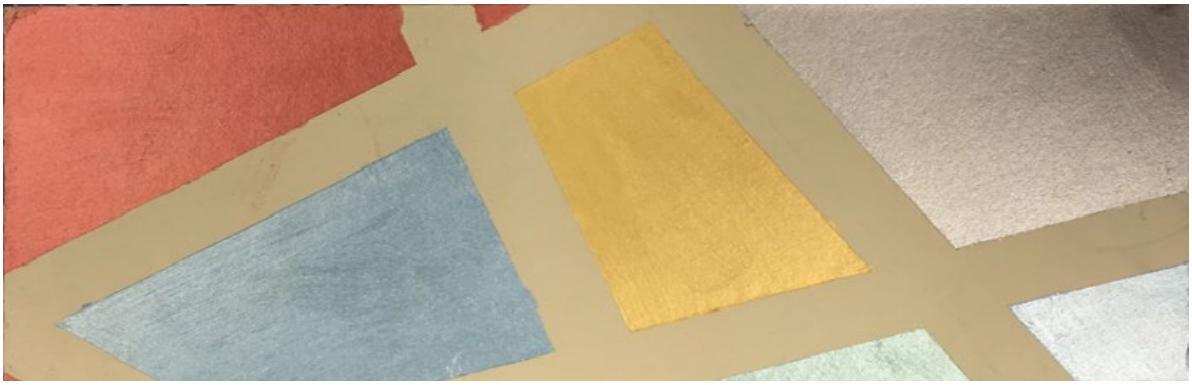
PROPERTY AND AFFAIRS
March 2025 | Issue 148



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

(1) In the Health, Welfare and Deprivation of Liberty Report: insight into the proper place of insight, best interests decision-making and good clinical governance, and anorexia and the changing calculus of decision-making;

(2) In the Property and Affairs Report: the Court of Protection's (international) jurisdiction over children;

(3) In the Practice and Procedure Report: fees changes relating to the Court of Protection and the OPG guidance on disclosing visitors' reports;

(4) In the Mental Health Matters Report: the Mental Health Bill progresses and the independent investigation into the care and treatment of Valdo Calocane;

(5) In the Children's Capacity Report: why the report is named as it is, the Court of Appeal confirms that local authorities cannot consent to the confinement of children in care, and guidance for judges writing to children;

(6) In the Wider Context Report: the updated Code of Practice on diagnosing death and restraint in Northern Ireland.

(7) In the Scotland Report: no hard news, but the way ahead for AWI reform becomes clearer, and unhelpful uncertainty about powers of attorney.

The progress of the Terminally Ill Adults (End of Life) Bill can be followed on Alex's resources page here.

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

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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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Does the Court of Protection have jurisdiction over children? Answer yes – up to a point (even when they have moved abroad)

Irwin Mitchell Trust Corporation Ltd v KS & Ors [2025] EWCOP 7 (T2) (Senior Judge Hilder)

Mental capacity – assessing capacity

Summary

In this case, Senior Judge Hilder had to grapple with a question that had not been the subject of a previous reported decision: what can the Court of Protection do in respect of a child, whose property and affairs (including assets in England & Wales) are subject to deputyship, but who is no longer habitually resident in England & Wales? The Official Solicitor argued that the court no longer had jurisdiction to determine the deputy's request for authorities in respect of expenditure from her funds. The deputy sought to argue that it did, either by virtue of the operation of s.47 MCA 2005 (importing the powers, rights and privileges of the High Court), or on a pragmatic basis.

Senior Judge Hilder found her own route to maintaining the court's jurisdiction, drawing on the provisions of the 1996 Hague Convention (the counterpart for children) to the 2000 Hague Convention on the International Protection of Adults, sometimes known as Hague 34.

It is accepted that the appointment of the Deputy for KS amounts to a protective measure for the purposes of Hague 34. It is also accepted that the jurisdiction issue is not a best interests decision. It is clear, however, that whether or not the Court of Protection retains jurisdiction over KS's property in England will have a very significant impact on the ability of KS and her parents to live the life they choose.

46. The pragmatic argument in favour of the Court of Protection retaining jurisdiction is attractive on the facts of this case, but pragmatism is not a proper basis for deciding an issue about jurisdiction. Other facts may point a different way.

47. The s47 argument: I agree with Mostyn J at paragraph 27 of R(SM) v Court of Protection that "there is no opacity in the language of s47(1)." The words are indeed "completely clear": the statutory conferment on the Court of Protection of "the same powers, rights, privileges and authority as the High Court" is "in connection with its jurisdiction".

48. I acknowledge that Mostyn J, having noted the difference in the heading of this section as between the Act ("General powers...") and that which had earlier been proposed by the Law Commission's draft Bill ("Supplementary

powers..."), observed that the enacted version's reference to 'powers' is not specified as was the Bill and "nor were they confined merely to matters incidental to the court's jurisdiction." However, I do not understand him to have been suggesting that s47 somehow extended the Court of Protection jurisdiction to encompass everything that the High Court does or could do, in particular "inherent power and authority to make orders concerning the property in England and Wales of people lacking capacity (including children who are likely to lack capacity when they reach majority)". The inclusion of the words "in connection with its jurisdiction" has a limiting purpose.

49. Hague 34: it seems to me that the greatest assistance in understanding how s18(3) and Schedule 3 of the Mental Capacity Act 2005 fit together in respect of KS is derived from Article 14 of Hague 34 and the associated commentary in the Handbook and the Lagarde Report. Article 14 is explicit in providing that measures remain in force according to their terms, even if the basis of their jurisdiction has been eliminated by a change of circumstances. The supporting documents both address specifically the very situation which has occurred in this matter, namely a change of habitual residence from a Contracting State to a non-Contracting State:

a. paragraph 4.11 of the Handbook spells out that "nothing ...stands in the way of retention of jurisdiction by the authorities of the Contracting State under their non-Convention Rules."

b. paragraph 42 of the Lagarde Report echoes that position: "nothing stands in the way of retention of jurisdiction, under the national law of procedure, by the authority of the Contracting State of the first habitual residence which has been seised of the matter."

50. Nothing in Mr. Dew's written or oral submissions persuades me that Article 14 is not in fact the starting point for considering KS's position.

51. The question then becomes what is the jurisdiction of England and Wales which is retained? KS is not in the same position as children generally. She is in the sub-group of children who are likely to continue to lack capacity to manage their property and affairs once they attain majority. For that sub-group, when it comes to management of their property and affairs in England and Wales, Parliament has created a jurisdiction which is outside the Family Law Act 1986 and the Family Court. Accordingly, after careful consideration, it seems to me that the answer is embedded in the question - "retention" refers to continued possession, use or control of something which was held before. What existed before KS's habitual residence changed to India was not (as Mr. Dew sees it) either the jurisdiction of the Family Court or of the High Court. It was the jurisdiction of the Court of Protection under s18(3) of the Mental Capacity Act 2005.

52. This conclusion is reinforced when checked against the apparent purpose of Article 14. As set out at 8.2 of the Handbook, the aim is "providing a degree of security and continuity for children and their families. Families need not fear that a move to another jurisdiction will, in and of itself, alter the arrangements that have been made.... Article 14 also guards against "gaps" in the protection of children resulting from factual changes in their circumstances."

This aim is just as relevant for children being moved (for it is rarely, if ever, their decision to move) to a non-Contracting State as it is for moves between Contracting States. And it is just as relevant for the sub-group of children who are likely to lack capacity to manage their property and affairs when they attain majority.

53. There is however a caveat in Article 14 - "so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures." The explanatory documents are less clear in their consideration of a move to a non-Contracting State but paragraph 43 of the Lagarde Report (in the paragraph next following such specific consideration) suggests that it is not distinguished from a move between Contracting States. It also acknowledges risk in an approach which encompasses potentially competing jurisdictions:

> *"This change of jurisdiction of the authorities in cases of a change of the child's habitual residence runs the risk that the authority which has newly acquired jurisdiction might very quickly take a measure which will annihilate that which was previously taken ..... Certainly, the measure taken in the State of the former habitual residence ought to be recognised in the State of the new habitual residence ...and remain in force there so long as it has not been modified or replaced"*

*54. The evidence before me at present is that "India will likely recognise that England has jurisdiction over assets located within its territory" [**F29**], albeit that this is clearly distinguished from any implication that India will also recognise IMTC in its role as Deputy. On the other hand, there are two potential routes to seeking recognition set out in the evidence, as well as a clear statement that "there is no strict legal requirement for Indian courts to approve the continuation of the deputyship in England unless a question of KS's guardianship, control over KS's assets or a related issue is to be adjudicated upon in an Indian court." [**F32**] No such prospect is presently apparent.*

55. I am concerned that the position taken by KS's Litigation Friend as to jurisdiction of this court would cause unworkable difficulties. It is the deputyship appointment, as distinct from the exercise of it, which is the protective measure. Being, as accepted, an appointment which continues (until termination either by the Court or the death of the protected person), how is a deputy to know the limits of their authority when habitual residence changes? Sometimes, and in this case, such a change is not a matter of a clear fixed date - at least until hindsight is available. In contrast, my conclusion (that the Court of Protection retains jurisdiction) gives clarity consistent with the aim of Article 14 of Hague 34, without offending against the position of KS's new state of habitual residence (according to the evidence before me).

56. As to "the connecting factor" for jurisdiction of the Court of Protection in respect of the property of persons under the age of 16 who are likely still to lack capacity to make relevant decisions when they reach the age of 18, it is unnecessary for me to seek to formulate any generality beyond KS's own circumstances. The Court of Protection undoubtedly had jurisdiction over KS's property in England and Wales when the Deputy was appointed; and it retains that jurisdiction after KS's habitual

> *residence has changed to India, at least until a contrary step is taken in the new state of habitual residence.*
>
> *57. I acknowledge that the conclusion may not be the same if, for example, a child had never been habitually resident in England but was awarded damages in England in respect of injuries sustained whilst on a brief holiday here. That situation will need to be considered further if/when it arises.*

Comment

This case is a helpful reminder that, whilst the Court of Protection has no welfare jurisdiction over those under 16, it can, however, exercise its jurisdiction in relation to the property and affairs of a person under 16 if the court considers it likely that P will still lack capacity to make decisions in respect of the relevant matters when they reach 18.[1]

In KS's case, it is unsurprising that Senior Judge Hilder wished to find a route to maintaining the court's jurisdiction, as otherwise her property and affairs would remain in limbo. It is of note that in reaching her destination, Senior Judge Hilder implicitly (and we would suggest correctly) identified that Schedule 3 was a red herring. Schedule 3 cloaks the Court of Protection with jurisdiction in cases with an international element where it does not already have jurisdiction (see para 7(1), providing for the court to discharge its functions "insofar as it cannot otherwise do so"). Here, the court had appointed a deputy to manage KS's property and affairs, in England & Wales, at a point when she was habitually resident in England & Wales, and was therefore discharging functions under ss.16 and 18(3). Schedule 3 therefore simply did not enter into it, nor did the carve-out in Schedule 3 for children falling within the scope of Hague 34.

Arguably, one might think that the real question before Senior Judge Hilder was not really whether Court of Protection retained a jurisdiction to authorise the deputy to take relevant steps. As HHJ Burrows had identified in *Re P (Property & Affairs Deputyship: Jurisdiction)* [2024] EWCOP 77 (T2) (a case decided between the hearing and the date of the judgment in KS's case), the very fact that the Court of Protection has made a deputyship order means that it must retain a jurisdiction to vary or revoke the order. Rather, the real question before Senior Judge Hilder was whether it was appropriate for the Court of Protection to seek to continue to exercise that jurisdiction in relation to KS's property and affairs. Until and unless an alternative method was identified – for instance some form of Indian authority which could be recognised and enforced in England & Wales – it might be thought to be entirely obvious that it was right that the court should continue to exercise its jurisdiction.

Short note: there is no upper age limit to the Court of Protection's jurisdiction

The case of *VX v KX & Ors* [2024] EWCOP 78 (T2) is a reminder that, just as there is no lower age limit, there is no upper age limit to the Court of Protection's jurisdiction. It concerned a 100-year old woman, and whether powers of attorney for health and welfare and property and affairs in favour of various combinations of her children should be revoked. The precise details of the decision are not of wider relevance, but, as with the decision in AECO discussed below, it

[1] MCA 2005 s18(3), although this does not include making a will on behalf of the person, something which can only be done in relation to a person aged 18 or over (MCA 2005 s18(2)).

provides a useful snapshot of the work carried out day-in, day-out by the Court of Protection.

Short note: removing the deputy

Re AECO [2025] EWCOP 5 (T2) is of note as a snapshot of the routine work of the Court of Protection which does not normally feature in reported judgments. It concerns the removal of a property and affairs deputy at the instigation of the Public Guardian. The failings of AECO's mother in discharging her functions as deputy led HHJ Cronin to the clear conclusion that it was in her best interests for her mother to be removed. There was, however, no doubt (and it was agreed) that AECO needed to have a deputy to manage her property and affairs. As HHJ Cronin noted at paragraph 16:

> *The court will always prefer to have a family member as deputy where there is a family member who is able and willing to take on that responsibility. JO expressed her concerns about being able to work with the interim deputy, but in my judgment the interim deputy is an experienced Court of Protection Deputy who will have the skills to manage the case in AECO's interests and what is required of JO is that she cooperates rather than collaborates with the deputy. It would not be sensible to appoint a further professional deputy because that would incur significant duplication of work. In this case, there is no other candidate but a professional and so I confirm the appointment of Jenny Pierce as deputy for property and affairs on a final basis.*

Property and Affairs Court User Group minutes

The minutes of the January meeting of the CoP Property and Affairs Court Use Group have now been published. Amongst the highlights are an interesting set of exchanges around local authorities relying upon appointeeship to collect a person's private / occupational pension. SJ Hilder made clear that the DWP appointee scheme applies only to state benefits, and that it confers no lawful authority in respect of any other funds. She also confirmed that, as pensions are not usually one-off payments, it is unlikely a one-off order would be appropriate.

A solicitor also asked:

> *When making an application for a deputy to be appointed to manage the property and financial affairs for P. If we have the information available to us, we provide the relevant DOLS paperwork and ask for authority to be provided to sell and or for trustee powers. However, we are not receiving the orders to include this authority and it seems to just be missed. Do you have any thoughts as to why this may be happening?*

Senior Judge Hilder confirmed that:

> *if the DOLS information has been provided and authority to sell is not included, it is most likely that a positive decision has been taken not to include that authority. Encourages decision-makers to set out that decision in a separate order with explanatory recitals, and a statement of the right to apply for reconsideration.*

SJ Hilder made clear that, in any application for a statutory will, the original will and copies must be bound, not stapled, to comply with Probate Rules.

The endless theme of the length of time for which a COP3 remains valid came up again. In answer to the question of how an appropriate person can confirm that a COP3 remains valid, SJ Hilder advised that a capacity assessment

cannot be added to, but a COP24 by an appropriate person confirming no change may be filed alongside. She further confirmed that

> *the appropriate person should be obvious from the circumstances of the case – including diagnosis of P, and the involvement with P by the person offering confirmation. For a stable condition, the confirmation of no change could come from a family member or care provider or an appropriately qualified and involved professional, including a deputy.*

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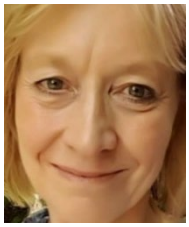
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Conferences

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

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

Advertising conferences and training events

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

Our next edition will be out in 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.

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