisdiction extend to the Court of Protection?'* (paragraph 19). The court noted that the draft Bill appended to the Law Commission report had provided for the Court of Protection in language very similar to the words to those "*very similar to those in the 2007 Act considered by the Supreme Court in Cart*" (paragraph 25). However, whilst s.45(1) of the MCA as actually enacted provides that the Court of Protection is a superior court of record, per s.50(1), Parliament provided that the Court of Protection has "*the like powers, rights, privileges and authority as the High Court.'* The court considered that:

> *In my judgment the variation of the Law Commission's language is highly significant. When defining the scope of*

> *the new court's jurisdiction Parliament spoke of "general powers" rather than supplementary powers. Further, those powers were not confined to procedural matters such as attendance of witnesses and the production of documents, nor were they confined to matters of enforcement, nor were they confined merely to matters incidental to the court's jurisdiction. Rather, the new Court of Protection was granted exactly the same powers, rights, privileges and authority as the High Court. There is no opacity of language in s.47(1). Pace Baroness Hale's para [37] the words are completely clear.* (paragraph 37)

As a result, "*the position of the Court of Protection is far removed from that of the Upper Tribunal*" (paragraph 29) as the Court of Protection was making orders which, prior to the MCA 2005, "*would have been made by the High Court exercising its inherent powers*" (paragraph 34). As a result "*the Court of Protection cannot be regarded as a court inferior to the High Court, and therefore its unappealable decisions cannot be the subject of judicial review by the High Court*" (paragraph 35). Mostyn J noted that the position was not "*nearly so clear cut where a decision refusing permission to appeal is made in the Family Court*" (paragraph 36):

> *38. …the Family Court principally subsumed the family jurisdiction of the County Courts, although it was intended also to embrace some, but by no means all, of the family jurisdiction of the High Court: see the President's Guidance at paras 14 and 17.*
>
> *39. Accordingly, it seems to me that the Family Court is probably to be regarded as inferior to the High Court. Therefore, a decision by an appeal judge within the Family Court refusing permission to appeal is seemingly covered by the reasoning of the Supreme Court and is susceptible to a judicial review challenge under the second-tier appeal test, although a definitive decision must be awaited.*

Mostyn J found that even if it were incorrect in respect of the above, "'*the application nonetheless falls to be dismissed both for a procedural reason and on the merits*" (paragraph 41). It noted that the application was out of time in respect of HHJ Hilder's decision, and made no mention of Keehan J's decision. The court further found that the application did not raise any important point of principle or practice, and did not demonstrate any error in law: "*Her complaints about the decision of HHJ Hilder amount to no more than a disagreement with its merits*" (paragraph 47). Like Keehan J in respect of the appeal, Mostyn J concluded that the application was totally without merit and refused permission to apply for reconsideration at a hearing.

## Comment

The appeal itself in this case appeared to be hopeless, having been found to be totally without merit by both Keehan J and Mostyn J. The judgment is notable for being a formal authority (should one, in fact be required) that the Court of Protection is a superior court of record, on an equivalent plane to the High Court, such that a decision by a judge of the Court of Protection to refuse permission to appeal is not amenable to judicial review in the same way as (currently) certain equivalent decisions within the Tribunal system are.

## Court fees increase from 30 September 2021

Following the consultation on increasing selected court fees and Help with Fees income thresholds by inflation, the Government response to the consultation has been published and is available here.

The SI to effect these changes was laid on 6 September 2021, and the changes will come into effect on 30 September 2021. Any questions regarding this consultation response or the SI can be addressed to the Ministry of Justice Fees Policy Team (mojfeespolicy@justice.gov.uk).

The position in respect of Court of Protection fees is as follows:

**Court of Protection Fees Order 2007 No 1745**

*The fees in scope from the Court of Protection Fees Order include the fee to apply for action under, a hearing under or to appeal a decision made under the Mental Capacity Act 2005.*

| SI Ref ID | Description | Current | Fee included in consultation | Final fee after remodelling | Difference between consultation and final fee | Final increase |
|---|---|---|---|---|---|---|
| 4 | Application fee (Article 4) | £365 | £377 | £371 | -£6 | £6 |
| 5 | Appeal fee (Article 5) | £230 | £237 | £234 | -£3 | £4 |
| 6 | Hearing fees (Article 6) | £485 | £500 | £494 | -£6 | £9 |

## Costs update

The Civil Justice Council has published its final report on the Guideline Hourly Rates (which can be found here). The working group was tasked with conducting am 'evidence-based review of the basis and amount of the guideline hourly rates (GHR) and to make recommendations accordingly to the Head of Civil Justice and to the Civil Justice Council'. Given that the guideline hourly rates have not been increased since 2010, this report is long overdue. The report makes a range of recommendations, most importantly increasing all the guideline hourly rates from between 6.8% - 34.8%. Guideline hourly rates are of course the starting point for the summary assessment of all legal costs in the Court of Protection (and in practice are also widely used as the starting point in detailed assessments). They are also the hourly rates that are applied by Costs Officers when assessing the costs of deputies in the Court of Protection. The report makes it clear that the rates set out by Master Whelan in the case of *Re PLK, Thakur, Chapman and Tate* [2020] Costs LR 1349 are no longer to be applied.

In other costs news:

- Cobb J has delivered a costs judgment in the case of *T & Anor v L & Ors (Inherent Jurisdiction: Costs)* [2021] EWHC 2147 (Fam). This was a case issued in the High Court pursuant to the Inherent Jurisdiction which, after four case management hearings, settled by consent. The sole issue to be determined by the Court was whether the respondents should obtain an inter partes costs order against P for their costs in the sum of over £200,000. This application was opposed both by the Official Solicitor and the applicants. Mr Justice Cobb reiterated his conclusion in the case of *Redcar & Cleveland v PR* [2019] EWHC 2800 (Fam), that it is the Civil Procedure Rules that apply to a case brought under the Inherent Jurisdiction. However, because such proceedings have "*the same essentially welfare-oriented characteristics of proceedings under the inherent jurisdiction relating to minors……the costs principles which apply in family proceedings are likely to be highly relevant in this regard.*" As such his

Lordship held that "*no order for costs is likely to be the appropriate starting point in welfare-oriented proceedings under the inherent jurisdiction concerning a vulnerable adult. In this type of litigation, as with proceedings concerning children, there are generally no winners or losers, and costs orders are therefore likely to be 'unusual.*"

- Foster J has given judgment in an application that the defendant to a clinical negligence claim should pay the claimant's costs of a contested application as to who should be the claimant's litigation friend: *HR v Aneurin Bevan University Local Health Board* [2021] EWHC 2195 (Admin). That application did not concern the defendant, and arose out of the claimant's family's refusal to accept the advice of the claimant's solicitors that the Official Solicitor should be the claimant's litigation friend. Foster J held that it was 'not appropriate' for the Claimant to recover the costs of the application against the defendant in such circumstances.

## Discharging a party – the saga continues

*London Borough of Southwark v P, AA and South London and Maudsley NHS Foundation Trust* [2021] EWCOP 46 (Lieven J)

*Practice and procedure (Court of Protection) – other*

### Summary

The saga of *Re P (Discharge of a Party)* [2021] EWCA Civ 512, reported in previous issues, continued, following the Court of Appeal's overturning the decision of Hayden J to discharge AA, mother of P, from proceedings relating to P without notice or an application being made to do so.

Following the Court of Appeal decision on 16 April 2021, AA was reinstated as a party in proceedings. In a subsequent judgment as to costs (see below) the Court of Appeal considered that none of the other parties in the case had been unreasonable in arguing that Hayden J's order should be maintained – an unsurprising finding where this judgment had been handed down only a few days prior.

The substantive question of what should happen in relation to AA was then sent to Lieven J, and twice adjourned, once tragically due to the death of AA's counsel, Timothy Nesbitt QC.

The history of the case is summarised in the Court of Appeal decision; in brief, the application related to P, now 19 years old, who had diagnoses of atypical anorexia, PTSD and selective mutism. Concerns had been raised by the local authority that P had been sexually assaulted by a visitor to the family home, where she had lived with her mother, AA. By the summer of 2019, P's anorexia was quite severe, and she had a BMI of 10.9; it was also noted that she was unkempt and in a poor state of hygiene.

Welfare proceedings had commenced in June 2019 before Hayden J, who made immediate orders that P should be removed from the family home, and that her direct contact with AA was to be supervised. Proceedings had continued for over a year while additional work by way of trauma therapy was conducted with P, and further assessments were undertaken. Lieven J summarises a turning point in proceedings at paragraph 7-8:

> *7. In October 2020, P revealed for the first time that she had been subject to emotional abuse by AA through various WhatsApp messages. She also disclosed that contrary to what she and her family had previously said, AA had been aware of the abuse by the alleged abuser, SB, but had taken no action. She also alleged, for the first time, that she had been physically and sexually abused by AA's new partner and father of P's half-sister who was born in October 2020.*
> *8. In a material departure from P's previous statements, P indicated in late October 2020 that she no longer wished to live with her mother or have any contact with her mother…*
>
> *(d) AA told P not to disclose the abuse by SB or AA's new partner to anyone;*
> *(e) AA threatened P that both she and the baby could be harmed if she did not speak to AA's new partner;*
> *(f) AA continued to send P emotionally abusive messages after 10.12.20 until around the end of February 2021.*
>
> *(2) There were messages from an anonymous source to P threatening her.*
> *(3) There were exchanges between the treating team at SLAM, the Local Authority and police and updates from P's treating time at SLAM.* (Paragraph 10)

At the next hearing on 3 November 2020, Hayden J discharged AA as a party to proceedings and ordered all contact between P and AA should end. AA successfully appealed that order in the Court of Appeal, and was again a party to proceedings when the case came before Lieven J.

The court summarised the material which had originally been withheld from AA, and had been the subject of a 'gist' document. AA had since been given some of the original material, but was still relying on the gist document in part:

> *(1) There were messages between AA and P which indicated that:*
> *(a) P informed AA of abuse by AA's new partner but NM disbelieved her;*
> *(b) P believed that [P's] baby was at risk of abuse by AA's new partner;*
> *(c) P was raped and physically abused by SB. She informed AA that abuse was occurring and believed AA took no action. AA was aware P had been assaulted by SB;*

By the time of the hearing before Lieven J, AA was now aware of the information above, and P's wishes and feelings had been set out. P had been consistent in stating that she did not wish to live with AA, that she did not want any contact with AA or AA's partner, and that she did not want AA to be a party to proceedings. P had also texted her representatives that in April 2021 that if AA "*gets back in as a party I'm not being involved, I don't see why she should as she's not very supportive of me as a person*" (paragraph 13). She continued: *"you can tell the judge I wouldn't want to be part of proceedings if my Mum was a party, I wouldn't see the point in participating as I don't want a relationship with her and she doesn't want me living away from home (despite me turning 20 this year)*" (paragraph 14). In discussions with other professionals working with her, P noted that communications from AA, AA's partner and her extended family had been "*abusive, threatening and deeply disturbing*" (16). P's therapist had expressed concerns for P's welfare if AA became a party to proceedings, and

considered it would harm her ability to engage in trauma therapy.

AA was clear that she wished to remain on as a party to proceedings, and to give evidence regarding P's best interests. Despite having filed a witness statement, AA did not provide evidence acknowledging or engaging with the abusive and concerning text messages P had disclosed.

Lieven J directed herself to the decision of the Court of Appeal, and the overriding objective, which included "*ensuring P's interests and position"* (22). She noted that the Court of Appeal had stated that if there were 'exceptional' circumstances, the parties may apply to discharge AA as a party. However, Lieven J observed that:

> *24. It is not clear to me, nor the advocates before me, where the reference to exceptional circumstances comes from. The Rules do not require any "exceptionality" before a party is discharged.*

Lieven J therefore considered instead that the relevant principles were those in s.1(5) MCA 2005, looking also to *Aintree University Hospital NHS Foundation Trust v James* [2013] UKSC 67, *Wye Valley NHS Trust v B* [2015] EWCOP 60 and *Barnsley Hospital NHS Foundation Trust v MSP* [2020] EWCOP 26, and emphasising that the best interests test is considered from the perspective of the protected person, though the specific weigh given to P's wishes and feelings will vary on a case by case basis.

In considering balancing competing rights, Lieven J looked to *London Borough of Redbridge v G* [2014] EWCOP 1361. While noting that that case related to the Article 8 rights of a journalist, Lieven J considered the statement of principles was also applicable, citing the following passages from the judgment of Munby J in that case:

> *24. Secondly, if for whatever reason, good or bad, reasonable or unreasonable, or if indeed for no reason at all, X does not wish to have anything to do with Y, then Y cannot impose himself on X by praying in aid his own Article 8 rights. For X can pray in aid, against Y, X's own Article 8 right to decide who is to be excluded from X's 'inner circle' and in that contest, if X is a competent adult, X's Article 8 rights must trump Y's. It necessarily follows from this that, absent any issue as to X's capacity or undue influence, X's refusal to associate with Y cannot give rise to any justiciable issue as between Y and X.*
>
> *25. Thirdly, if X lacks capacity, Y's Article 8 rights can no more trump X's rights than if X had capacity. Y cannot impose himself on X by praying in aid his own Article 8rights. Y's Article 8 rights have to be weighed and assessed in the balance against X's Article 8 rights. If Y's rights and X's rights conflict, then both domestic law and the Strasbourg jurisprudence require the conflict to be resolved by reference to X's best interests. X's best interests are determinative. As I said in Re S, para 45, referring to what Sedley LJ had said in In re F (Adult: Court's Jurisdiction) [2001] Fam 38, 57:*
>
> > *"In the final analysis, as Sedley LJ put the point, it is the mentally incapacitated adult's welfare which must remain throughout the single issue (emphasis added). The court's*

> *concern must be with his safety and welfare.""*

Looking to *Re F (A Child Adjournment)* [2021] EWCA Civ 469 by analogy, AA argued that the best interests test was not the correct one to apply in case management decisions. Lieven J, however, considered that the analogy was not entirely apt:

> *…. In proceedings under the Children Act 1989 the parent has a right to be a party, not least because s/he has in law parental responsibility. However, in the Court of Protection the parent of an adult child has no rights to party status and as such the legal analysis is different. The legal relationship between a minor child and his/her parents is quite different from that of a person over 18 and their parents. Having said that, it is obvious that justice to any third party is a highly important consideration.*

Considering the judgment of Cobb J in *KK v Leeds City Council* [2020] EWCOP 64, Lieven J considered that potential harm to P of a person being joined as a party or having evidence disclosed was likely to be a relevant consideration, summarising her approach at paragraph 32-33 thus:

> *32…the whole purpose of the MCA is to protect and promote the best interests of P. Where the interests of P's parents, here AA, conflict with P's best interests then P's interests must take precedence. There is a real danger in this litigation of that fundamental principle being forgotten.*
>
> *33. However, it would be vanishingly rare in a Court of Protection case for justice to a third party to result in a decision which was contrary to the best interests of P. It is critical to be clear where one starts from in the analysis under the MCA. There are always two questions under that Act; does P have capacity and if not, what is in P's best interests? Critically, P is an adult and has the rights that go with being an adult, subject to the loss of capacity. As Hayden J put it in the Barnsley case the "whole focus of the MCA is to reassert P's autonomy and his or her right to take their own decisions." The focus in Children Act proceedings is entirely different. The principles underlying the two statutory schemes are not analogous, and they should not therefore be conflated.*

All parties except for AA took the clear position that it was in P's best interests for AA to be removed as a party. The Official Solicitor emphasised P's strong wishes to this effect, and the court noted their consistency over a period of approximately 8 months.

AA argued that she had Article 8 rights in respect of P, and had a right to be a party. Lieven J did not accept this argument:

> *Since October 2020, P has made it entirely clear that she does not want contact with her mother. In my view whatever Article 8 rights AA had in relation to P in respect of the earlier evidence (which was considered by the Court of Appeal), the weight to be accorded to any such rights has significantly diminished in light of the further evidence. We now have a position where P has been living away from family home for at least 2 years and most importantly where P is now an adult, being no longer under the age of 18 and has expressed in the clearest way that she does not want to have contact or an*

> *ongoing relationship with her mother, who she says was complicit in her abuse. In my view, that assertion of her rights must cap and seriously diminish any Article 8 rights of her mother.*

Lieven J similarly rejected arguments that AA had the right to respond to allegations made against her by P, with AA also noting that Hayden J's order discharging AA as a party appeared to have been made under the inherent jurisdiction rather than the MCA 2005. Lieven J concluded that the original orders had been made under the MCA 2005, as it had been determined on an interim basis that P lacked capacity, and capacity was not to be revisited until P's therapy had been completed. The court thus proceeded on the basis that P lacked the material decision-making capacity.

Lieven J considered that it was "*entirely open to AA to file evidence saying that she did not send the texts and to produce evidence to that effect*" (paragraph 40). She did not consider that the fact of an ongoing criminal investigation into the texts would preclude her from producing evidence that she did not send them "*if that is the true position.*" The court further could not "*see any requirement of natural justice for her to be a party in order to refute the allegations. This is not a case where without being a party she does not know the substance of the allegations*" (40).

Lieven J considered that by focusing on facilitating 'P's participation in proceedings' and having "*at the forefront of my mind her best interests*" (paragraph 41) the outcome of the application to discharge AA as a party was clear. "[T]*o put the mother's rights before P would be to entirely subvert purposes of the Mental Capacity Act. Secondly, it is very clear from evidence from Ms Dawson and most importantly, Ms X that it would be contrary to P's best interests for her mother to be a party to these proceedings*" (paragraph 42). The court considered that AA could file evidence relating to the texts and as to P's best interests, "*albeit without knowing all the evidence before the court but in circumstances where the evidential position as to best interests and wishes and feelings is so clear, in my view AA should be removed as a party*" (paragraph 44).

### Comment

The case provides what appears to be an end to the saga, with AA having effectively all relevant information to hand, an application before the court and an opportunity to put her case, Lieven J reached the same conclusion as had Hayden J in November. The discussion is notable for several reasons, not least being what Lieven J identified as the interplay between consideration of P's welfare and best interests under the MCA 2005 and the case management question before the court. The judgment is also interesting for its refutation of the suggestion by the Court of Appeal that the discharge of a party was 'exceptional,' with the court noting that no party was able to offer an argument that such a standard should be applied.

## Costs principles reviewed

*Re P (Discharge of Party: Costs of Appeal)* [2021] EWCOP 46 (Court of Appeal (Peter Jackson, Baker and Warby LJJ))

*COP jurisdiction and powers – costs*

### Summary

In *Re P (Discharge of Party: Costs of Appeal)* [2021] EWCA Civ 992, the Court of Appeal was asked to

consider an application for costs following the appellant's successful appeal in *Re P (Discharge of Party)*. The underlying case related to the mother of P (who was the subject of proceedings) having been discharged as a party without an application being made to the court, notice given to the mother, or an opportunity for the mother to put forward arguments until a considerable period of time after the discharge had occurred.

The appellant proposed five reasons why her costs should be paid by the respondents (paragraph 2):

> *(a) Whilst the normal rule in welfare cases in the Court of Protection is that there should be no order as to costs, it was held by this Court in Cheshire West v P [2011] EWCA Civ 1333 that this does not apply to appeals from the Court of Protection which are governed by CPR Part 44. Under r.44.2(2), the general rule is that, if the court decides to make an order about costs, the unsuccessful party will be ordered to pay the costs of the successful party. That rule should have been followed in this case.*
>
> *(b) As a result of the decision of the court below, the appellant was obliged to bring this appeal to secure fundamental rights. Although the decision to remove her as a party was taken by the judge without any prior application by any of the parties, it had been open to the respondents to propose a different order which would have protected P without infringing the appellant's fundamental rights.*
>
> *(c) Furthermore, once the appellant had filed her appeal notice, it was open to the respondents to concede the appeal and/or propose a different order, having seen the way the appeal was put.*
>
> *(d) Although the appellant was publicly funded, the appellant owed a duty to the Legal Aid Agency to seek to recover costs.*
>
> *(e) This Court should have regard to the observations of Lord Hope R (on the application of E) v Governing Body of JFS & Anor [2009] UKSC 1 at [25], in which he emphasised the importance of costs orders for those who are publicly funded in the event that they are successful.*

The court rejected the application (paragraph 3):

> *(a) As the appellant recognised in her submissions, whilst CPR 44.2 establishes the normal rule to be followed where a court decides to make a costs order, the court has a discretion under r.44.2(1) as to whether costs are payable and, under r.44.2(2), if it decides to make an order, to make a different order to that described by the general rule. Under r.44(3), in deciding what order (if any) to make about costs, the court must have regard to all the circumstances.*
>
> *(b) In the Cheshire West case, Munby LJ stressed that he was not intending to lay down any principle, save that every case had to be decided by reference to what is now CPR 44.2. He also acknowledged that, whilst an appeal from the Court of Protection fell within CPR Part 44, the fact that it concerned a vulnerable adult was one of the circumstances to be taken into account under r.44.2(2) and that in some cases it may be one of the more important circumstances.*

*(c) In the present case, the vulnerability of P was manifestly a central feature of the proceedings and of the appeal. It was P's high degree of vulnerability that led the judge to take the step of discharging the appellant as a party. The protection of P was the focus of the proceedings and of all parties thereto.*

*(d) The decision to discharge the appellant as a party was made by the judge without application from any party at a hearing which had been listed to consider different applications by the respondents which were brought because of their concerns about threats to P's safety and welfare. In our judgment when allowing the appeal (paragraph 65), we concluded that the judge would have been fully entitled to make the order which the respondents were asking for.*

*(e) Although it would have been open to the respondents to oppose the judge's proposal at the hearing, and/or to concede the appeal, we concluded that it was not unreasonable of the respondents to seek to uphold the judge's order for this Court, given their responsibilities towards P and their concerns about her safety and welfare.*

### Comment

The judgment provides a pithy summary of some of the key principles of costs applications in health and welfare cases (still relatively rarely seen in reported decisions). The Court of Appeal emphasized that there was not a default position if the court considered it was appropriate to deviate from the general rule of no order as to costs, and costs applications would turn on the facts of the particular case (and the vulnerability of the subject of proceedings would likely always be of relevance). In this case, the Court of Appeal did not consider that the parties had been unreasonable in supporting the action of Hayden J to discharge mother. The respondents maintained in further proceedings before Lieven J, who, four days before this judgment, had made the same order as had Hayden J following an application being made on notice to the mother and the mother having an opportunity to put her case forward.

## Remote hearings in the family court and Court of Protection post pandemic

The Nuffield Family Justice Observatory (NFJO) published on 22 July a report on remote hearings in the family court and Court of Protection. 50% of the 880 who answered the question "Do you think Court of Protection hearings could continue to be held remotely" said "yes," 38% said "no", and 12% said "it depends." The findings, which are informing consideration of the post-pandemic practices of both the family court and the Court of Protection, do need to be read with some care, because the comments accompanying the "yeses" revealed caveats. Interestingly, the responses included members of the judiciary, one District Judge identifying that:

*Subject to the caveat that short directions hearings involving lawyers only can be dealt with remotely. Remote hearings for people with impaired capacity are fundamentally unfair. The person may already have problems of orientation in relation to time, person and space and building rapport and engagement, and therefore meaningful participation, requires face-to-face contact. The problems are amplified*

> *where the person is unrepresented or their solicitor is not with them during a remote hearing. Subject to the above caveat, it is essential that we return to attended hearings as soon as practicable*

## Protocol 15 to the ECHR now in force

For anyone contemplating a challenge to the ECtHR arising out of the Court of Protection (or, more likely, from the Court of Appeal/Supreme Court after an appeal originating from the Court of Protection), it is important to note that with the entry into force of Protocol 15 to the ECHR, the time limit for making any application is 4 months with effect from 1 February.

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Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He 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.

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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributor to 'Assessment of Mental Capacity' (Law Society/BMA), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click here.

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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

Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

### Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in October. 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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