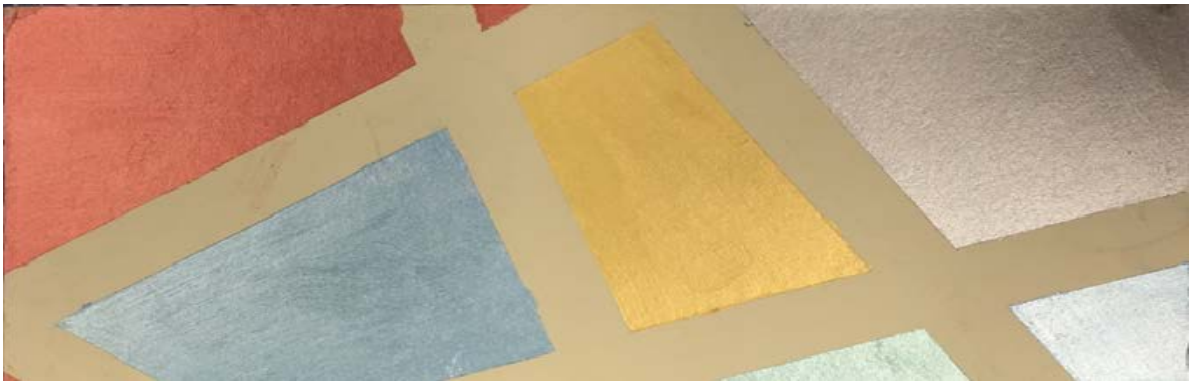
MENTAL CAPACITY REPORT:
PRACTICE AND PROCEDURE
March 2023 | Issue 130



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

(1) In the Health, Welfare and Deprivation of Liberty Report: fluctuating capacity and emotional dysregulation;

(2) In the Property and Affairs Report: the Court of Protection divorce, refreshed deputy standards and relevant legislative developments;

(3) In the Practice and Procedure Report: 'closed hearings' guidance and Forced Marriage Protection Orders;

(4) In the Wider Context Report: covert medication guidance, an updated litigation capacity certificate, the malign influence of Andrew Wakefield, and changes afoot in Ireland;

(5) In the Scotland Report: a Scottish perspective on the Powers of Attorney Bill and implementation of the Scott Report.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

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

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

Scottish Contributors
Adrian Ward
Jill Stavert

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

Contents

Closed hearing guidance

In one of his last acts as Vice-President of the Court of Protection, Hayden J issued on 8 February 2032 guidance about closed hearings and closed materials. As it says in its opening paragraphs, it applies to 'closed hearings' and 'closed materials,' defined as follows:

> *1. "Closed hearings" are hearings from which (1) a party; and (2) (where the party is represented) the party's representative is excluded by order of the court. For the avoidance of doubt, this is different to a "private hearing," which is a hearing at which all the parties are present (or represented), but from which members of the public and the press are excluded*
> *;*
> *2. "Closed material" is material which the court has determined should not be seen by the party (and/or their representative).*
> *The practice guidance also applies to situations where an order may be made that a party (and/or their representative) is not to be told of the fact or outcome of a without notice application.*

As the guidance emphasises:

> *In situations which are rare, but which do occur from time to time, it is necessary for the court to consider whether a hearing should be closed and/or for material be closed. Nothing in this guidance is intended to increase the number of closed hearings or applications for material to be closed. Rather, its purpose is to provide clarity as to the principles to be applied and considerations to be taken into account in the very limited circumstances under which such steps may be appropriate.*

"Intellectual impairment of parties and witnesses in COP proceedings – the need to be alert"[1]

In a recent speech, Sir Andrew McFarlane, President of the Family Division, provided a crucial reminder for professionals, lawyers and judges of the need to be aware of intellectual impairment in public law family proceedings, which applies equally to Court of Protection proceedings.

The focus, as it should be, in Court of Protection proceedings is on the person ("P") to whom the proceedings relate; but what about those closest and dearest to P who may have invaluable information about P's wishes, feelings and values or may wish to support P at home?

First, it is necessary to identify whether an individual may have an intellectual disability (or low cognitive functioning). In this regard, Sir

[1] Sir Andrew McFarlane's keynote address to the Aspire Conference in Exeter was entitled, "Parents with intellectual impairment in public law proceedings – the need to be alert"

Andrew pointed to guidance from the British Psychological Society. He observed that some individuals with a form of intellectual deficit (not necessarily fulfilling the conditions of an intellectual disability) may develop strategies for masking their difficulties, such as being very talkative. He therefore emphasised the importance of professional psychological assessments to understand the true underlying situation.

Second, once such individuals are identified, it is critical that these individuals should understand the proceedings and be able to participate fully (particularly in circumstances where they do not lack litigation capacity and therefore do not have a litigation friend). Articles 12 and 13 of the United Nations Convention on the Rights of Persons with Disabilities require equality before the law and effective access to justice; by Article 6 of the European Convention on Human Rights, the obligation falls on both local authorities and courts as public bodies.

Specific guidance on the participation of vulnerable witnesses is now set out in Practice Direction 1A to the Civil Procedure Rules and Practice Direction 3AA of the Family Procedure Rules ("FPR"), which the Court of Protection can apply (see Court of Protection Rules 2017, r. 2.5(1)). By r 3A.7(b)(i) of the FPR, the court must have regard to whether the party or witness suffers from a mental disorder or otherwise has a significant impairment of intelligence or social functioning (see also CPR r.1.6).

Courts, with the assistance of parties, should identify vulnerable witnesses or parties at the earliest stage or proceedings and identify whether any directions are necessary, for example, in relation to the nature and extent of their evidence, the conduct of the advocates and/or other parties, and whether special measures should be put in place.

Sir Andrew also emphasised the utility of The Advocates Gateway which provides free access to practical, evidence-based guidance on communicating with vulnerable witnesses and defendants through a series of useful toolkits.

Whilst ground rules have been laid down, a failure to comply with them can give rise to a successful appeal in circumstances where (i) there has been a serious procedural or other irregularity and (ii) as a result, the decision was unjust (see *Re S (vulnerable party: fairness of proceedings)* [2022] EWCA Civ 8). In *A Local Authority v A Mother* [2022] EWHC 2793 (Fam), the parents with low cognitive functioning had not been provided with regular breaks or intermediaries in a fact-finding hearing on non-accidental injuries. Williams J considered the failure to comply with the ground rules was unfair and he ordered a re-hearing.

In terms of support during a hearing, Sir Andrew noted that that intermediaries have a critical role to play because they facilitate communication between all the parties and ensure that the vulnerable person's understanding and participation in the proceedings. That includes undertaking an assessment of the person and reporting to the court on the communication needs of the individual. The witness must, however, provide their informed consent to the appointment of an intermediary: *Z LBC v Mother* [2022] EWFC 63.

Further, and importantly, the guidance that Sir Andrew provides can also usefully be applied to facilitate P's participation in the proceedings. In *ZK (Landau-Kleffner Syndrome: Best Interests)* [2021] EWCOP 12, for example, ZK communicated through British Sign Language, writing messages, and showing images on his mobile phone; his communication was then relayed to the judge by his intermediary and a signer.

Sir Andrew identified that thought must also be given as to ensuring that judgments are clear so that vulnerable witnesses and parties can understand what has been decided. For example, it may be appropriate to write a short, clear accessibility summary (which does not form part of the judgment) or the court may communicate directly to the witness in another way.

Sir Andrew emphasised that some professionals may be over "polite" to raise the issue of intellectual deficit. In his view, professionals must be alert to "*the potential for learning disability to be a factor requires that these issues should be approached professionally and with clarity*." He noted that the Down Syndrome Act 2022 and Health and Social Care Act 2022 aim to aid a wider understanding of the needs to individuals with Down Syndrome, learning disabilities and autism. He also emphasised the importance for professionals of the guidance promulgated by "Working Together with Parents Network" ("WTPN"). Whilst it applies to public law children proceedings, it emphasises: (i) the importance of clarity about rights, roles and responsibilities, including the legal basis for any action; (ii) in-depth assessments; (iii) timely and effective information-sharing between relevant professionals and bodies; and (iv) timely and effective involvement of family, and the provision of independent advocacy. This guidance, in our view, applies equally to vulnerable individuals in Court of Protection proceedings.

Forced Marriage Protection Orders

Two recent cases have identified different practice aspects relating to FMPOs.

Coventry City Council v MK & Ors [2023] EWHC 249 (Fam) concerned applications in linked proceedings in the Court of Protection and the Family Court. The case arose within the context of a FMPO made on 28 September 2021 without notice by Coventry City Council. The Council was the applicant in both proceedings.

The subject of the proceedings, MK, was 21, had a mild learning disability and ADHD. On 2 May 2019 he moved from his parents' house to supported accommodation. The application for a FMPO arose from the discovery that there had been an arranged putative wedding in Pakistan which took place over WhatsApp. MK attended the ceremony from the UK while the bride and MK's grandfather, who acted as his purported proxy, attended from Pakistan. The hearing considered the status of that marriage, and on that basis the remedy to be granted to the parties.

The parties agreed that the fundamental requirements for marriage were not complied with, either those of Pakistan or England and Wales and that MK lacked capacity to marry at the relevant time. The issues in the case, contained at paragraphs 9(i)-(iii), therefore focused on the questions of whether MK's marriage to A was valid, and if not, what the appropriate remedy would be to recognise the invalidity, including the terms of any FMPOs. Other issues such as best interests decisions in relation to MK's placement were also considered, but are not addressed in this note.

The first question that was considered was the question of where the marriage took place given that capacity to marry is governed by the 'dual domicile' test (see paragraph 16) which depends on the law and state in which a party is domiciled. The parties agreed that if the court were to conclude that the marriage took place in Pakistan and the marriage is a void marriage that a degree of nullity would become available under s.14 MCA 2005 which provides:

> *(1) Subject to subsection (3) where, apart from this Act, any matter affecting the validity of a marriage would fall to be*

> *determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales, nothing in section 11, 12 or 13(1) above shall—*
> *(a) preclude the determination of that matter as aforesaid; or*
> *(b) require the application to the marriage of the grounds or bar there mentioned except so far as applicable in accordance with those rules.*
> *(3) No marriage is to be treated as valid by virtue of subsection (1) if, at the time when it purports to have been celebrated, either party was already a civil partner.*

At paragraph 22, Morgan J cited *Asaad v Kurter* [2013] EWHC 3852 (Fam) where Moylan J (as he then was) had concluded that it was for the English court to determine what remedy, if any, was available under English law to a petitioner who had failed to establish the existence of a valid marriage governed by foreign law. As paragraph 97 of *Asaad*: *"(a) whether the defect makes the marriage valid or invalid is a matter to be determined by the applicable law, being in the case of the formalities of marriage the law of the place where the marriage was celebrated"*

A single joint expert, Professor Rahman, was called with expertise in Islamic Law International Human Rights Law and Pakistani Family Laws. He gave evidence as to requirements for a valid marriage. He identified an absence of evidence that MK's grandfather had the legal authority to sign the Nikah Nama as his vakil, and that as the marriage took place in Pakistan, this was a crucial defect in the document. Professor Rahman's evidence concluded with his unequivocal view summarised at paragraph 36: "*failings of formalities were fundamental to the validity of the marriage."*

Morgan J concluded at paragraph 37 that the *Lex Loci* was Pakistan on the basis that this was the location for the ceremony, bridge, and MK's grandfather, along with the fact that the ceremony attempted to comply with the Islamic Law in its formalities. She then went on to conclude, at paragraph 39, that the marriage was to be treated as invalid as it did not comply with the formalities of Pakistani law.

The parties proposed that the remedy should be that the court should record that there had been a 'non-qualifying ceremony.' Morgan J concluded (at paragraph 46) that, on public policy grounds, it was appropriate to make "*such a declaration to ensure certainty and to protect MK from the implications of a forced marriage."* She concluded (at paragraph 46) that, on public policy grounds, it was appropriate to make "*such a declaration to ensure certainty and to protect MK from the implications of a forced marriage."* She emphasied, however, that "*that I make such a declaration on public policy grounds does not detract from the fact that the decision is one that I make on the fact specific circumstances here and is not intended as being of any wider application for other cases which are very likely to depend on their own factual circumstances*."

In *Re P* [2023] EWHC 195 (Fam), Knowles J considered an appeal from the decision of a District Judge dismissing an application for an FMPO pursuant to Part 4A of the Family Law Act 1996 ("1996 Act"). The District Judge had dismissed the appeal because the applicant was not physically present within the jurisdiction nor was she a British citizen.

Knowles J, however, took matters back to first principles and analysed them by reference to the statutory provisions in play.

By s 63A of the 1996 Act, the court has the power to make a FMPO for the purpose of protecting – (a) a person from being forced into a marriage or from any attempt to be forced into a marriage. Section 63A(2) requires the court to have regard

"*to all the circumstances including the need to secure the health, safety and well-being of the person to be protected*." Section 63CA creates an offence of breaching a FMPO.

Section 63B of the 1996 Act addresses the contents of orders; and specifically states that the orders may relate to conduct outside England and Wales.

Section 120 of the Anti-Social Behaviour, Crime and Policing Act 2014 created a criminal offence of forced marriage. A person commits an offence under that provision "*if, at the time of the conduct or deception (a) the person or the victim or both of them are in England or Wales, b) neither the person nor the victim is in England or Wales but at least one of them is habitually resident in England and Wales, or c) neither the person nor the victim is in the United Kingdom but at least one of them is a UK national*."

Knowles J allowed the appeal and made the FMPO. She determined that the 1996 Act was drafted in the widest and most flexible terms. She held that there was nothing in the 1996 Act that requires the court to apply any criteria beyond that set out in s 63A(2); and that, had Parliament wanted to limit the court's jurisdiction by reference to physical presence, habitual residence and/or citizenship, it would and could have done so. She was therefore clear that the Act had extraterritorial application, given the wording of s 63B(2). As she observed, forced marriage is a very serious form of domestic abuse and a fundamental abuse of a victim's human rights – the 1996 Act would fail to meet its objectives if an application had to be physically present in the jurisdiction or a British national to obtain protection against a respondent; and that interpretation would not be compatible with the UK's international treaty obligations. As she concluded at paragraph 43:

> *I observe that this interpretation of the Act's wide and protective jurisdiction sends two clear messages which are of real importance. First, victims abroad who are forced into marriage with a British national or someone habitually resident here may be able to avail themselves of protective orders in this jurisdiction to counter such abusive behaviour and mitigate its harms. Second, British nationals or those who are resident here should be aware that they cannot force a person into marriage and escape legal sanction for their behaviour in the family court merely because their victim is neither habitually resident nor a British national. Forced marriage is a global phenomenon with many forced marriages in the UK having an international dimension. In a world of global social media, it is possible for perpetrators to continue their abuse online with easy access to their victim, wherever their victim is based and whatever the nationality of their victim. This purposeful interpretation of the Act's jurisdiction permits the courts to exercise their protective jurisdiction to safeguard victims, wherever they are based and whatever their nationality.*

Editors and Contributors

Alex Ruck Keene KC (Hon): alex.ruckkeene@39essex.com
Alex has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

Victoria Butler-Cole KC: vb@39essex.com
Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

Neil Allen: neil.allen@39essex.com
Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click here.

Arianna Kelly: Arianna.kelly@39essex.com
Arianna has a specialist practice in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in matters relating to the inherent jurisdiction of the High Court. Arianna works extensively in the field of community care. To view a full CV, click here.

Nicola Kohn: nicola.kohn@39essex.com
Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 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.

Rachel Sullivan: rachel.sullivan@39essex.com

Rachel has a broad public law and Court of Protection practice, with a particular interest in the fields of health and human rights law. She appears regularly in the Court of Protection and is instructed by the Official Solicitor, NHS bodies, local authorities and families. To view full CV click here.

Stephanie David: stephanie.david@39essex.com

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

Nyasha Weinberg: Nyasha.Weinberg@39essex.com

Nyasha has a practice across public and private law, has appeared in the Court of Protection and has a particular interest in health and human rights issues. To view a full CV, click here

Simon Edwards: simon.edwards@39essex.com

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

Adrian Ward: adrian@adward.co.uk

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

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

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.

Conferences

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

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

Advertising conferences and training events

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

Our next edition will be out in April. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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

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

Chambers UK Bar
Court of Protection: Health & Welfare
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Court of Protection and Community Care
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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