



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

(1) In the Health, Welfare and Deprivation of Liberty Report: what to do when an advance decision to refuse treatment may be in play, and the consequences of the gaps between services for those with disordered eating;

(2) In the Property and Affairs Report: capacity in the rear view mirror: how does the presumption work?;

(3) In the Practice and Procedure Report: disclosing position statements to observers; habitual residence, moving jurisdictions and 'lawful authority;' and the impact on P of being assessed;

(4) In the Mental Health Matters Report: progress of the Mental Health Bill and the tort consequences of a finding of Not Guilty by Reason of Insanity;

(5) In the Children's Capacity Report: a depressing snapshot from the national DoL court, human rights of children in the social care system and capacity and gender-affirming treatment;

(6) In the Wider Context Report: the Oliver McGowan statutory learning disability and autism training, and the pitfalls of facilitated communication

(7) In the Scotland Report: joint attorneys in dispute: appropriate remedies and; "If at first you don't succeed ...": res judicata in tribunal proceedings.

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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The Court of Protection (Amendment) Rules 2025

These Rules were laid before Parliament on 15 July, and come into force on 1 October 2025. They make a number of changes in relation to committal proceedings, especially to pick up the problems identified by Poole J in *Esper v NHS North West London ICB* [2023] EWCOP 29.

Rule 3 amends rule 4.1(4) of the 2017 Rules to remove a defunct cross-reference.

Rule 4 amends rule 21.4(2) of the 2017 Rules, which requires a committal application to give information to a defendant about their rights including their right to silence, to incorporate a requirement to warn the defendant of the risk of a court drawing adverse inferences from that silence if that right is exercised. This follows the decision in *Inplayer Ltd. and another v. Thoroughgood* [2014] EWCA Civ 1511 and aligns with the position in criminal proceedings.

Rules 5 and 6 amend, respectively, rules 21.7 and 21.8 of the 2017 Rules, concerning hearings in contempt proceedings, in response to the decision in *Esper*:

1. Rule 21.7 of the 2017 Rules is amended to require the court to consider, before the first

hearing of any contempt proceedings, whether to make an order under rule 21.8(5) for the non-disclosure of the identity of the defendant in the court list. This is to prevent the utility of any subsequent non-disclosure order being undermined by the prior public notice of the identity of the defendant.

2. Rule 21.8 is amended to provide that the court has a discretion to order the non-disclosure of the identity of any person during contempt proceedings, where certain criteria are satisfied. Currently, the rule mandates non-disclosure where those same criteria are satisfied, but only in respect of a party or witness to the contempt proceedings. Rule 21.8(11A) is inserted to clarify that the court's discretion does not extend to restricting the disclosure of the identity of a defendant who has been convicted and sentenced to a committal order. An amendment to rule 21.8(13) clarifies that the judgment is transcribed and published solely where the court has made an order for committal.

Disclosing position statements to observers

Re AB (Disclosure of Position Statements) [2025] EWCOP 25 (T3) concerns a question of

increasing importance given (in particular) the sterling work of the Open Justice Court of Protection Project: namely when and how can position statements be provided to observers? ¹ Poole J has rolled up his sleeves, and given the following answer:

36. There is presently no guidance on the provision of position statements to observers of Court of Protection hearings. I am told that practice varies and there is some confusion amongst parties, representatives, and observers as to the correct procedure and whether copies of position statements may be provided to observers on request or whether a court order is required. I confess to having taken a less than rigorous approach in the past, simply indicating that I was content for position statements to be provided to observers who had a copy of the Transparency Order. Hence, having been compelled now to take a deeper look at the legal position, pending any formal reconsideration of the standard terms of the Transparency Order or changes to the COP Rules, it might be helpful for me to draw some of these threads together and to set out what I believe to be the procedure that ought to be adopted:

1. Position statements are documents "put before" the Court within the terms of the Court of Protection template Transparency Order. They also become documents within the court record once filed and they are filed once sent to the court listing office or a judge's clerk or court clerk.

2. Parties preparing position statements should foresee that an observer at an attended hearing in public might request an electronic or hard copy and should therefore prepare suitably anonymised

position statements which comply with the Transparency Order. I also suggest that it would be helpful to include a warning on the front sheet of the position statement - a rubric similar to that which appears on published judgments, namely that "there is a Transparency Order in force and that irrespective of what appears in the position statement, the Transparency Order must be strictly complied with. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court."

3. An observer does not have an automatic right to see position statements, whether they are being used in a hearing they are to observe or have been used at a hearing they have previously observed. A change in the court rules and/or relevant practice direction (or to the standard Transparency Order referred to in the practice direction) would be required to create such a right.

4. If an observer wants to see a party's position statement they should ask the party in advance of the hearing and state their reason. If they cannot contact a party in advance of the hearing (whether at court or otherwise) they may make the request (with reasons) to the court and that request can be passed on to the party or their representatives.

5. When a hearing is in public and a Transparency Order has been made, a party is free to provide a position statement to an observer attending a hearing without requiring a Court direction provided that (i) the position statement does not include the information protected by the Transparency Order and (ii) the observer

¹ Note: Tor, Nicola and Katie having been involved in this case, they have not contributed to this summary.

has been provided with a copy of the Transparency Order so that they are bound by it.

6. At a hearing in public, a party must ask the Court for permission to provide a position statement to an observer who has requested it if the document does include the information protected by the Transparency Order, provided that the party is otherwise content to provide it. The Court can then allow a variation of the Transparency Order to allow for the provision of that non-anonymised position statement to that observer at that hearing, if the Court considers that an appropriate step to take without hearing further submissions. That variation should be recorded in the subsequent court order. To re-iterate, the order would be a variation of the Transparency Order for the purposes of a specific hearing and on request of the party or legal representative who would otherwise be in breach of the Transparency Order by providing the position statement to an observer.

7. If a party refuses to provide a position statement to an observer on request, the observer may apply to the Court for a direction, as provided for by the standard terms of the template Transparency Order, that they be provided with a copy on such terms as the Court considers fit.

8. Such an application need not be made formally under the procedure in COP Rules Part 10. There is insufficient time to allow for a formal written application to be made and the Transparency Order allows for its variation to be made of the court's own motion or on application with no requirement for such an application to be made in writing. That is a much more suitable process for a request by an observer at a hearing. The

application may be made orally to the Court at the outset of the hearing.

9. The Court will hear submissions by the observer as to how access to the position statement will advance the open justice principle, for example by allowing them to follow the case. If needed, the Court will then hear submissions from the party refusing to provide its position statement as to countervailing factors such as the risk of harm or proportionality. The observer may respond and the Court will give a short ruling and allow the application on such terms as it thinks fit, or refuse it. Dring will be applied.

10. If, after a hearing has concluded, a non-party - whether or not they observed the hearing - requests to be provided with a position statement that was used at the hearing, then they should make a Part 10 application under r5.9(2). That process must be adopted because the application should be on notice with an opportunity for the party concerned to respond. The applicant observer will need to make out a case in support of their application. The hearing having concluded, the more immediate, less formal process outlined above will no longer be appropriate. Again Dring will be applied (and see In re HMP below).

Poole J noted that:

37. That procedure would be broadly consistent with the approach taken in Moss (above). It is not a straightforward procedure but unless or until there is a change to the rules, practice directions or the standard

Transparency Order,^[2] it appears to me to be the best that can be achieved. For my part, I would add that:

1. I am concerned in this case with an application by an observer. The rules, practice directions, and standard Transparency Order distinguish between parties and non-parties, but not between observers and reporters. Hence the same procedures set out above should, in my judgement, apply to applications by accredited journalists and legal bloggers.

2. The Transparency Order is the mechanism through which persons are prohibited from communicating or publishing certain information. In most cases it will not be necessary to consider further prohibitions in respect of information within a position statement when deciding whether to permit or direct its provision to an observer at an attended hearing. After all, the position statement is a means of avoiding longer oral submissions at the hearing. In the absence of a written position statement, an advocate would make the same submissions orally and those would be heard by the observer and could be communicated or published provided there was compliance with the Transparency Order. Although it is good practice to prepare anonymised Position statements, I would usually allow a variation of the Transparency Order so that a non-anonymised position statement may be provided to an observer who is at an attended hearing and who has the Transparency Order, rather than insisting on full anonymisation as a condition of provision. The observer will be bound by

the Transparency Order. My practice is to refer to P by name during a public hearing with observers present, safe in the knowledge that the Transparency Order prohibits them from communicating or publishing P's identity outside the hearing. If there have been breaches of Transparency Orders by observers, I am not aware of any. I can see that a hard copy of a position statement naming P might be left on a desk and seen by someone other than the observer but, again, if that has happened I am unaware of any such instances. The addition of the rubric I have suggested to the first page of a position statement would add a further reassurance. So the Transparency Order would protect "the information" even if names or other protected information is included in a position statement provided to an observer. If there are a large number of observers then I might vary this practice and insist on a position statement being fully anonymised before provision to observers. Even if every observer were to abide by the Transparency Order, the purpose of protection the information referred to in a Transparency Order would be de facto defeated if, say 50 observers were all provided with that information.

4. Some of the submissions received on this issue emphasised the private nature of material within position statements and that the default position for COP hearings is that they be heard in private. However, the great majority of COP welfare hearings are in public and subject to a Transparency Order. Information relayed to the court whether orally or in writing is indeed personal, but the Transparency Order allows reporting and communication of it without undue

² We would add to this list the Mental Capacity Act 2005, because many of the problem with the sometimes convoluted procedure around transparency orders stem from the fact that there is no adequate protection in primary legislation for the privacy rights of P when

proceedings move from private to public (reflecting the fact that the MCA 2005 was drawn up at a time when the idea of routinely holding hearings in public would have struck many as unthinkable).

interference with the Article 8 rights of P and others. That is the balance struck. A hearing that is in public can be attended by anyone who can hear even intimate information about P. I do not believe it necessary to limit the purpose for which position statements are provided to an observer. The answer to the concerns raised is to make an application for the hearing to be heard in private. Upon such an application the Court will consider whether to proceed in public or in private, applying the relevant rules, practice directions and case law. It was submitted that position statements should be provided only to allow for understanding of the hearing but with a prohibition on an observer quoting from them. I do not believe it necessary for the Court to engage in that distinction - the Transparency Order prevents publication of the relevant information. If there is further information included in position statements that requires "protection", then the Transparency Order may need amending, as indeed has been done in this case at the hearing on 22-23 May 2025.

Habitual residence, moving jurisdictions and 'lawful authority'

Re A (Habitual Residence) [2025] EWCOP 22 (T2) (HHJ Millar)

International jurisdiction of the Court of Protection – other

Summary

In this case, HHJ Millar set out a helpful worked example of determining whether a person's habitual residence has changed following a loss of capacity, and where the move has not been at the behest of professionals, but family members.

As he held at paragraph 13:

In my judgment the following reasons lead me to the conclusion that A's habitual residence is in Spain;

- a. *He lived and was settled there for 33 years which is a significant period. I accept that there is no evidence that he wished to or intended to return to Wales to live when he had capacity. He chose to return to Spain following his period of ill health in 2018 whilst still suffering complications;*
- b. *A was integrated into life in Spain. His permanent home was there. He built a life there over many years. He may not have spoken Spanish to any great extent nor socialised much through choice, but in all other respects his integration was complete;*
- c. *He had owned property in Spain. He owns no property in England or Wales. It is suggested that he and B lived in rented accommodation from 2011. This is also a significant commitment demonstrating integration into that community. It is a lengthy duration and was settled, stable accommodation;*
- d. *A established business in Spain;*
- e. *He held bank accounts in Spain not in the United Kingdom. His finances were operated from those accounts;*
- f. *He received health care in Spain. His medical notes from E Hospital record that he 'lives in Spain';*
- g. *He obtained residency in Spain;*
- h. *It is clear A chose to live and make his life in Spain;*

- i. *A played no part in the decision to move him to Wales. I accept he did not understand he was moving permanently to Wales. It is accepted that he lacked the capacity at the time to make that decision. At all times since he moved to Spain and had capacity to decide, it was A's settled intention to reside and make his home there;*
- j. *It was not his decision to leave Spain and move to D. He was taken there;*
- k. *There is much objective evidence from the records and evidence from his litigation friend that he wished to return to Spain;*
- l. *Subjectively the evidence is overwhelming that A was settled in Spain and wished to live there.*

14. *I accept that B and C had no lawful authority to move A to Wales. He had refused to sign a lasting power of attorney in Spain which indicates he objected to others making decisions about him. His permanent removal from Spain was likely to be contrary to his wishes.*

15. *B and C did not act in bad faith. However, options for care in an area wider than the immediate locality in which B and A lived in Spain were not explored.*

16. *I therefore find that A remains habitually resident in Spain.*

Comment

³ See the [cross-border guidance](#) produced by the Law Societies of England & Wales and Scotland;

⁴ Albeit that, in that case, Munby J talked of reliance upon the doctrine of necessity. For the reasons

In relation to paragraph 14, it should be noted that 'lawful authority' does not solely mean authority granted (for instance) under an LPA or court order. In contrast to the position in Scotland, where ordinary residence cannot change absent such express authority,³ it is possible for 'lawful authority' to take the form of a decision made relying upon the defence in s.5 MCA 2005. For an example of such a case, see *Re PO* [2013] EWCOP 3932.⁴ However, it is only possible to rely upon this defence where the person(s) doing so reasonably believe that they are acting in P's best interests, which has two consequences:

1. There must be some basis for that belief – i.e. a purely subjective belief that you are doing the right thing is not enough: see *Re QD (Jurisdiction: Habitual Residence) (No 1)* [2019] EWCOP 56 at paragraph 21;
2. It is going to be very difficult to make out the grounds for the defence where the action – as here – is against all the person's known wishes, feelings, beliefs and values, and also where appropriate steps have not been taken to comply with the other provisions of s.4 MCA 2005.

Cross border mental capacity frameworks: new joint information note from the Law Societies of Scotland and England & Wales

In a coincidence of timing (both projects having been started and running independently, albeit with two common joint participants),⁵ the recent [publication](#) of the new pan-UK protocol for judicial communications for cases involving adults who lack capacity and accompanying

discussed at nerdily great length [here](#), Alex is not sure he was quite right to do so.

⁵ The common participants being (now Sheriff) Helen McGinty for Scotland, and Alex as one of the contributors for England & Wales on both

handbook⁶ has now been joined by a new information note prepared by the Law Societies of Scotland and England & Wales on cross-border mental capacity frameworks. The information note complements the handbook (for Scotland, England & Wales), the handbook focusing primarily on procedures before the relevant courts and the information note on the legal frameworks more widely.

The information note can be found on the Law Society of Scotland's website [here](#), and the website of the Law Society of England & Wales [here](#).

Short note: experts blurring the lines

Liverpool City Council v Ms A & Ors [2025] EWHC 1474 (Fam) is a case concerning children, but the observations made about the approach taken by the expert are equally applicable in the Court of Protection:

13. The united position of all parties is that Dr Parsi di Landrone wholly misunderstood and failed to comply with her instructions as an expert. Most crucially, her conclusions and recommendations were fundamentally flawed by reason of her failure to proceed on the basis of the factual findings made by HHJ Coppel.

14. Dr Parsi di Landrone was notified in writing by the parties of their concerns and that they would be seeking for adverse comments to be made regarding her report within this judgment. Dr Parsi di Landrone has attended two hearings before me to deal with this issue and has submitted a lengthy response to the parties' concerns. Within the response, Dr Parsi di Landrone denies that she refused to accept the findings of HHJ Coppel. She

argues that in carrying out a psychological risk assessment she must consider not just historical findings but a wide range of factors including current risk indicators. She opposed being named within any published judgment.

15. The Court does not take issue with the methodology for carrying out a psychological risk assessment as set out by Dr Parsi di Landrone in her response. The fundamental difficulty is that contrary to the duties of an expert, Dr Parsi di Landrone did not consider the Court's findings within that broader framework of assessment, but challenged the validity of the findings themselves. It is not a case of different professionals utilising different assessment tools, but a court appointed expert failing to proceed on the basis of the facts as determined by the Court in carrying out the risk assessment as instructed. The Court notes the objection raised by Dr Parsi di Landrone that she was not given an opportunity to respond to concerns before a new psychologist was appointed. However, given the fundamental and pervasive nature of this failing, the Court is satisfied it was not susceptible to remedy through the raising of questions or points of clarification. The Court also has to note that Dr Parsi di Landrone's detailed response, continues to conflate the factual findings of the Court (which are not subject to question or challenge), with the process of assessing current risk. (emphasis added)

Harris J made clear that:

16. In terms of the impact these failings have had on proceedings, it ultimately led to further cost and delay whilst a new psychologist was instructed. The

⁶ As to which see also the Scotland section of this report for a correction to the Protocol.

assessment of Mr O had to be undertaken de novo. For those reasons, I am satisfied the fees of Dr Parsi di Landrone should not in principle be met from the public purse. The Court understands that Dr Parsi di Landrone has in fact already been paid in full by the local authority and the legal aid agency for her work. In light of the Court's comments, I would invite her to consider whether she should out of good will return her fee to those public bodies.

The court, further, went on to name Dr Parsi di Landrone, on the basis that:

There is a clear public interest rooted in ensuring the fair, just and efficient administration of family justice that experts should not be anonymised, the more so when their assessments and recommendations have been found to be flawed. The Court observes that experts have clear and important duties to the Court as set out within Part 25 of the Family Procedure Rules 2010. It is vital instructed experts understand those rules and comply with them. If they fail in those duties, it not only causes harmful delay and significant cost to the public purse, but undermines fair, sound and just decision-making by the courts.

The impact on P of assessment

We cover the case of *N v N (Expert Evidence on Gender Affirming Treatment)* [2025] EWHC 1325 (Fam) (Family Division (MacDonald J)) in the Children's Capacity section because it concerns a 17 year old. We want to flag it for readers who spend their time thinking about adults as well, though, because of its wider implications for the instruction of experts in the Court of Protection.

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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 September. 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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