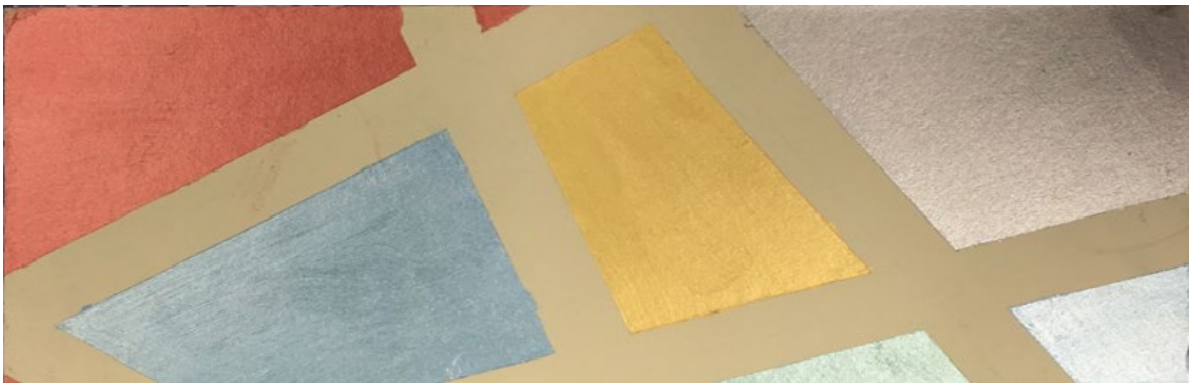

Welcome to the April 2025 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: a masterclass in determining a particularly complex set of capacity questions;

(2) In the Property and Affairs Report: statutory will applications and publicity; OPG guidance on family care payments, and the bond provider saga continues;

(3) In the Practice and Procedure Report: a helpful reminder of elephant traps for the unwary as regards when time runs for purposes of appealing decisions;

(4) In the Mental Health Matters Report: the Mental Health Bill progresses, and the CQC reports on the MHA 1983 in 2023-24;

(5) In the Children's Capacity Report: a new BMA toolkit to help with capacity and other issues in relation to those aged 16 and 17, and back to the vexed question of parental consent to confinement;

(6) In the Wider Context Report: the inherent jurisdiction rebuffed in a personal injury case, recent research of relevance, and strong views from the CRPD Committee on medical assistance in dying and the 2000 Hague Convention.

(7) In the Scotland Report: what is appealable in the AWI context, and the complexities of the position of those aged 16 and 17 in Scotland.

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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HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

'Stitch,' capacity and complexity – a masterclass in capacity determination

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Mental capacity – assessing capacity

Summary

Cobb J sketched the outlines of this complex case after an introduction reinforcing that "*determination of an adult's capacity represents the crucial jurisdictional gateway to the exercise of the Court of Protection's powers to make orders, as appropriate, under the MCA 2005. It is in that important exercise of determining capacity that I find myself engaged in this application*":

> *4. The application before the Court concerns Stitch; she is a 31 year old woman. Stitch is not her real name, but is the name by which she has specifically chosen to be referred in this judgment* (being one of her favourite Disney © characters) *She currently lives in supported rented accommodation which is in the area of, and funded by, Calderdale; she receives care from an independent agency commissioned by Calderdale. I shall refer to her*

accommodation as 'Oak House.' Stitch appears in these proceedings by the Official Solicitor as her litigation friend. The Second Respondent is Stitch's mother, MS; she too lacks litigation capacity, and appears separately by the Official Solicitor as her litigation friend.

5. Proceedings under the MCA 2005 were first brought in respect of Stitch in 2019 ('the first round of proceedings'). I was the allocated judge in those proceedings, and over a period of time made a number of substantive decisions about Stitch, both interlocutory and final. Stitch's decision-making capacity was a live issue for the duration of those earlier proceedings, which were aptly described by Calderdale in its more recent COP1 application as "lengthy and complex". At the conclusion of those proceedings (and for reasons more fully explained at §22 below), I concluded on the evidence, including the expert evidence from Dr O'Donovan, and with the concurrence of all parties, that Stitch had decision-making capacity in most areas of her life.

6. However, almost as soon as that order had been made, concerns re-surfaced among the staff at Oak House about Stitch's capacity in a number of areas. Further assessments of capacity were undertaken by Calderdale social workers over several months, and in May 2024, Calderdale issued a fresh application for best interests declarations and orders under the MCA 2005.

Stitch's lack of capacity to conduct the litigation was not in issue, but her capacity to make decisions about residence, care, contact, internet social media use and sexual relations was.

As Cobb J identified at paragraph 77, it was a difficult application for him to resolve for a number of reasons:

(a) First, Ms A's assessment in August 2023 which was to the effect that Stitch lacked capacity in many areas of her life followed within only a matter of a few weeks of a final consent order which had been made at the end of protracted proceedings, which had concluded with all of the professionals expressing themselves to be satisfied, and I too of course confirmed, that Stitch had capacity in those self-same areas of her life;

(b) Secondly, Ms A's capacity assessment in August 2023 was unorthodox, and to a degree was lacking in the rigour which is customary (and indeed necessary) in the Court of Protection; given the manner in which the assessment was undertaken (over a period of eight sessions, with no or no explicit statement to Stitch that her capacity was being assessed) it is possible that Stitch was not fully aware that her capacity was being assessed, and this may have skewed the results; furthermore, by the time of the hearing, the report was 18 months out of date;

(c) Thirdly, Dr O'Donovan's final report filed in these proceedings uncharacteristically lacked the forensic acuity which was called for in this case, particularly at this stage, and against this background; in performing her analysis and making her recommendations there was, disappointingly, little or no attempt to triangulate the wide range of available evidence about Stitch, including (specifically but not exclusively) the evidence gathered in the assessments conducted by Ms A and Ms B;

(d) Fourthly, Stitch's capacity has been assessed numerous times over the last

> *few years, and it appears that she has now developed an ability to recall and deploy phrases and vocabulary which – when used in the right context – can mislead the assessor into believing that she has greater understanding, or ability of reasoning, than is in fact the case.*

Each of these matters was unpacked – for present purposes, (d) is one of particular interest, Cobb J noting that:

> *89.* […] *I find that over the many years in which these Court of Protection proceedings have been ongoing, and in which a significant number of assessments have been undertaken, Stitch has become adept at holding conversations with professionals about her capacity. Ironically, it may be that Ms A's assessment has more reliable content than might otherwise have been the case had Stitch truly known that her decision-making capacity was being formally investigated. So, for instance, Ms A reported that on one occasion Stitch was:*
>
> > *"… not as coherent or talking in full sentences at this point – but using hand gestures and facial expressions - this made her response feel quite genuinely felt and not a learned phrase or stock response … [indicating] the struggle that [Stitch] is having with making choices and decisions for herself".*
>
> *90. In other contexts, the staff at Oak House have reported that Stitch has become adept at "saying the right things"; Ms A speaks of Stitch 'talking the talk'. Stitch has developed a range of reasonable expressive language, and has learned certain terms to use, such as 'vulnerability', 'risk', 'safety', which can lead the assessor to believe that her level of understanding is greater than it is. I was most interested to note Ms B's view that "when conversations delve deeper, [Stitch] is not able to explain what she means when she says she is vulnerable or why certain actions are a risk to her".*
>
> *91. These comments (and others of a like kind in the evidence) make it probable that Stitch has developed an ability to retain and deploy phrases and vocabulary which – when used in the right context – can (and do) mislead the listener into believing that she has greater understanding, or ability of reasoning, than is in fact the case. Her statements have to be plumbed more carefully than may otherwise be the case; hence the importance of triangulation.*

In the circumstances and despite the deficits in the capacity assessments which were before the court, Cobb J made clear that:

> *92.* […] *I do not believe that I would learn more (indeed I fear it may be counter-productive in the longer term) if I were to commission a yet further opinion on Stitch's capacity at this stage. I am ultimately constrained to reach conclusions on these complex questions of capacity based on a less than satisfactory collection of assessments.*

Cobb J also had to deal with an ambitious submission on MS's behalf relating to what might best described as a robust approach to the support principle:

> *93. History relates that when Calderdale's restrictive support framework was in place around Stitch up to the final hearing in June 2023 – Dr O'Donovan described it as 'containment' and 'psychological containment' – Stitch demonstrated that she could make decisions which at the time appeared to indicate capacitous*

thinking. When the structure or 'containment' was removed, her decision-making fairly obviously went off the rails, and her 'capacity' (as assessed at the time) to make decisions appeared to recede or altogether disappear.

94. In view of this history, Ms Roper argues that, taking the evidence as a whole, it would be appropriate now for the court to make 'contingent orders' that Stitch has capacity to make decisions about residence and care but only "provided that" a support plan (a plan of 'containment') is "compulsorily" (Ms Roper's word[4]) at all times in place. In relation to the decision as to contact between Stitch and her mother, Mr Roper further argues that the court could be satisfied that Stitch has capacity "provided she has the supportive framework of a compulsory support plan and the support and presence of her carers; but that when that supportive framework is absent, [Stitch] is likely to lose such capacity" (emphasis by underlining added).

95. I recognise that underlying Ms Roper's proposal, to which Mr O'Brien aligned himself in part, could be said to be one of the core principles of the MCA 2005, namely that those who lack capacity should be supported to make decisions for themselves in order to achieve self-determination and independence. However, decision-making which could be 'capacitous' only if the decision is made in the environment in which P is 'contained' by a continuous and (materially) 'compulsory' framework of protections, supports and restrictions, in my judgment lacks the quality of autonomy or self-determination which are important characteristics of capacitous decision-making, where the decisions are made "for [oneself]" (section 2(1) MCA 2005 and §9(d) above). Ms Roper's proposal, if adopted, would be likely to lead to the conclusion that Stitch would 'lose' capacity whenever she is permitted to make her own unsupported decisions, and to have capacity only when she is compulsorily contained or supported. That does not suggest that she has capacity or even that her capacity fluctuates; rather, it suggests that she is unable to make her own decisions.

96. Looking at it another way, it would be stretching the statutory language too far to conclude that the continuous, compulsory, protective, supportive and restrictive framework created by Calderdale can be seen as an extension of section 1(3) MCA 2005 – i.e., a form of contextual practical 'help' which has been put in place to enable Stitch to make a capacitous decision. I do not accept that the compulsory imposition of a support plan which contains protective and restrictive measures can properly be regarded as comprising the practical steps which have been taken by Calderdale and which I am obliged to consider before I could conclude that Stitch should be treated as unable to make a decision (section 1(3) MCA 2005).

97. I am therefore unpersuaded that the MCA 2005 permits of the construction urged on me by Ms Roper and Mr O'Brien. That said, looking forward, I view the protective and supportive care package as crucial in offering Stitch a high degree of stability and security within which she can feel more able to express her wishes and feelings freely and fully. For this reason, it is important that her support plan emphasises that those supporting her take into account and respect her expressed wishes at times when she is calm and is able to express her preferences. I return to address this in my order.

When it came to capacity to determine residence and care, Cobb J (as with many other judges) found that it was not sensibly possible to delink the two on the facts of Stitch's case.

> *100. In assessing capacity in this regard, as in others, what matters is Stitch's ability to carry out the processes involved in making the decision; history convincingly reveals, in my judgment, that she cannot do this without the infrastructure around her of the court order, and the constant support of, and boundaries set by, the staff at Oak House. In my judgment, she is not able to exercise the necessary level of executive functioning to achieve this decision-making autonomously. She derives crucial psychological containment and security from the infrastructure of the support plan; when that has gone in the past, it has exposed her inability to deploy the functions required to make a capacitous decision.*
>
> *101. This leads me to consider whether Stitch's capacity in relation to residence and care is fluctuating. The question of fluctuating capacity has been advanced for discussion in this case for the first time, in part (I believe), (a) because Stitch was assessed (and found) to have had capacity in multiple areas relevant to her welfare in June 2023, but in a number of respects it is agreed that she 'lost' it reasonably soon thereafter, and (b) because at times even during the currency of these proceedings she appears to demonstrate capacitous decision making and at other times not.*
> *102. From time to time, cases come before the Court of Protection in which it is said that P's capacity fluctuates. This is not a typical 'fluctuating' capacity case: Stitch is not someone who has 'meltdowns', or periodic psychotic episodes which impact on her capacity. Within the limitations of her intellect, she displays cognitive rigidity, and periodically she needs to be supported in her decision making when she is feeling personally/emotionally rejected, or her needs are not met and she has difficulty in processing information about others; when using the internet, her motivation to seek a physical relationship is so strong that she is unable to consider other factors when she makes her decisions.*
>
> *103. I have considered a number of authorities in this regard. The most pertinent in my judgment is Cheshire West and Chester Council v PWK [2019] EWCOP 57 ('PWK'). It is unnecessary to recount the facts, save to note the similarity between PWK and Stitch in that they can and do "function remarkably well within the constraints of [their] care package" ([25]); in PWK's case, he could easily become overcome by anxiety, and it was the unpredictability of that anxiety and the seriousness and breadth of its impact which was decisive in overturning the legal presumption of capacity. In Stitch's case, she easily becomes overwhelmed by the compulsion to have her needs met.*
>
> *104. Sir Mark Hedley described the situation thus: (at [9]/[10]))*
>
> > *"When PWK was relaxed and in a good place he might well be regarded as having capacity. However, when he became anxious his position could be very different. Moreover, there were many things that could trigger anxiety and quite often his carers would be confronted with irrational behaviour that could be difficult to manage. The question arose as to how the legal position on capacity should be addressed in these circumstances.".*

105. In PWK, Sir Mark Hedley referenced and relied on his earlier decision of A,B & C v X, Y & Z [2012] EWHC 2400 (COP); he distinguished isolated decision-making with decision-making (sometimes at short notice) within the overall context of managing one's own affairs: "the management of affairs relates to a continuous state of affairs whose demands may be unpredictable and may occasionally be urgent". He added: "It is the unpredictability of that anxiety and the seriousness and breadth of its impact which is decisive in this case in overturning the legal presumption of capacity" ([25]). Sir Mark Hedley commented that:

> *"[19] Some have referred to this as taking a longitudinal view. In my view, this approach has the value of clarity. It establishes that the starting point is incapacity. The protection for the protected person lies in the mandatory requirements of Section 4, in particular subsections (3) and (6) ….*
>
> *[21]… where a longitudinal perspective was adopted then PWK lacked capacity in all relevant areas."*

106. The protection offered by section 4(3) MCA 2005 (to which Sir Mark Hedley refers in the passage above) requires the person making the best interests determination to consider "whether it is likely that [P] will at some time have capacity in relation to the matter in question" and if so when; by section 4(6) MCA 2005 (also referenced by Sir Mark Hedley), the person making the best interests determination must consider (so far as is ascertainable) "[P]'s past and present wishes and feelings … (b) the beliefs and values that would be likely to influence his decision if he had capacity, and (c) the other factors that he would be likely to consider if he were able to do so". I return to these provisions later.

107. I took a different approach, plainly on different facts, in Wakefield MDC and Wakefield CCG v DN and MN [2019] EWHC 2306 (Fam) ('DN'), in which I made 'anticipatory declarations' in respect of P who (I found) had capacity except at times when he had periodic 'meltdowns'. Whether this proved easy to operate on the ground as a matter of practicality is outside my knowledge.

108. In A Local Authority v PG & Ors [2023] EWCOP 9, Lieven J, having tactfully indicated that she did not consider that my approach or Sir Mark Hedley's approach "is the correct or indeed better approach" on the facts of her case preferred the "longitudinal approach" adopted by Sir Mark Hedley adding:

> *"How an individual P's capacity is analysed will turn on their presentation, and how the loss of capacity arises and manifests itself".*

109. In this case, Calderdale does not accept that Stitch' capacity fluctuates; Mr Patel and Ms Gardner argue that Stitch lacks capacity in all relevant decision-making, and does not 'lose' it just when she is permitted to make her own decisions. Their secondary position is that the longitudinal approach of Sir Mark Hedley in PWK should be adopted in this case rather than the DN approach.

110. Dr O'Donovan suggested specifically that given the chronic and unpredictable nature of Stitch's presentation, where the court concludes that Stitch's capacity fluctuates it may be appropriate to determine capacity on a longitudinal basis. By contrast, Ms

Roper has argued that this case is closer to the DN scenario than the PWK scenario and that I should therefore consider making anticipatory declarations as to Stitch's capacity and best interests under section 15 and 16 of the MCA 2005, to cover those occasions when she demonstrates to her carers that she is unable to make a capacitous decision as to her care.

111. I have reached the conclusion on the evidence which I discussed above (§§36-45) that, recognising all of the caveats described above, in the area of residence and care there are times when Stitch appears to articulate a level of understanding and reasoning which suggests that she does have capacity; indeed, this was a finding which I made about this and many aspects of her decision-making in 2023. However, at other times, she shows such a clear and marked lack of understanding or reasoning about her residence and care needs that she could not be viewed under any circumstances as having capacity. In this regard, and on all of the evidence laid before me, I feel driven to the view that she does not have capacity to make decisions about her residence and care, but her lack of capacity does to a degree fluctuate to a point where she has been, and from time to time, when settled, appears capacitous.

112. Looking forward, as Lord Stephens exhorts the Court of Protection to do (see §11 above), this is a case in which I should consider a future continuous state of affairs where the demands on Stitch are as 'unpredictable' (see §105 above) as they have been in the past, and where her dysfunctional attachment style causes her to function (again as it has in the past) in a way which is overpoweringly "needs led". I am satisfied that in the future she will continue to prioritise what she thinks she needs to achieve validation. In these circumstances, she is likely in my judgment to become easily overwhelmed and/or driven by her needs. This case is, in my judgment, more like PWK than DN; that it would impose an all-too onerous burden on the staff at Oak House if I were to require them to operate under a programme of anticipatory declarations. It is thus appropriate that I should take a longitudinal perspective on her capacity in these regards, and to declare (albeit with reservations) that she is incapacitous in these areas.

The same longitudinal approach was adopted in relation to contact; Cobb J also found it more straightforward on the evidence to resolve the questions about capacity to use the internet and social media, and to make decisions about engaging in sexual relations. However, in relation to the last of these, he noted that:

121. It may be that low level sex therapy could assist Stitch to understand what options are available for her to experience sexual gratification in the absence of a partner; this may take several months. Calderdale has indicated its commitment to continue to offer support to Stitch in this area, and will take steps to review her capacity in this area, following any support of education. A report from the local Consultant Clinical Psychologist for the relevant NHS Trust confirms that the trust offers work around sex education when an individual has a significant lack of knowledge around sexual health. Whether this is the right type of service for Stitch, I am not sure. If the correct resource is identified (and Calderdale should endeavour to locate the same) – and if Stitch is willing to engage (she has shown ambivalence in the past) – I feel hopeful that some targeted work with Stitch and support around the issue of consent to sex and the making of

> *choices in relation to sexual activity may well enable Stitch to achieve/have capacity in this area in the future. I make provision for this in the order which I propose (see §124 below).*

Finally, he was clear that Stitch was deprived of her liberty, which would require him to consider authorisation at a subsequent hearing.

Having declared that Stitch lacked capacity to make the decisions, Cobb J concluded thus:

> *129. Looking forward, it is important that all those who work with Stitch take full account of her own views as an integral component of the arrangements for her care and support, in strict observance with section 4(6) MCA 2005; within the parameters of the support and protection plan, Stitch's personal autonomy must be respected and her decision-making encouraged. The evidence which has been presented in this application suggests that at times Stitch is close to capacity (or even at times capacitous) in her decision-making; in those regards, thought must routinely be given to whether she may gain capacity (section 4(3) MCA 2005). Great weight must be attached to her views when they are clearly expressed; Stitch will be able to make many choices in her life, but not all.*

Comment

Cobb J is shortly to take his position on the Court of Appeal. This decision shows just what an asset he will be to the Court of Appeal bench, but what a loss he will be to those requiring determination of delicate issues at first instance.

Although (necessarily) very lengthy, the judgment should be required reading for all those who are required – for whatever reason – to think about capacity in the social care context. Not only does it set out a very helpful recap of the principles to be applied (at paragraphs 9-12), and provide observations of wider relevance about such thorny issues as fluctuating capacity, it then applies those principles to a paradigmatically complicated case (made more complicated, as so often, by the human factors involved on the side of the assessors and those advising them) in a rigorous and sensitive way, never forgetting that there is a person at the centre – and a person who has been given the choice of her own pseudonym.

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PROPERTY AND AFFAIRS

Statutory wills and public hearings

W v P [2025] EWCOP 11 (T3) (Rajah J)

Media – court reporting – private hearings

Summary

The person at the centre of this matter, 'P,' was an unnamed person who had previously been in the public eye, and significant wealth. P was now elderly, had severe dementia and was unable to communicate; he appears to have lost capacity to make decisions as to his property and affairs and execute a will. His wife, 'W', made an application to the Court of Protection that a statutory will be made for estate planning purposes, with the support of P's family.

For reasons which are not explained in the judgment, P was joined to the proceedings, and the Official Solicitor was appointed P's litigation friend; an attended hearing was listed. Prior to that hearing, W made an application to the court not to make the standard order pursuant to Practice Direction 4C that the attended hearing should take place in public prior to hearing W's submissions on this issue. Rajah J heard this application in a private hearing, which took place without notice to the media.

Rajah J worked through the relevant framework for private and public hearings in the Court of Protection:

- COPR 4.1 sets a general rule that all Court of Protection hearings are heard in private, but the Court has a power under COPR 4.3 hold hearings in public. If no order is made to list a Court of Protection hearing in public, it will be heard in private. No reporting restrictions are required for private hearings, as "[p]*ursuant to section 12(1)(b) Administration of Justice Act 1960 it is a contempt of court to publish information relating to Court of Protection proceedings where the court is sitting in private*" (paragraph 6)
- Practice Direction 4C has effectively reversed the 'normal' position by creating a 'supposition' (paragraph 11) that hearings are to take place in public with reporting restrictions granting anonymity to P and P's family.

Mr Justice Rajah considered that there was not a legitimate public interest in W's application which outweigh P's Article 8 privacy interest, and effective reporting restrictions could not be drafted which would protect P's identity:

> *13. In this case, a public hearing which identified P would inevitably result in significant publicity to satisfy public curiosity. That would be a serious intrusion in the private life of P and his family. For reasons on which I will not elaborate here, this could have serious consequences for P and his family. The "supposition" that a transparency order would protect P's privacy is, in this case, displaced. I am satisfied that it is not possible to craft reporting or other restrictions which would protect P's identity and the privacy of P and his family. There is a very significant risk of jigsaw identification unless the reporting restrictions (and other measures such as exclusion of the public from parts of the hearing) were so stringent as to make a public hearing meaningless. This substantially outweighs any legitimate public interest in this hearing being in public, even with reporting restrictions, and amounts to a good reason for the matter to be heard in private.*
>
> *14. It is for essentially the same compelling reasons that I have reached the conclusion that there will be no published judgment on the substantive application (in accordance with the Practice Guidance of 16 January 2014:*

Transparency in the Court of Protection - Publication of Judgments). Any judgment would have to be so heavily redacted that it would make little sense. I will authorise only the publication pursuant to COPR 4.2(2)(b) of this summary of the judgment relating to privacy, delivered ex tempore in private, and shorn of the details which are relevant to why jigsaw identification is such a risk, why public curiosity is inevitable and as to the unjust impact publicity would have on this particular family.

Considering older case law which pre-dated *Abbasi*, Mr Justice Rajah considered why the Court of Protection may have different rules regarding privacy than other courts:

9. The reasons for the statutory regime in COPR 4.1 to 4.3 were explained in the Court of Appeal in Independent News Media v A [2010] 1 WLR 2262 in relation to their predecessor provisions. Those who have mental capacity can deal with their private affairs confidentially and in private. The general rule in COPR 4.1 recognises that a person who lacks mental capacity to deal with their private affairs should similarly be entitled to the same privacy. The Court of Protection is only involved because the person's reduced capacity requires interference in their personal autonomy. Court of Protection hearings should therefore be held in private unless there is a good reason not to. The provisions of COPR 4.1 to 4.3 encapsulate the Article 8 rights of persons who are vulnerable, and whose involvement in court proceedings arises from their vulnerability and not their choice. The provisions rearticulate a longstanding common law exception to the principle that justice should be done in open court: see for example Scott v Scott [1913] AC 417. The jurisdiction for good reason to depart from these provisions recognises that there will be cases where the public interest in an individual case outweighs the privacy considerations…

The press was not informed of the hearing, nor given an opportunity to make submissions on W's application that it be heard in private:

15. No notice was given to the press of this hearing. Section 12 Human Rights Act 1998 provides:

> *"(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.*
>
> *(2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied:*
>
> *(a) that the applicant has taken all practicable steps to notify the respondent; or*
>
> *(b) that there are compelling reasons why the respondent should not be notified."*

16. In Re EM, Mostyn J expressed the view that s. 12 was not engaged if the proceedings remained in private but the Court was asked to consider making a permissive order under COPR 4.1(3) permitting the press to attend. The press would not need to be notified of an intention to seek such an order. Practice Direction 4A takes the same approach- see paragraph 8. Such a permissive order does not restrict the right to freedom of expression, it enables it, and thus s. 12 is not engaged.

17. In this case, there is not an application for such a permissive order. I am not considering granting any relief

> *at all. I am being asked not to make an order of my own motion under PD 4C. I am asked not to interfere with the general rule under COPR 4.1. In such circumstances, s. 12 HRA 1988 is not engaged. This may seem a fine distinction, and in another case a judge may baulk at such niceties bearing in mind the important principles involved. But I am satisfied that this is a case in which notice to the press would itself undermine the purpose of the proceedings being in private.*

Comment

We would note that in many ways privacy is very much the norm of property and affairs applications. The great majority of the work of the Court of Protection is in property and affairs, with most of these applications being considered on the papers without an attended hearing (the trigger under Practice Direction 4C for making a hearing public). Dispute Resolution Hearings (where many property and affairs applications are resolved) are also not in public, being expressly excluded from the Transparency Practice Direction.

Only the small number of property and affairs applications which are heard at attended hearings and are not Dispute Resolution Hearings fall under the PD4C definition of an 'attended hearing' at all. The case before Rajah J did not (on the face of the judgment) appear to be a disputed application; the far more 'normal' course for it would have been to be considered by the court entirely outside of the public eye, without any issues of private or public hearings emerging.

Whether this is 'right' or 'wrong' is a matter we suggest could usefully be addressed in the context of amendments badly needed to the MCA 2005 to put in place a framework for transparency which would enable much less 'clunky' orders to be made, with all the attendant potential for errors to creep in.

For the perspective of the media, Joshua Rozenberg has written a blog post on this case, questioning why the media could not have been given notice and an opportunity to make submissions on the decision to hold the matter in private. Joshua also discussed this case at a webinar on 27 March, along with Katie, Arianna and Vikram Sachdeva KC.

Finding, searching and viewing lasting powers of attorney

The Office of the Public Guardian ('OPG') has recently published a useful blog on its website: "Your questions answered: Finding, searching and viewing lasting powers of attorney (LPA)."

Family care payments

On 7 March 2025, the OPG published a guidance document for deputies, OPG's approach to family care payments. The guidance considers situations other than where a family member is providing care through formal employment. While it only governs deputies, the Guidance states that attorneys may also find the document useful.

While much family care is provided on an informal basis without payment, the guidance notes that in some cases a payment can ease the carer's own financial situation and enable them to continue in their caring role. The guidance identifies that the Public Guardian considers that payments to enable such care can be in P's best interests, provided the factors this guidance outlines are considered. When managed properly, it is often best for everyone if P gets a combination of professional care and care from a family member, thereby enhancing the quality of family life while also providing respite for the family member.

The kinds of care arrangements that might justify a family care payment include those where:

- there is no contractual relationship between P and the family member involved
- the family member is providing the care by way of their natural love and affection for P
- the care is informal in nature and not by way of a job description
- the family member(s) do not have formally agreed hours, breaks or holidays
- there is little or no demarcation of work between family members, and no one is responsible for securing contractual terms or service delivery (such as a case manager).

Considering the legal framework for such payment, the guidance advises that authority should be sought where a deputy is taking family care payments for themselves to ensure compliance with fiduciary duties. Reviewing the authorities on gratuitous care in the Court of Protection, the guidance notes:

- The importance of the deputy's working through the best interest checklist
- That the court has previously approved a rate of 80% of the commercial rate of payments for care due to the payment's not being taxable if HMRC agrees that they are voluntary payments

The guidance states that professional deputies will not normally require specific authority from the Court of Protection to make family care payments:

> [a]*s long as the professional deputy can provide evidence of best interest decision making.* […] *However, in cases where agreement on the amount of payment cannot be reached, or there is a possibility of challenge by other family members, the professional deputy may wish to apply to the court themselves for specific approval of payments.*
>
> *The Public Guardian may apply to the court for directions if they consider that the payments do not follow this guidance and are not in P's best interests. In extreme cases, they may apply to the court for removal of the deputy.*

For lay deputies, the OPG recommends that the deputy should apply for specific approval for payments to themselves or someone they are closely connected to, such as a spouse or a child "where the decision to pay may be influenced by the close relationship rather than objectively made in the best interests of P."

The guidance makes clear that deputies should take the following factors into consideration in best interests decision-making:

> *The care must be reasonably required to meet P's needs and be of a good standard. If in doubt, the deputy may need to seek a care assessment from social services. If there has been any litigation claim for damages, the deputy should consider the level of care recommended by experts in the course of the litigation claim.*
>
> *The payments must be affordable taking into account P's resources, age, and life expectancy. If the payments cannot be met out of P's income, deputies must consider the effect on capital, having in mind P's future care needs.*

Payments must properly reflect the input by the family/carer. There should be evidence of how the care payment has been calculated in relation to the degree of care being provided. If P is a very young child, deputies should consider whether care is over and above what a parent would normally give.

The care must actually be provided. Temporary interruptions in provision of care, for example if P is in hospital, do not mean the payments need to stop, but long-term changes in P's living arrangements that affect the amount of care being provided must be considered – for example, a permanent move to a care home or supported living arrangement.

Deputies should consider payments alongside the level of professional care in place, i.e., they should be necessary to supplement professional care. Payments should represent a saving on the cost of professional care.

Payments should take into account any other contributions P makes towards the running of the household or paying bills. Payments may need to be adjusted down if the carer is living in P's property rent-free or is getting other income.

Payments should take into account the overall family situation, for example, whether anyone is in gainful employment. If two parents are providing care, what is their respective contribution? If P needs two people at any time to manage their needs, payments may need to increase to reflect this.

Payments should be agreed in consultation with the carer and other family members, where possible. It is good practice to consult others with an interest in P's affairs to avoid situations of conflict.

The Guidance offers three approaches to calculating the amount of payment:

Where P's estate is sufficient, and the family provide most of the care

In this situation the deputy may consider what allowance would be needed. If the amount is affordable, sustainable, and reasonable in relation to the amount of care provided, then payment can be made.

Where P's estate is sufficient and a significant amount of professional care is provided

The deputy may wish to calculate the allowance with reference to the approach Senior Judge Lush recommended in the case of Re HC [2015] EWCOP 29. That involves calculating family care by taking the commercial cost of care and reducing it by 20%. This in turn follows the approach taken by the King's Bench Division of the High Court in quantifying heads of damages in personal injury litigation.

The OPG will generally refer to the mean hourly salary (less 20%) for carers in the Annual Survey of Hours and Earnings (ASHE) (Table 26.5a) published by the Office for National Statistics as a benchmark for the commercial cost of care.

Where the High Court has agreed that the higher rate of the 80th percentile represents the commercial cost of providing care for P and has granted approval for a periodical payment order (PPO) at the higher rate, the 80th percentile will be an acceptable starting point as the benchmark for care payments. Family care payments and PPOs may be index linked, in which case annual assessment against the ASHE tables will not be required…

Where P's estate is limited

In this situation the payment should reflect only what P can reasonably afford.

When considering affordability, if there is an annual periodical payment P gets as part of a litigation claim, then such a payment is normally for care and case management. It can also be useful to refer to counsel's advice on settlement of a damages claim. This helps in accessing an overall budget for family care when any professional care costs and case management costs are eliminated from the equation.

In some situations, the carer may have given up a well-paid job to care for P. It is the Public Guardian's view that, in all but the most exceptional circumstances, family care payments are not intended to replace salaries.

The guidance recommends that where it is deemed necessary to increase an allowance, family care payments should index-linked to the commercial cost of care to avoid repeat applications to the Court of Protection. The guidance also notes that:

Deputies need to bear in mind that, when applying the different factors in this guidance, and particularly taking into account affordability, payments can vary widely. It is possible, for example, that two carers providing the same amount of care may get different family care payments. While on the face of it this appears unfair, it reflects the fact that carers' situations must be considered in the round rather than applying a simple formulaic approach.

In recent years, ASHE increases have been modest and, in some cases, have reduced. Carers may need to be aware therefore that they are unlikely to see large annual increases in payments for care as a result of this indexation.

The guidance emphasises the importance of good record-keeping and ongoing review of the payments to ensure they remain appropriate and affordable. The guidance notes the need to review due to a change in living arrangements, care needs, entitlement to continuing healthcare funding, the carer's circumstances changing or changes in P's financial situation.

Bond providers

The OPG has outlined two changes to surety bonds.

From 1 April 2025 the rates applied for surety bonds with Marsh have increased. This will be applicable for both any new bonds and any surety bonds due for renewal from 1April 2025. Marsh will be contacting existing customers to explain the changes and what this means for bonds that are in place 30 days in advance of any renewals.

In April 2023, the OPG procured a new surety bonds contract. Two of the suppliers are no longer contracting through this framework, and one provider (Marsh) remains.

The OPG has identified that:

Following review of how the contract is supporting our wider operations across Office of Public Guardian and Court of Protection, we have taken the decision as the contracting authority to Commence a new procurement for this service. This decision is in no way reflective of any dissatisfaction with the service we are receiving from our current provider Marsh. In parallel, the Guardianship bonds contract is also due to come to an end this summer and so

we are taking the opportunity to procure both services together.

We have listened to stakeholder feedback to help refine our requirements for the new procurement exercise. An expression of interest outlining our intention to run a new procurement process was issued on Friday 14th February and can be found here Deputyship and Guardianship Surety Bonds (MoJ CoP and OPG) - Find a Tender.

The timeline for this is being finalised and is likely to be launched later this year. We'll update you with any relevant information as things progress.

PRACTICE AND PROCEDURE

Short note: permissions to appeal and traps for the unwary

In *Re (A Minor) (Permission To Appeal)* [2025] EWHC 638 (Fam), a family law case, the appellant sought permission to appeal a fact-finding judgment five months out of time which provided Hayden J with an opportunity to review the case law on the procedure and timing of appeals in the modern day. His Lordship observed at paragraph 10.

> *It must be said that times have changed since [Sayers v Clarke Walker [2002] EWCA Civ 645] was delivered, particularly post-pandemic, where many, I suspect most, judgments are now handed down electronically. In this process, which usually involves a draft judgment being sent to the parties for corrections, amendments, anonymisation and compliance with Transparency Orders, the date that the decision is formally handed down can sometimes get lost. I suspect that compliance with the Rules may frequently be "overlooked".*

To avoid any ambiguity as to when a judgment is handed down and, accordingly, clarify when a first instance judge may hear an application for permission to appeal their own decision, Hayden J gave the following guidance in relation to the Family Procedure Rules which, in this context, is equally applicable to Court of Protection cases:

> ***An oral hand-down or ex-tempore judgment:***
>
> *For the purposes of an application for permission to appeal to a first instance judge, the decision to be appealed is made either at the time of the oral hand-down or the date on which the judge adjourns the permission application to be heard. After that point, the first instance judge has no further jurisdiction and recourse must be had to the Appellate Court.*
>
> *If no permission application is made at the decision hearing and, accordingly, there has been no adjournment, the lower court has no further jurisdiction and cannot consider any retrospective application for permission to appeal.*
>
> ***A reserved judgment, handed down either in court or electronically:***
>
> *A judge who has written a reserved judgment will, ordinarily, circulate the draft of the judgment to the parties. This will be to afford the opportunity, most particularly where the parties are represented, for corrections, amendments, anonymisation and compliance with Transparency Orders, et cetera.*
>
> *The judge will and ought to set a deadline for response, indicating that following consideration of any suggested amendments, the perfected judgment will be handed down. In the majority of cases, this will be an electronic hand-down and thus not require the attendance of the parties.*
>
> *When the judge has perfected the draft, he or she must communicate to the parties the date on which the judgment will be handed down. This will afford them further opportunity to consider or indicate whether they wish to appeal.*
>
> *In the event that an application is to be made, the judge will either provide that the hand-down hearing should be attended, so that the application may be made, or set a separate date for the application to be heard. It is also possible that an application for permission may be made in writing, where the judge agrees. Again, this may*

be either at the hand-down date or the adjourned date.

*In McDonald v Rose (supra), the Court of Appeal emphasised that adjournments should not be necessary in the generality of cases. In contemporary practice, as I have referred to above, this has even greater force. The judgment will have effectively been pre-circulated in draft and ordinarily that will provide sufficient time for the parties to decide, prior to the hand-down hearing, both whether they wish to seek permission to appeal **and** to formulate grounds and such supporting submissions as may be necessary. Adjourning the application will inevitably serve to increase delay and generate a risk of some procedural complication. But, as the Court of Appeal accepted, "it will nevertheless sometimes be justified".*

To reiterate, for the purposes of FPR 30.3(3), the 'decision to be appealed'[1] date is either the date of hand-down, if no application is made, or the date on which the application for permission to appeal is determined.

Notice of hand-down of reserved judgment must be given in the daily Cause List. The following wording is likely to be helpful:

> *"This judgment will be handed down remotely by circulation to the parties or their representatives by email."*

Where appropriate, the following should be added:

> *"…and released to the National Archives.*
>
> *A copy of the judgment in final form as handed down should be available on the National Archives website shortly thereafter."*
>
> *19. In order to achieve clarity, when the perfected judgment is sent to the parties, it seems sensible to include the following:*
>
> > *"I attach the judgment in this case by way of hand-down, which will be deemed to have occurred at [**time**] on [**day, date, month, year**]."*
>
> *20. Compliance with the above should avoid any ambiguity as to when a judgment was handed down and, accordingly, clarify when a first instance judge may hear an application for permission to appeal their own decision.*

Hayden J also identified a trap for the unwary at paragraph 21:

> *Whenever a party seeks an adjournment of the decision hearing to consider whether to make an application for permission to appeal or to prepare for it, they should also seek an extension of time (see McDonald v Rose para. 21(5)). The Court of Appeal was very clear that, even though a decision hearing may be adjourned, the 21 days (within which an appeal must be filed, in accordance with the FPR) run from the date the decision was formally announced and **not** the date that the formal order recording the decision was issued. Underhill LJ regarded this as "uncontroversial" and considered that it "should be known to any practitioner, though experience shows it is often overlooked".*

This is a useful judgment to have in one's back pocket for the inevitable moments where judgments come in, the question of an appeal arises and all the legal team are frantically busy. The key takeaways are: work out when hand down is as a priority; seek an extension of time at the same time as seeking permission from the

[1] In the COPR, r.20.10(3).

lower court – particularly if issues such as funding need resolution – and, importantly, don't forget that the window doesn't close if you haven't asked permission from the court below but time keeps ticking. Be bold!

Court of Protection statistics October – December 2024

Following a hiatus during the transition to a new data system in July 2024, Court of Protection figures have been reintroduced into the MoJ quarterly statistics, although there is a statistician's note that "*due to improved recording practices and several changes to the categorisations published, it is not recommended that comparisons to data prior to Q3 2024 be made.*"

*The statistics show that i*n October to December 2024, there were 9,381 applications made under the MCA 2005. Of those, 34% related to applications for appointment of a property and affairs deputy. They also show that there were 2,044 applications relating to deprivation of liberty under the MCA 2005 in October to December 2024.[2] This is 22% of the applications made under the MCA 2005 in that quarter. Of these:

- 219 were identified as being for orders under s.16 (presumably in the context of wider issues and / or where it was recognised that the *Re X* streamlined procedure was not appropriate);
- 1,258 were identified as being *Re X* applications (which are for s.16 orders, but on a 'paper basis');
- 567 were s.21A applications relating to DoLS authorisations.

[2] We address the statistics for applications to the High Court in respect of children in the Children's Capacity Report.

MENTAL HEALTH MATTERS

Mental Health Bill progress

The Mental Health Bill had the first day of its Report stage in the House of Lords on 31 March, and its second day on 2 April.[3] Tim Spencer-Lane has, ever, provided an exceptionally helpful summary, which we reproduce below.

The first day of report on the Mental Health Bill in the House of Lords took place on 31 March. The Government suffered defeats on the following amendments:

1. To create a new category of "authorised person" who can carry out detentions, as well as the police, under the Mental Health Act. The authorised person would include health and care professionals. This was passed by 223 – 157 votes.
2. To limit the duration of community treatment orders to 12 months and provide they can only be extended following consultation with the patient and others, and are subject to six-monthly reviews. This was passed by 272 – 157 votes.
3. To require that when an AMHP appoints a nominated person for a child lacking competence, they must appoint a local authority (if the child is subject to a care order), a special guardian, someone named in a child arrangements order or anyone with PR. This was passed by 218 – 143 votes.
4. To require the de-briefing of mental health patients after they have left hospital, to review their experience of hospital treatment. This would be carried out by IMHAs within 30 days of discharge. This was passed by 209 – 143.

There were also a number of commitments made by the government minister, Baroness Merron.

Learning disability and autism

The Minister committed to monitoring the number of people with a learning disability and autistic people who are detained under the Mental Capacity Act, and will "include a line on this in standard publications". If there is an increase in numbers and the Mental Capacity Act is being used inappropriately, "we will ensure that appropriate action is taken."

The Minister also committed that within a year of Royal Assent, and each year subsequently, government will lay a Written Ministerial Statement in both Houses, setting out what has been done to implement the Bill.

Nominated person and parental involvement

The Minister committed to establishing an expert taskforce to support the development of the code of practice on the nominated person appointment process for children and young people. This would include Baroness Berridge and Baroness Butler-Sloss.

Treatment

The Minister said that government will engage with stakeholders on whether revisions to regulations should provide extra safeguards for artificial nutrition and hydration being provided under the MHA.

[3] The current version of the Bill can be found here, as can Alex's annotated version of the MHA as it would look if amended by the MHA Bill as it stands.

Advance choice documents

On Advance Choice Documents (ACDs) – the Government will explore how the duties can be strengthened and clarified, and intend to bring forward an amendment in the Commons. Also, there will be a requirement in regulations to include a plan to make an ACD where appropriate, in the patient's care and treatment plan.

Government amendments

All Government amendments were agreed without a vote.

Reforms to criminal justice system

MoJ committed to the introduction of a new strategic body to oversee transfers from prison to hospital.

The second and final day of report on the Mental Health Bill in the House of Lords took place on 2 April.

The Government managed to avoid defeat on three votes:

1. Mental Health Commissioner - Baroness Tyler (Lib Dem) tabled an amendment to establish the office of the Mental Health Commissioner and make provision for relevant duties and responsibilities. This was defeated by 129 – 49 votes.

2. Long-term segregation - Baroness Hollins (Crossbench) tabled an amendment to introduce an independent review process for patients with learning disabilities or autism placed in long-term segregation under the Mental Health Act 1983. This was defeated by 106 – 51 votes.

3. Funding - Lord Stevens (Crossbench) tabled an amendment to require that each financial year mental health spending under the Mental Health Act 1983 in England by the Government does not decrease. This was defeated by 112 – 19 votes.

Human Rights Act 'gap'

There was no vote on Baroness Keeley's (Labour) amendment to ensure private care providers are covered by the Human Rights Act 1998 when delivering mental health care on behalf of the NHS and local authorities.[4] The Government minister agreed to revisit this matter when the Bill is considered in the House of Commons. The amendment was withdrawn.

Children and young people

Lord Meston (Crossbench) withdrew his amendment to introduce a statutory test of competence for children subject to the Mental Health Act 1983.

The next stage is third reading before the Bill goes to the House of Commons.

Monitoring the Mental Health Act in 2023 – 2024

The CQC has published its annual Monitoring the Mental Health Act report. Its summary largely speaks for itself.

> *CQC and the Mental Health Bill*
>
> *We welcome the Mental Health Bill, which was introduced in the House of Lords in November 2024 and will bring about important reforms to increase the safeguards for people who are detained.*

[4] [our editorial note – identified in the *Sammut* case: see also below]

The new statutory principles embedded within the Bill, and accompanying changes to the Code of Practice, will provide for a sharper focus on the rights and experiences of mental health patients, people in custody who have a mental disorder, and people with a learning disability and autistic people.

However, as highlighted in our 2022/23 report, legislation alone won't bring the changes needed. Better funding, improved community support and investment in workforce are essential to improving mental health care and providing better outcomes for patients.

Systems

We remain concerned that the high demand for mental health services, without the capacity to meet it, means people cannot always get the right care at the right time. Not being able to access care in a timely way can lead to people's mental health deteriorating while they wait for support.

Through our monitoring activity, we have seen how system pressures mean people are detained far from home or in environments that do not meet their needs. Many services told us that patients seem to be more unwell on admission than in the past. Services need to balance the increase in demand for inpatient beds with ensuring existing patients are not discharged too soon.

Workforce

In 2023/24 there were continuing problems with workforce retention and staffing shortages, as well as concerns around training and support for staff. Although the mental health workforce has grown by nearly 35% since 2019, shortages in both medical and support roles continue to have a negative impact on patient care.

Shortages of doctors also continue to affect the delivery of our second opinion appointed doctor (SOAD) service. We remain concerned about the long-term sustainability of the service, with proposals in the Mental Health Bill due to increase the numbers of second opinions required while reducing the timeframes for delivery of some second opinions.

Inequalities

We are concerned that some of the key issues we raise in this report, including access to mental health support, are particularly challenging for certain groups of people, such as people from ethnic minority groups and those living in areas of deprivation. We identified several issues around people not understanding their rights, despite services having a legal duty to provide this information.

There was variation in how well services met people's needs. While many provided access to spiritual leaders, we remain concerned about gaps in the knowledge of staff around caring for autistic people.

Children and young people

Children and young people continue to face challenges in accessing mental health care. Increasing demand is leading to long waits for beds, and increases the risk of being placed in inappropriate environments and/or being sent to a hospital miles away from home.

Once in hospital, we are concerned that access to specialist staff is being affected by low staffing levels, leading to patients' needs not being met. In addition, the quality of physical environments for children and young people varies; access to food and drink, and food preparation facilities were key issues for many children and young people.

Challenges in transitions of care between children and young people's mental health services and adult mental health services remain, with many young people still falling through the gaps and not getting the care and support they need.

Environment

Through our MHA monitoring visits, we found that the quality of inpatient environments continues to vary. We are concerned about the impact of poor-quality environments on patients and have seen examples of how ageing and poorly-designed facilities affect people's care.

Being able to go outside brings therapeutic benefits for patients, but access to outdoor facilities varied across services. Gardens were usually well maintained, and in some services, patients were encouraged to grow plants and vegetables. However, we also found examples of unwelcoming gardens and at some services, patients' access to outdoor spaces was limited. This issue was also raised by members of our Service User Reference Panel.

The CQC also have some familiar (but nonetheless problematic) things to say about the MHA / MCA interface:

We also continue to see different interpretations of the interface between the Mental Health Act and the Mental Capacity Act, which the Deprivation of Liberty Safeguards (DoLS) are part of. In recent State of Care reports, we have raised concerns that providers' understanding of DoLS remains varied. This affects how the safeguards are applied and, in some cases, means people may not have a DoLS authorisation in place when they need one.

In the 2018/19 Monitoring the Mental Health Act report we raised our concerns that neither patients nor professionals were likely to be clear on when the MHA or DoLS should be used. This could lead to the safeguards and rights relating to deprivation of liberty being applied inconsistently. We suggested that the government should update the respective codes of practice to reflect evolving case law needs, but this has not happened.

In 2019, the government passed the Mental Capacity (Amendment) Act, which planned to replace the DoLS system with the Liberty Protection Safeguards (LPS). While this has been delayed, the introduction of LPS will not resolve the questions of interface between these systems and the MHA.

We remain concerned that clinicians may not always be considering where the MHA can be used when the DoLS framework is not appropriate and where the patient is objecting to their placement. This concern is heightened by widespread delays in DoLS assessments, which can mean that some patients never receive an independent assessment of their clinician's decision to initiate an urgent deprivation of liberty. When such urgent applications expire, delays in the system mean that patients and clinicians are left

> *in legal limbo, without any effective safeguard or procedure.*

Interestingly, and perhaps stretching precisely what had formed the focus of the decision in *Sammut*, the CQC continued:

> *In 2024, the High Court decided that such legal limbo excludes patients in independent health providers from the reach of state obligations to its detainees under the Human Rights Act. In other words, the High Court found that, since a DoLS authorisation was not in place, it could not be argued that the functions carried out by the independent health provider were of a public nature. As such, the significant procedural failures in DoLS implementation have the effect of pushing some detained people beyond the reach of the Human Rights Act.*
>
> *The court also found that neither the joint-funding arrangement under section 117 of the MHA nor CQC regulation could be used as evidence to conclude that the provider in question was delivering functions of a public nature. As a member of the National Preventive Mechanism, we are concerned that failure to close this gap may also have implications for ensuring that people have protections against inhuman or degrading treatment. We note that this issue has been raised in parliament over the passage of the Mental Health Bill and hope that government will want to close this gap in the protection of patients.*

Finally, we also take this opportunity to congratulate Dr Arun Chopra on his appointment as the first Chief Inspector of Mental Health for the CQC. We strongly hope that Dr Chopra will bring with the spirit of the Scottish Mental Welfare Commission where he has been for the past few years, as that latter body plays such a helpful role as critical friend north of the Border

Identifying whether a person truly means to take their own life

The difficulty of determining whether a person truly intends to end their own life is an issue that is vexing Parliament at the moment. It is also highlighted in the decision in *Shipsey & Anor v HM Senior Coroner for Worcestershire* [2025] EWHC 605 (Admin). It concerned the inquest into the death of Bethany ('Beth)' Shipsey, who died in Worcestershire Royal Hospital on 15 February 2017, aged 21. Beth died from the toxic effects of Dinitrophenol ("DNP") in a quantity of unlicensed slimming tablets she had purchased over the internet. At the time of her death, she was on home leave from the in-patient mental health unit at Holt Ward, Newtown Hospital, Worcester.

At the inquest in 2018, the Coroner recorded the following narrative verdict:

> *Bethany Shipsey was a young woman with significant mental health difficulties who, on 15 February 2017, died as the result of suicide having deliberately ingested a quantity of tablets containing the drug Dinitrophenol which she had purchased over the Internet.*
>
> *She did so intending to take her own life and was admitted into the Worcestershire Royal Hospital at approximately 5:30 PM on that day.*
>
> *The clinicians having care of her recognised the extreme toxicity of the drug, the lack of antidote, the risk of rapid deterioration and the need for close monitoring of her condition with a view to providing supportive treatment.*
>
> *Notwithstanding this the clinicians failed to take sufficient or adequate*

> *steps to monitor her leaving them unprepared to deal with the rapid deterioration which ensued.*
>
> *There were significant failings in the care given to her which amounted to a lost opportunity to provide supportive treatment which although probably would not have saved or prolonged her life may nevertheless have done so".*

Beth's parents initially attempted to challenge the coroner's finding that the death was as a result of suicide – rather than, as they contended, a cry for help in the context of substandard care which amounted to neglect – by way of judicial review. This was refused at the permission stage by a decision of David Lock QC, sitting as a Deputy High Court Judge.

Some two years later – and now six years after the initial claim for judicial review, the matter having been stayed pending the hand down of the Supreme Court judgment on the standard of proof in suicide, *Maughan* [2020] UKSC 46 – Beth's parents renewed their challenge by way of a s.13 Coroners Act 1988 application.

One element of the challenge – which went through a variety of iterations, was that Beth "*lacked the mental capacity to form the intent to take her own life*." As the Divisional Court noted: *"The Claimants argued that, relying on the judgment of the Court of Appeal in R v Rebelo [2021] Cr App R 3, [2021] 4 WLR 52, a fresh inquest could find that Beth was unlawfully killed due to gross negligence manslaughter perpetrated by the person who sold her the DNP pills*" (paragraph 45).

Much of the judgment is concerned with the complex procedural issues in the case which arose from a multitude of applications brought over time by the claimant parents. Ultimately, however, the court accepted fresh evidence that Beth had not intended to take her own life – or, as it put it at paragraph 81, the fresh evidence was consistent with the suggestion that "*Beth's underlying EUPD condition drove her to take the DNP pills to relieve tension, as opposed to her actions being motivated by an intention to end her life.*"

The Divisional Court determined to amend the Record of Inquest rather than ordering a fresh coronial investigation.

While the claimants achieved victory for their daughter after an exceptionally lengthy and no doubt exhausting fight, they were not rewarded in costs. As the court set out:

> *118.* […] *authority at the highest level makes clear that a Coroner will not be ordered to pay costs on a section 13 application that has succeeded, unless the Coroner has acted flagrantly improperly, "entered the fray" or unreasonably refused to consent to a section 13 application: R (Davies) (No. 2) v HM Deputy Coroner for Birmingham [2004] 1 WLR 2739, per Brooke LJ at [22], [43] and 47] and Sir Martin Nourse at [58]; and the related authorities of R (Gudanaviciene) v Immigration and Asylum First Tier Tribunal [2017] 1 WLR 4095, per Longmore LJ at [36] and R (Maguire) v HM Senior Coroner for Blackpool and Fylde [2023] 3 WLR 103, per Lord Sales at [117].*

While the fresh evidence gave rise to the court's conclusion that Beth's suicide had not been intentional and that the conclusion of suicide could not stand, there was no criticism of the coroner who had handed down a lengthy and thorough conclusion.

CHILDREN'S CAPACITY

BMA Toolkit

The British Medical Association has published a toolkit on treating 16 and 17-year-olds in England, Wales, and Northern Ireland.[5]

This toolkit sets out the legal and ethical factors doctors need to consider when providing care and treatment for young people aged 16 and 17 years old in England, Wales, and Northern Ireland, such as consent, refusal of treatment, and confidentiality.

Deprivation of liberty statistics October – December 2024

The MoJ quarterly statistics show that there were 321 applications to the High Court for it to exercise its inherent jurisdiction to authorise the deprivation of liberty of a child during October to December 2024, up 13% compared to the same period in 2013, for this purpose, handling the same number of children. Almost all of these children were teenagers; 53% aged between 13 and 15 and 37% aged between 16 and 18 years. In October to December 2024, 294 orders were issued (up 5%), of which, 149 have had a final order made. 30% of the orders which were finalised between October to December 2024 lasted less than 3 months, while 14% lasted more than 12 months.

In 2024 there were 1,280 deprivation of liberty applications and 1,151 orders made by the High Court.

Parental consent to confinement

The vexed question of whether and under what circumstances parents can consent to (or otherwise authorise) the confinement of children under 16 came before HHJ Burrows (sitting as a High Court Judge) in *QX (Parental Consent for Deprivation of liberty: Children under 16)* [2025] EWHC 745 (Fam). As he noted:

> *3. The issues I had to determine in this case are almost identical to those before me in Lancashire County Council v PX [2022] EWHC 2379 (Fam) ("PX"). There, I had to decide whether a care order should be made where those with parental responsibility had asked the LA to accommodate and look after the child who had serious mental health conditions that made him impossible for them to care for. Furthermore, in the event that I did not make a care order, whether the child's care plan, which inevitably resulted in his objective deprivation of liberty at the behest of the State had to be authorised by the Court?*
>
> *3. I decided that a care order was not appropriate in that case. I reached the same decision in this case.*
>
> *4. In PX I decided I would follow the then recent decision of the High Court in Lincolnshire County Council v TGA [2022] 3 WLR 1297 (FD) ("Lincolnshire"), a judgment of Mrs Justice Lieven, meaning that parental consent to the child's arrangements acted to prevent the engagement of Article 5 of the European Convention of Human Rights (ECHR).*
>
> *5. I reached that conclusion in PX because I decided that unless I was satisfied that Lincolnshire was wrongly decided, I ought to follow it. However, at the earlier hearing in this case, I was mindful that the tide may have turned since then and the approach taken by Lieven, J needed to be reconsidered. This was particularly*

[5] Full disclosure, Alex has had input into the England Wales sections.

> *so because of the recent Court of Appeal decision in which Lieven, J's judgment in Re J: Local Authority Consent to Deprivation of Liberty) [2024] EWHC 1690 (Fam) had been reversed. Unfortunately, at both hearings in this case, and at the time this judgment is written, the judgment of the Court of Appeal in J had not been handed down.*

HHJ Burrows continued:

> *7. Having read and heard focused argument on this issue and having considered the relevant authorities relied upon, I have come to the same conclusion as I did in PX and I have followed Lieven, J. I do, however, have some misgivings, which were the basis of my interactions with counsel. It seems right for me to outline them here.*

Helpfully, HHJ Burrows undertook an exercise which is not always done in this context, namely separating out the individual elements of deprivation of liberty:

> *36. There are three components to a deprivation of liberty: see e.g. Storck v Germany (2005) 43 EHRR 96).*
>
> *37. The first is objective confinement which, following Cheshire West means for a person to be confined in a particular restricted place for a not negligible period of time, and being under continuous supervision and control and not free to leave that place (See [2014] UKSC 19).*
>
> *38. The second component is the absence of consent to that confinement either because the person does not consent (like a prisoner) or is unable to consent (in the case of an adult who lacks capacity, or a child who is not competent to consent).*
>
> *39. The third component is that the state is responsible.*
>
> *40. I am not concerned with either the first or the third component in this case. In particular, no one seeks to argue that QX comes within another decision of Lieven, J., namely Peterborough City Council v a Mother and a Father [2024] EWHC 493 (Fam) ("Peterborough") or the more recent decision of Rochdale Borough Council v V [2025] EWHC 200 (Fam) a decision of HHJ Middleton-Roy sitting as a High Court Judge. In those cases, such was the mental and physical disability of the child, that **it** deprived them of their liberty and not any "restrictions" that were put in place by the State or parents to keep them safe. As Lieven, J put it at [38] of the Peterborough case:*
>
> > *On a conceptual level it is difficult to see how one can be deprived of something that one is incapable of doing. Equally, how can one be deprived of a right that one is incapable of exercising, not through the actions of the State or any third party, but by reason of ones own insuperable inabilities.*
>
> *41. Had this case rested wholly or in part on this argument, I would have struggled to follow those authorities that appear to be plainly wrong. Wrong conceptually, because they fail to distinguish between "negative" liberty, the freedom from being prevented from doing something, and "positive liberty", the freedom to be enabled to do something. There are many people who are incapable of doing things without the help of others and are enabled to do those things by carers/family etc, often funded or provided for by the State, or following assessments under the Care Act. Where a carer for a profoundly physically, but not mentally disabled person, decides not to assist that person to move from a*

place where they do not want to be, no one would surely argue that the disabled person was not deprived of their liberty. Unless, it seems, they are mentally incapable, too. But in that case, the universality of human rights, for abled and disabled people alike, as in Cheshire West must be recognised. In which case both are deprived of their liberty.

42. Wrong also because these decisions seem to conflict with the Cheshire West decision as distilled through the Court of Appeal's judgment in Rochdale MBC v. KW [2015] EWCA Civ 1054. In that case, Lord Dyson, MR rejected an earlier iteration of the Peterborough argument, by Mostyn, J. That argument was summarised by the Court of Appeal at [4]:

> *"Mostyn J purported to apply the test required by Cheshire West, although it is clear from para 19 of the first judgment that he did not agree with it. He said at para 17 that it was impossible to see how the protective measures in place for KW could linguistically be characterised as a "deprivation of liberty". Quoting from JS Mill, he said that the protected person was "merely in a state to require being taken care of by others, [and] must be protected against their own actions as well as external injury". At para 25, he said that he found that KW was not "in any realistic way being constrained from exercising the freedom to leave, in the required sense, for the essential reason that she does not have the physical or mental ability to exercise that freedom".*

43. The Court of Appeal overturned Mostyn, J.

44. Consequently, a person, subject to a care plan that requires them to reside in a particular place and be under constant supervision and control and are not free to leave, whether or not their physical or mental capabilities prevent them from leaving, is deprived of his/her liberty, absent their consent.

45. Mr Jones suggests that the Court needs to apply a modified comparator in this case. In other words, whether a child is subject to confinement that may amount to a deprivation of liberty, one has to ask whether those restrictions are "well in excess" of what a child of his age would have imposed upon them in "normal circumstances".

46. It is important to note that the comparator is a normal child and not one with QX's disabilities.

47. I agree with Mr Jones.

HHJ Burrows then went on to consider whether a person holding parental responsibility give consent for that child to be placed in a regime that leads otherwise to his deprivation of liberty. He noted that:

54. In Re D (a child) [2019] UKSC 42 the Supreme Court considered the issue of parental consent and deprivation of liberty in respect of children who have reached the age of 16. The answer is that they cannot. That is primarily because the Mental Capacity Act 2005 places people who have reached the age of 16 on a different jurisdiction footing when it comes to the issue of consent, than those under the age of 16.

55. For that reason, the tensions between the Justices of the Supreme Court in Re D, as to the proper application of Cheshire West to children under 16 result in observations that are only obiter. These are outlined and

analysed by Mr Jones in his Skeleton, and I need not repeat what he says there in this judgment.

56. One issue that occurred to me that left me uncertain as to the approach of Lieven, J and Keehan, J, concerned the relevance of disability to the exercise of PR. As Keehan, J stated in Trust A v X [2015] EWHC 922 (Fam) at [54]-[57]:

> *[54] I wish to pay tribute to D's parents who have throughout acted in what they considered to be in the best interests of their elder son. They have, at all times, paid the closest interest in his care at the hospital and they have worked in co-operation with the clinicians, staff and carers at the unit. They have attended, or at least one of them has attended, the periodic reviews held at the hospital.*
>
> *[55] When considering the exercise of parental responsibility in this case and whether a decision falls within the zone of parental responsibility, it is inevitable and necessary that I take into account D's autism and his other diagnosed conditions. I do so because they are important and fundamental factors to take into account when considering his maturity and his ability to make decisions about his day to day life.*
>
> *[56] An appropriate exercise of parental responsibility in respect of a 5 year old child will differ very considerably from what is or is not an appropriate exercise of parental responsibility in respect of a 15 year old young person.*
>
> *[57] The decisions which might be said to come within the zone of parental responsibility for a 15 year old who did not suffer from the conditions with which D has been diagnosed will be of a wholly different order from those decisions which have to be taken by parents whose 15 year old son suffers with D's disabilities. Thus a decision to keep such a 15 year old boy under constant supervision and control would undoubtedly be considered an inappropriate exercise of parental responsibility and would probably amount to ill treatment. The decision to keep an autistic 15 year old boy who has erratic, challenging and potentially harmful behaviours under constant supervision and control is a quite different matter; to do otherwise would be neglectful. In such a case I consider the decision to keep this young person under constant supervision and control is the proper exercise of parental responsibility.*

57. As I suggested to Mr Jones in argument (an argument conducted exclusively with me!), although Keehan, J's reasoning is clear and very compassionate, it comes close to breaching the anti-discriminatory purpose behind the majority in Cheshire West. If a child of 15 with autism and severe learning disability can be deprived of his liberty on the consent of his parents, but one without autism and severe learning disability cannot, is that not discriminatory against the former child? Does it not deprive the more vulnerable from the protections of Article 5 which are designed to protect the most vulnerable?

58. However, I am persuaded that the line of authority, of which Keehan J and Lieven, J's decisions are an essential part, is clearly stated in the judgments and based upon a careful consideration of the law, both domestic and ECtHR. They clearly state that parental responsibility can be deployed to consent to an objective deprivation of liberty. To summarise their views, provided the exercise of parental responsibility is for the interest of the

> *child, then it is within the zone of parental responsibility; if it is not, then it is without that zone.*

Comment

It is unfortunate that the judgment of the Court of Appeal in *Re J* has yet to be published. That having been said, all parties before the court were unanimous (although not for the same reasons) in submitting to the court that it should not pronounce upon the question that came before HHJ Burrows in *QX*. It is, however, fair to note that some of the parties were submitting (and, it appeared, to a favourable response) that the Court of Appeal should not by such a non-pronouncement suggest that it was endorsing the line of authority including, in particular, the *Lincolnshire* case (a case where there was agreement between all the parties before the court). An appellate level decision on this point is badly needed.

It is also relatively rare for a more 'junior' judge[6] to express so baldly the view that the judgment of a more 'senior' judge is "plainly wrong." With respect, in the instant case, we entirely agree with HHJ Burrows that it is very difficult to square the decision in the *Peterborough* case with the authorities. Again, however, an appellate level decision on this point is badly needed so as to be able to resolve this issue one way or another.

Can the court order blood testing of a baby before it is born?

Manchester University NHS Foundation Trust v PP [2025] EWHC 783 (Fam) (High Court (Family Division)) (McKendrick J)

Other proceedings – family (public law)

Summary[7]

In this case, the newly elevated High Court Judge, McKendrick J, had to grapple with a very urgent situation. It is clear that he was concerned as to why the application was brought so late, but did not have the time to investigate in where a pregnant woman did not consent to screening for screening for blood borne viruses (BBVs), namely HIV, hepatitis B (HBV) and syphilis. She had presented at hospital with Kikuchi Lymphadenitis which McKendrick accepted (at paragraph 10) "*may indicate that she has HIV or even AIDS. The applicant considers that there is a real risk that she is infected with HIV*." He continued:

> *11.* […] *I am told that it is imperative that when the baby is born, it is investigated for these BBVs.*
>
> *12. The results from both the new born baby's blood and the cord blood, tests maternal antibodies to the BBVs not the child's. Therefore, if the result is positive it does not mean that the child is infected. If the cord blood tests positive for HIV it will reveal the mother's infection status. If the mother has HIV, then there is a risk that the baby does. There is a 4 hour window to get antiretroviral treatment into the baby to give the baby the best chance of avoiding developing HIV. The treatment is most effective within 24 hours. It has no effect after 72 hours.*

In the note of the ex tempore (i.e. oral) judgment given, which he perfected afterwards, McKendrick J identified that:

> *39. This is a difficult case which requires much greater time and thought and care than I can provide for in an urgent*

[6] Although, as HHJ Burrows was sitting as a High Court judge in *QX*, his observations were technically made by a judge of so-called coordinate jurisdiction.

[7] Katie having been involved in the case, she has not contributed to this note.

application. It raises profound ethical issues including the rights of mothers, the rights of an unborn foetus and matters of women's reproductive health. It also raises issues of human rights both for the mother and the child, when s/he is born. As I have set out, and this is not in doubt as established in In Re F (In Utero), an unborn child does not have a legal personality. It is part of the mother's body and does not have independent rights. That has been the settled status of the law for a long time, and no one says that is wrong. It is also established in a Court of Appeal judgment that I am bound by.

40. I am in essence being asked to provide the Court's consent to the treatment plan on the basis that it is in the best interests of the baby to be tested for BBV and treated within 4 hours of birth if HIV is indicated. I am being asked to make a welfare decision. I can only consent if the treatment plan is in the child's best interest. This is clear from established case law such as Aintree v James [2013] UKSC 67 (which although concerned with adults, also applies to children). The law is also set out most recently and clearly by Harrison J in the case of C (A child) (Life sustaining treatment) [2025] EWHC 413 (Fam).

41. The Trust are alive to the difficulties with this application, which is why Ms Scott says in her elegant submissions that I am not being asked to make a welfare decision about the foetus. Rather I am being asked to make anticipatory declarations that the care plan is lawful.

42. However in my view, what I am being asked to make in substance is a welfare decision. I am being asked to determine, whilst the child remains a foetus, the welfare of the baby when born. Munby J in the case of Re D, when he set out his anticipatory declarations, made it clear that the jurisdiction did not include the welfare of the child. His declaration is about withholding information from the mother. Ms Scott is asking the court to make a welfare decision about a foetus who has no legal personality. The foetus is not a party to this application.

43. PP's Article 8 ECHR rights are fully engaged. Testing will reveal the status of her health. Such testing plainly amounts to an interference in her respect of a private life. This interference may amount to a violation. That depends on whether the interference is necessary, proportionate and in accordance with the law. I therefore cannot balance the rights of the foetus against the rights of the mother to justify an interference with the mother's rights. The potential 'rights' engaged are those of the foetus, but I am bound by Re F and as such the foetus has no legal personality and no rights. It is therefore very difficult to balance the rights to justify an interference with the mother's rights. Re-framing the question to consider anticipatory declarations does not, in my judgement, resolve this difficulty.

44. There is also a difficulty with the best interests welfare jurisdiction as the child is not a party, but the declaration would bind the child. The child does not have a Guardian (CAFCAS will not accept an invitation to act for a foetus) and as the foetus is not a party it could not appeal the decision.
If I conclude that I can make a declaration about a foetus that goes to the welfare of the child when born, I may, if I can put it this way at this late hour, be opening a can of worms. What other declarations would be sought by others in the future? Accepting jurisdiction to make welfare decisions for a foetus is fraught with some danger. In as much as I have digested the learning of Re

F such a step would be for Parliament to decide not the courts. Care is necessary before determining such a jurisdiction exists, other than the circumstances that pertained before Munby J in Re D. It has the potential to undermine women's reproductive rights.

45. Ms Scott seeks to bolster her argument by reference to the anticipatory declarations made in the Court of Protection. That does not assist me however, as P in the Court of Protection has rights which are protected both when capacitous and when incapacitous. There is not a read across from a capacitous P to a foetus.

46. Therefore, with some regret, I conclude, there is no jurisdiction to make a welfare decision for this foetus when s/he is born. I am not prepared to circumvent long established common law principles by dressing up a welfare decision to consent to medical treatment by re-framing the issues as an anticipatory declaration.

47. I conclude I have no jurisdiction to determine what should happen to the foetus when born.

McKendrick J did, however, go on to say "a little" about the welfare issues involved:

49. Notwithstanding my lack of jurisdiction, and given the urgency, I should say a little about the welfare issues involved. From the information provided to me, the welfare analysis is relatively straightforward. Prof CC's evidence is clear – there is a risk that the mother has a BBV. The Trust cannot say definitely if this is so, but even if I assess that risk as being small or medium, it is a risk of very significant harm to the baby due to the effects of BBV on a newborn child. There would be almost no impact or risk to the child of checking the blood cord or even the blood of the baby. There will be no psychological or physical risks, but very many downsides if a blood test does not take place and essential treatment cannot be provided, giving the child risks of developing HIV, HBV or syphilis. The magnitude of that risk is set out in submissions and it is drawn from academic literature. At present I am clear this innocuous blood test is essential to the baby when born, to protect the baby from the symptoms of any serious illness.

50. The best interests analysis incorporates the article 8 rights, which would require me to balance the mother's rights against that of the baby. However the mother has not put forward a good reason for the tests not to take place. If I have to carry out the balance the rights would come down on the side of the child. However, I am not persuaded I have a jurisdiction to make welfare decisions, even anticipatory declarations. Therefore I will not decide today what is in the best interest of the unborn baby, but will do so when the baby has been born and has a legal personality. It is highly likely my provisional welfare analysis will not evolve from what I have said today, but of course I have reached no concluded view. I encourage PP to reflect carefully on what she has heard and consider consenting to a test and treatment for her baby when born.

McKendrick J adjourned the application, in effect to seek to reconstitute it as speedily as possible after the baby was born, and to enable the baby's representation by CAFCASS. In a postscript to the judgment, McKendrick J explained:

On 27 March 2025 PP was delivered of her baby. A hearing took place before me within an hour of the baby's birth. The baby's guardian was able to attend the hearing and instruct a solicitor to represent the baby's interests. Consent

to test was provided as being overwhelmingly in the baby's best interests.

Comment

We anticipate that having the necessary people around to be able to reconstitute the proceedings so speedily after the baby's birth was not cost-free. However, that may have been the price necessary to ensure that in reaching a route to a decision which (on its face) was blindingly obvious McKendrick J did not inadvertently open the door to a route to be used in very different circumstances to much more challenging outcomes.

THE WIDER CONTEXT

Short note: the inherent jurisdiction rebuffed

In the personal injury case of *Forsyth v Howson & Anor* [2025] EWHC 653 (KB), the defendant sought approval of a settlement agreement pursuant to the court's inherent jurisdiction but against the wishes of the Claimant. The claimant had been assessed as having capacity to conduct the litigation and had decided to accept a Part 36 settlement offer even though the advice of his lawyers was that it was too low. The defendant was worried that if the claimant was subsequently found to lack capacity to manage his property and affairs, which was a real possibility, then his capacity to accept the Part 36 offer might be questioned, and the acceptance unravelled.

There have been a number of previous cases, cited in the judgment, where the inherent jurisdiction has been used to give court approval of a settlement even though the claimant had capacity to conduct the litigation, where there were doubts or concerns about that capacity, or the claimant's capacity to manage their finances. In this case however, the court refused to accede to the defendant's application because:

1. There was only a small risk that the claimant would later be judged to lack capacity to conduct proceedings and therefore to accept the Part 36 offer, as all the experts who had assessed him had found he had litigation capacity.

2. The claimant did not want the court to exercise its inherent jurisdiction to protect the settlement agreement.

3. Given the claimant's objection, it was difficult to see how privilege could be waived so that the court could consider all the relevant material that would ordinarily be reviewed when approving a settlement for a protected party.

4. The actual offer was lower than the claimant's legal advisors had advised was appropriate, so it was unlikely the court would approve it in any event.

The use of the inherent jurisdiction to avoid determining disputed or complex issues of capacity in personal injury litigation appears relatively common, noting the cases cited in this judgment. This case is an example of the obvious limits of that approach, but yet again shows how much the binary distinction of the world of adults into those having capacity and those lacking capacity to make relevant decisions does not always sit easily with reality.

Short note: same-sex care and disability

The main issue in *R (VRP) v The Royal Borough of Kingston Upon Thames* [2025] EWHC 504 (Admin) was whether the local authority had a duty to provide same-sex carers for the personal and intimate care of a 19-year-old woman described as having severe physical, learning and Autistic disabilities. Her parents through direct payments commissioned her full-time one-to-one support with female carers. They were concerned there would be a time when they were no longer able do so and were worried that local authority commissioned services would not ensure the same-sex personal and intimate care for their daughter. They also argued that local authorities should record the sex (as well as the gender) of service users when carrying out functions under the Care Act 2014. The local authority's position was that there was no such duty and the arrangements it had in place for the discharge of its existing duties meant that in practice such care would always be provided by female carers.

Heather Williams J, applying the Care Act 2014, Human Rights Act 1998, and Equality Act 2010, ultimately rejected the argument for the "novel duty" being imposed:

> *161. I have fully taken into account the no doubt deeply held concerns of the Claimant's parents, but in the circumstances no legal basis has been shown for the Court to recognise the alleged Combined Duty - namely a novel duty for which there is no supporting authority, to operate a system that ensures or which has the objective of ensuring, the provision of same-sex personal and intimate care for female service users (save where there is a preference or it is assessed to be in the service user's best interests to have care delivered on some other basis) – in addition to the Defendant's existing legal responsibilities."*
>
> *162. Whilst written practice guidance in this area (which the Defendant is in the process of compiling) is in no doubt desirable, that is a long way from the Court finding that the current absence of written guidance reflecting the alleged Combined Duty, is unlawful.*

Research corner

Capacity assessment and conversation analysis

In a recent 'in conversation with,' Alex spoke to Jess Foulkes, Dr Suzanne Beeke and Dr Anna Volkmer about their paper in the International Journal of Language & Communication Disorders, *Using Conversation Analysis to explore assessments of decision-making capacity in a hospital setting*. They explore what 'conversation analysis,' means, and how it helps shed light on the process of capacity assessment. They also considered about the implications for training and further research. (Note, there is a good cat intervention – hurrah – and an annoying ring tone – sorry – in this episode).

The MCA and Multiple Exclusion Homelessness – a scoping paper walkthrough

Alex has done a walkthrough of *Approaches to the mental capacity assessment of people experiencing multiple exclusion homelessness in England: A scoping paper* by Stephen Martineau, a research fellow at King's College London. The paper forms part of the preparatory work for the larger-scale research study funded by NIHR Health and Social Care Delivery Research which is currently underway (running until 2026) (with which Alex is involved). Stephen welcomes comments on the paper, at stephen.martineau@kcl.ac.uk.

DNACPR and resuscitation policies

If you want to look at something Alex was not involved in, a very helpful – and challenging – review has recently been published By Emily Fitton and others in BMJ Supportive & Palliative Care. Called *Divergence in DNACPR and resuscitation policies: institutional survey in England*, it analyses the policies of hospitals and care homes in England as regards the use of do not attempt cardiopulmonary resuscitation (DNACPR) recommendations. They found that "*many of the policies we surveyed diverge significantly from national guidance. Some require that CPR be administered in all cases where no DNACPR recommendation has been made. Others fail to specify that CPR may be appropriate even in the presence of a DNACPR recommendation*." They therefore conclude that "[l]*ocal DNACPR policies currently place both patients and healthcare professionals at significant risk*."

2000 Hague Convention on the International Protection of Adults: Practical Handbook

The Hague Conference has recently published a Practical Handbook to accompany the 2000 Hague Convention on the International Protection of Adults. The Handbook reflects the practical experiences of those using the Convention since it came into force,[8] and contains case examples and practical guidance on resolving some of the dilemmas that arise. It has already had its first outing before the English courts, in the context of a further go-round in relation to the question of whether and under what circumstances Scottish guardianship orders providing for deprivation of liberty can be recognised and enforced in England (the decision of Theis J is likely to be published in short order).

The British Medical Association has published a toolkit on treating 16 and 17-year-olds in England, Wales, and Northern Ireland.[9]

This toolkit sets out the legal and ethical factors doctors need to consider when providing care and treatment for young people aged 16 and 17 years old in England, Wales, and Northern Ireland, such as consent, refusal of treatment, and confidentiality.

CRPD Committee concluding observations

The CRPD Committee – the expert body overseeing the UN Convention on the Rights of Persons with Disabilities – has recently published a further round of concluding observations. Of particular interest are

(1) those in relation to Canada, in which they note in relation to the provision of Medical Assistance in Dying (at paragraph 19(b)) that:

> *The concept of 'choice' creates a false dichotomy by setting up the premise that if persons with disabilities are suffering, it is valid for the State Party to enable their death, with safeguards not guaranteeing the provision of support, and ableist assumptions deemphasising the myriad of support options for persons with disabilities to live dignified lives, and the systemic failures of the State Party to address the social determinants of health and well-being, such as poverty alleviation, access to healthcare, accessible housing, prevention of homelessness, prevention of gender-based violence, the provision of community-based mental health supports and employment supports.*

(2) Those in relation to the European Union, which recommends that it:

> *Halt efforts to authorize EU Member States to join or remain parties to the Hague Convention of 13 January 2000 on the International Protection of Adults; do not proceed with the proposed Regulation COM/2023/280 final, and do not proceed with the proposed Council Decision COM(2023) 281 final/2;*[10]

[8] Including from England & Wales. Although the UK has still (embarrassingly) only ratified the Convention in respect of Scotland, Schedule 3 to the MCA 2005 reflects the obligations of the Convention. Alex formed part of the UK delegation on the Hague Conference working group, and was therefore able to feed in the practical experiences of working with Schedule 3 cases.

[9] Full disclosure, Alex has had input into the England Wales sections.

[10] The Regulation and Decision would effectively transpose the 2000 Hague Convention into EU law.

> And expresses *"concern about the reluctance of the European Union to advise Member States to not proceed with the Draft Additional Protocol to the Oviedo Convention."* It notes that "[t]*he Committee reiterates that the draft additional protocol would legitimize involuntary placement and treatment of persons with disabilities, and that it would contribute to the fragmentation of international law, creating deep contradictions between the Convention and the law of the Council of Europe."*

Another way of putting that last point is that the EU, at present, appears to be minded to follow the approach of the European Court of Human Rights, which accepts the validity of the concepts of mental capacity and mental disorder, and the validity (as a last resort) of compulsory confinement and treatment. We suggest that it would be surprising, and indeed deeply problematic, were it to take any other course.

Book review

The Later Years: The Simple Guide to Organising the Rest of your Life by Peter Thornton (Bedford Square. 2025, 337pp, paperback, £10.99)

The only flaw with this book is its title, as it suggests that it is only relevant for those who identify themselves as being in their later years (or for those close to such people). It is, in fact, a book that anyone of any age should read to prepare for life's inevitable unknowns. Written by Sir Peter Thornton KC, the first Chief Coroner of England & Wales, the book sets out to provide practical guidance for a whole host of things that are all too often put off for a rainy day. In straightforward and clear terms, the book covers such issues as: making a lasting power of attorney and a will, setting out your wishes regarding medical treatment and wider care concerns, planning financially (including covering care costs), avoiding scams, and the rights of older persons. It also provides a necessary route through what to do after death for those who are left behind (I would also in this regard recommend Cariad Lloyd's *You Are Not Alone* to help with the emotional load that death brings). It is a book that I wish that I had had a time when I needed to deal with the administrative after-effects of sudden death, and know that I should be implementing to make sure that I have my death file suitably arranged for when the time comes.

Full disclosure: I am very grateful to the publishers for providing me with a copy; I also gave some assistance in relation to the sections relating to advance decisions to refuse treatment / DNACPR and mental capacity matters.

Alex Ruck Keene

SCOTLAND

What is appealable? And the elusive litigant

Can procedural interlocutors during the course of an application under the Adults with Incapacity (Scotland) Act 2000 be appealed to the Sheriff Appeal Court under section 2(3) of that Act? What are the obligations of a court, and other parties, towards a litigant who acts elusively? These two questions were both addressed by Sheriff Principal N A Ross, sitting alone in the Sheriff Appeal Court, in an appeal by MF (Respondent and Appellant) in a summary application by City of Edinburgh Council (Applicant and Respondent) in respect of VF ("Mr F"), [2025] SAC (Civ) 5, also now reported at 2025 SLT (SAC) 17.

On the first question, the relevant provisions of section 2 are as follows:

> *"Applications and other proceedings and appeals*
>
> *(1) This section shall apply for the purposes of any application which may be made to and any other proceedings before the sheriff under this Act.*
>
> *(2) An application to the sheriff under this Act shall be made by summary application.*
>
> *(3) Unless otherwise expressly provided for, any decision of the sheriff at first instance in any application to, or in any other proceedings before, him under this Act may be appealed to the sheriff principal, and the decision upon such appeal of the sheriff principal may be appealed, with the leave of the sheriff principal, to the Court of Session."*

Without amending section 2(3) of the 2000 Act, section 109(3) of the Courts Reform (Scotland) Act 2014 provided that appeals to the sheriff principal are to be read as appeals to the Sheriff Appeal Court.

"VF" appealed against two interlocutors of the sheriff at first instance. By interlocutor dated 9 January 2025, the sheriff "*refused various motions by Mr F directed at removing or regulating the safeguarder, and making provision for lodging documents and ancillary procedural matters.*" By interlocutor dated 15 January 2025, the sheriff "*ordained Mr F to disclose his email address and a true postal address in the UK, for the purposes of service of documents.*"

The Council challenged the competency of the appeal. The Council argued that the wording of section 2 of the 2000 Act should be read as applying only to the merits of the summary application, and not to every incidental or procedural decision in the court process. VF argued that the Parliament had deliberately left the category of appeals wide, because (as SP Ross narrated): "*These were important proceedings for the Adult's benefit, and that the Parliament 'had not restricted the nature of appeals because it was reasonable to assume, in such procedure, that everybody would act reasonably to resolve any issues'.*"

SP Ross considered that the first issue was the inter-relationship between section 2(3) of the 2000 Act and section 110 of the Courts Reform (Scotland) Act 2014. "*The terms of section 110 resolve the matter – it expressly does not affect the right of appeal to this court under any other enactment (section 110(4)).*"

SP Ross had been addressed on rules of statutory interpretation, but held that there was no requirement to resort to those rules, because "*The question of how section 2(3) should be read is plain, in my view, from the whole wording of*

section 2." Rather than concentrating solely on section 2(3), due weight should be given to the earlier provisions of section 2. "*Section 2(1) restricts the section to 'the purposes of any application which may be made to and any other proceedings before the sheriff under this Act'. Section 2(2) states that 'An application to the sheriff under this Act shall be made by summary application'.*"

SP Ross held that "*the application which may be made*" referred to the summary application itself, and not to every interlocutor within the court process. The summary application identifies the orders sought, and why they should be granted, and the terms of the summary application "*do not regulate or limit the incidental directions which a court may issue in furtherance of the application, such as appointment of a safeguarder or directions about amending pleadings, providing information, lodging documents, or any other orders which contribute to the preparation and hearing of an action. These matters are within the control of the court, and are not the subject of the 2000 Act. They are regulated instead by procedural rules and the inherent powers of the court. The 2000 Act does not purport to regulate all incidental and procedural decisions to be made by the court.*" The appeal that will become available, subject to the usual rules about when appeals are statable, will (in this case) be in relation to the appointment of a welfare guardian, the financial guardian, and in relation to such incidental orders as were sought. SP Ross held that neither interlocutor was appealable under section 2(3) of the 2000 Act; and that the appeal was not competent. He dismissed it.

One would question one aspect of this part of the decision. SP Ross held that appeal under section 2(3) "*is not available against the decision to appoint a safeguarder, which is a common law power inherent to the court, and not regulated by the 2000 Act.*" That is not easily reconcilable with the provisions of subsections (4) and (5) of section 3 of the 2000 Act empowering the court to appoint a safeguarder and containing provisions on procedure for, and effects of, making such appointment.

On the second question, VF submitted that documents had not been properly served upon him, as his address of choice was in France, and if that was not acceptable to the court, it meant that all foreign litigants would be prejudiced. He submitted that he had provided an email address to the court, but from SP Ross' judgment that does not appear to have been established. SP Ross gave short shrift to all of that. As to the obligations on the court and on other parties, one can do no better than quote SP Ross:

> *"Mr F appears to wish to participate in the court procedure while refusing to provide an address within the jurisdiction, or an email address, at which service can be made. That is not a position open to any litigant, and appears to misunderstand the onus on the court. The court is concerned only that each litigant receives fair notice. The court does not require to guarantee service in the face of obfuscation, refusal to engage or frustration of service. If a litigant does not wish to participate, the court and the other parties are under no obligation to force him to accept service. The litigant is at liberty to avoid service, allow envelopes to pile up on the doormat, or leave messages unopened in an Inbox. The penalty is, however, that the court will not listen to any protest that service was not made, or information not given, if it is shown to have been sent to the correct address. In the present action, it will be enough if the court or the applicant make electronic service at any of the email addresses used by Mr F in submitting his own documents. Effective service will be assumed. If that address is to be changed, the onus is on*

> *him to provide an alternative, effective address."*

Adrian D Ward

"16 going on 17" – again

The position of "young persons" between the ages of 16 and 18 in Scotland remains troublesome. On the one hand, they are governed by provisions of legislation that are complex and difficult to follow, to an extent that can reasonably be characterised as absurd. On the other hand, away from complexities that keep lawyers busy in the courts, they are all too likely to encounter difficulties, and fall into gaps, in transitions between child and adult services, both under-resourced.

At the heart of the legal difficulties is Scotland's ambivalence about whether a "child" becomes an "adult" at 16 or at 18. Adult incapacity practitioners will be aware of the conundrum that Schedule 3 to the Adults with Incapacity (Scotland) Act 2000 substantially incorporates the Hague Convention of 13 January 2000 on the International Protection of Adults, and that the Convention defines adulthood as beginning at 18; yet Schedule 3 applies without adjustment the definition in section 1(6) of that Act that "adult" means a person who has attained the age of 16 years. We previously quoted "16 going on 17" in the title to an item commencing on page 4 of the March 2021 Scotland Report here in a case on whether a 17 year-old was a looked-after "child". See that Report for the tangles through which the Inner House had to navigate to conclude that in that case, and for the relevant purposes, she was a child.

Substantially similar complications have now led our highest criminal court into an error which has had to be corrected in a Supplementary Opinion of the Appeal Court, High Court of Justiciary, in the case of *The Procurator Fiscal, Dundee against (First) JH; and (Second) LL*, Minuters, in which The Commissioner for Children and Young People in Scotland intervened, reported at [2025] HCJAC 12. See that report for the tangles through which that court required to navigate, in order to conclude that two paragraphs of the original judgment were in error. The original judgment had concluded that, for the purpose of relevant provisions under which both accused were prosecuted, they were both children, because they were under the age of 18 years. They had in fact ceased to be children at the age of 16.

Through a complexity of amendments, the core question related to the definition of a "child" in section 307 of the Criminal Procedure (Scotland) Act 1995, which was amended with effect from 24 June 2013 to provide that "child" generally meant a person under the age of 16, subject to exceptions. When section 12 of the Children (Care and Justice) (Scotland) Act 2024 is fully in force, the definition of "child" will for most purposes alter from a person under 16 to a person under 18. However, that amendment is only partially in force. Until the outstanding amendments in the 2024 Act come into force, a "child" for the purposes of the 1995 Act will continue to be a person under 16 years of age, save for exceptions in the transitional provisions, which exceptions did not apply in this case. The relevant provision of the original Opinion was thus narrated to read as follows:

> *"[11] UNCRC Article 1 defines a child as meaning 'every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier'. However, unless and until further provisions are commenced, for the purposes of the 1995 Act section 142, the age of a "child" remains a person who is under 16 years of age."*

Lord Beckett was a member of the court which arrived at the original Opinion issued on 17 January 2025, and delivered by Lord Carloway as then Lord Justice General. The Supplementary Opinion was delivered by Lord Beckett, following his appointment as Lord Justice Clerk. His Supplementary Opinion included this comment:

> *"We were surprised and troubled to hear that in neither case is a new trial diet fixed. Given the already protracted history of proceedings, we expect early trials to be fixed for both cases, involving child complainers, against JH and LL each of whom is a child under UNCRC Article 1."*

The complaint that justice delayed is justice denied applies particularly where those involved in criminal or civil litigation have vulnerabilities, such as those arising from childhood or disabilities.

Those who delight in complexity will no doubt note the reference in the Supplementary Opinion to provisions relevant to certain offences against "children under 17 years of age to which special provisions apply".

Viewed more broadly, there could be said to be three dimensions in play here. There is a vertical dimension of different ages for different purposes within any one jurisdiction, with related questions of how they are arrived at and the coherence (or lack of it) with which they stack up together. Horizontally, there are the differences between different systems, or between systems and international instruments. Thirdly, there are the differences within each system over time, as laws are created, then reformed. Do at least some of these differences provide potential, at least within the United Kingdom, for discrimination challenges? What evidential basis is there for the setting by legislators of different ages for relating capacity and responsibility to different ages for different purposes? Do evidential bases exist, and if so to what extent? Are they used, and if so why are they not referred to?

Though acknowledging that the science has developed, there seems to be little evidence of it being accessed by legislators and used as an evidential basis. How far have we moved beyond the following, that I wrote in "The Power to Act" (SSMH, 1990)?

> *"So far as I can ascertain, there has been little or no adequate research into one question which is of considerable significance in relation to any reform of mental disability law. What are the skills and abilities which are needed to have full legal capacity? What is the nature of the impairment of those skills which impairs legal capacity? How can we best assess such impairment, and relate the results to specific modifications in legal capacity?*
>
> *"It is interesting to note that it has been considered possible to review child law without such information in relation to children. Discussion of the age at which children should have full legal capacity, or the ages at which they should have lesser degrees of legal capacity, has proceeded without any data as to how and when children develop the skills and abilities needed for such levels of legal capacity. Even if we knew that the "average" or "normal" child of a given age has a particular level of such skills and abilities, we would also need to know the degree of divergence from that norm."*

Could the Parliament, and Government when exercising delegated powers, contrive to make it rather easier to find a straightforward answer to the simple question: "Is this person, for these purposes, a child or an adult?"

Adrian D Ward

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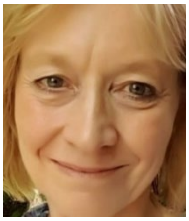

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Conferences

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 May. 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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