



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

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

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

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

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Short note: reporting restrictions / transparency orders – the Court of Appeal's perspective

The Court of Appeal has allowed the conjoined appeals in *Abbasi and Haastrup* [2023] *EWCA Civ* 331, (permission to appeal to the Supreme Court has been sought by the two hospital Trusts involved). For more detail, see [here](#), but in headline terms, the implications of the judgment are as follows:

- (1) as 'refined' a focus as possible is required by both the relevant parties and the court upon those individuals most clearly requiring protection;
- (2) that the protection may be required to ensure the continued anonymity of the subject of the proceedings / their family; to maintain the integrity of the proceedings; or to secure against a risk of harm to a professional;
- (3) that the focus may need to be refined as matters continue to unfold (and, in particular, in light of any relevant social media activity of concern);
- (4) any application to continue an order restricting the identification of professionals after the end of the proceedings on the basis of continuing risk must be based upon clear evidence as to the nature of that risk; and
- (5) indefinite orders restricting identification (at least in respect of securing the anonymity of professionals, rather than the person or their

family) will very much be the exception rather than the norm.

Short note: the cost of getting things wrong

In *West Hertfordshire Hospitals NHS Trust v AZ* [2023] *EWCP* 11, Vikram Sachdeva KC, sitting as a Deputy High Court Judge has delivered a helpful reiteration of the law on costs as it applies to the Court of Protection – the headline point being that, rightly or wrongly, the COP remains a costs free jurisdiction for welfare cases.

This costs application arose out of an out of hours application for a caesarean section. The initial application was adjourned by Morgan J when he realised the sole urgency was that P had reached 37 weeks' gestation and was therefore considered to be at "term" rather than any medical emergency; and that no proper capacity evidence had been provided to the court, the patient's psychiatric notes being absent from the bundle and no professional involved in the case apparently having assessed the mother's capacity.

Before the application was reheard, P was considered to have regained capacity and the application was withdrawn, with the Official Solicitor's consent.

Having agreed the application to withdraw, and the usual order for 50% of her costs, the Official Solicitor subsequently made an application for costs. The basis for this was essentially that the Trust should have followed the well-known

guidance of Keehan J in *NHS Trust 1 v FG* [2014] EWCOP 30 and made the application far earlier [38], that there had been no urgency justifying an out of hours hearing, and that there was incomplete capacity evidence.

DHCJ Sachdeva set out at paragraphs 44- 60 a round up of the existing law on costs in the COP. He noted that:

- The application clearly – and admittedly by the Trust – should have been made sooner, in accordance with the guidance in *FG* (paragraphs 62-66);
- The applicant trust should have contacted the Official Solicitor far earlier in order to discuss the case which may have obviated the need for an urgent hearing (paragraph 67);
- Professionals involved in the case were wrong to consider that an assessment of capacity can only be conducted on the date of the procedure – it should be done in advance and done again if, at the time of the hearing, there is reason to think the position may have changed (paragraph 69).

However, DHCJ Sachdeva noted that the original agreed order arising out of the application hearing included a “no order as to costs” provision, which he had no jurisdiction to re-open (paragraph 71). As to the subsisting period – post the initial, adjourned application, prior to the withdrawal of the application, he noted that the Trust’s actions, while regrettable, were neither “significantly unreasonable” or a “blatant disregard of the processes of the MCA” (paragraph 72). He observed:

72. The way in which this application was approached signifies substandard practice. Whether to make an application to the Court of Protection, and the appropriate timing of an

application, is not just a clinical question, but one which also involves a legal judgment. The Applicant, in identifying the need for training in this area, recognises its actions on 21 October 2022 were inappropriate.

73. Although it is important to follow the guidance in FG, there is no suggestion in the case itself that breach of the guidance automatically justifies a costs order against an applicant. Something more is needed.

DHCJ Sachdeva is undoubtedly correct in his analysis: the law does provide that there will, generally speaking, be no order as to costs in welfare proceedings, save where the parties have acted in a manner which can be construed as significantly unreasonable. The COP remains, however, beset with delay and, regrettably, poor practice from many public bodies – and private individuals. One does sometimes wonder whether more strict provisions on costs might concentrate minds and result in smoother and faster conduct of proceedings.

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Alex has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click [here](#).

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



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



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Conferences

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

Parishil Patel KC is speaking on Safeguarding Protected Parties from financial and relationship abuse at Irwin Mitchell's national Court of Protection conference on 29 June 2023 in Birmingham. For more details, and to book your free ticket, see [here](#).

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

Advertising conferences and training events

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

Our next edition will be out in June. 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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