



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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### Capacity in the rear view mirror – how does the presumption work?

*Furley Page LLP v KFL* [2025] EWHC 1703 (SCCO) (Senior Court Costs Office) (Costs Judge Whalan))

*Other proceedings – civil*

#### Summary

The problem of the retrospective consideration of capacity troubled Costs Judge Whalan in *Furley Page LLP v KFL* [2025] EWHC 1703 (SCCO). The question arose in relation to the detailed assessment of costs due by the defendant (a distinguished – unnamed – barrister who is now living with dementia) to those solicitors acting for him in complex proceedings ultimately leading to the appointment of a property and affairs deputy and the execution of a statutory will (see for a summary: *T & Anor v L & Ors (Inherent Jurisdiction : Costs)* [2021] EWHC 2147 (Fam)).

As a preliminary point on the detailed assessment, the point was taken on behalf of the barrister that:

*At the time of the Claimant's instruction, the Defendant did not have contractual capacity to enter into a contract to retain the Defendant. The Claimant took no steps to establish if the Defendant had contractual capacity prior to acting for him in circumstances where the*

*Claimant knew, or ought to have known that the Defendant lacked contractual capacity. Consequently, the alleged retainer between the Claimant and the Defendant is unenforceable and no costs are payable by the Defendant.*

The solicitors asserted that the barrister had had the capacity at the material time. This meant that Costs Judge Whalan had to engage in a detailed reconstruction exercise both as to the Defendant's contractual capacity at the relevant item, and the solicitors' knowledge of his contractual capacity.

Costs Judge Whalan's judgment is commendably succinct on the key points, reproduced below:

*40. Capacity is presumed under the MCA 2005 until the party challenging the presumption discharges the burden of proving otherwise. Although the Claimant has referred to a "high burden of proof", the standard of proof is the balance of probabilities. For a party to avoid a contract due to lack of capacity, it is clear, following the Supreme Court judgment in *Dunhill v. Burgin* (ibid), that the other party must have actual or constructive knowledge of the incapacity. I reject the Claimant's narrow construction purporting to limit the test to actual knowledge only.*

*41. In the extended chronology of this matter, two propositions are tolerably*

clear. First, that on 15<sup>th</sup> October 2019, when the Defendant executed a Lasting Power of Attorney for health and welfare, and property and finance, he had the capacity to do so. Second, that by June 2021, when Dr Warner and Professor Howard (experts in the High Court proceedings) conducted a joint meeting, the Defendant no longer had capacity as a result of his dementia. Although the High Court proceedings concentrated necessarily on the Defendant's testamentary capacity, it seems to me that the Defendant's capacity to contract certainly followed a similar trajectory. The Defendant's condition, in other words, deteriorated to the extent that he effectively lost capacity to contract sometime between October 2019 and June 2021. All the evidence I have seen suggests that his downturn was characterised by a gradual, steady deterioration, rather than a precipitous bright-line moment when his status notably changed.

42. I am not satisfied that the Defendant has discharged the burden of proving that the Defendant had lost capacity to enter into a contract by October 2020. Indeed, I find as a fact that he had such capacity when the retainer with the Claimant was concluded on 4<sup>th</sup> October 2020. I am satisfied that the reports of Peterkin Ofori of Mental Capacity Consults in October and November 2020, accurately recorded and assessed the Defendant's capacity as it was at that time. Whatever Mr Ofori's precise status as an expert, he was instructed properly and carefully by the Claimant, who was aware of the Defendant's dementia diagnosis and keen to ensure that he had capacity, and his reports suggest a structured, informed and accurate analysis. The Office of the Public Guardian, moreover, recorded in late January 2021, that it was ending its investigation, having 'received mental capacity assessments' which found that

the Defendant had capacity 'to make their own decisions about their lasting power of attorney (sic)'.

43. Insofar as I have noted that the Defendant had lost capacity by June 2021, it seems to me that this represented the first point in time when this conclusion could be justified and stated with any confidence. Although the High Court had made a number of interlocutory orders in April and May 2021 which appear to have been predicated on the Defendant's lack of capacity, a joint experts meeting (Dr Warner and Professor Howard) on 10<sup>th</sup> May 2021 'failed to yield any clear consensus on key issues relevant to a determination of capacity' (Cobb J, JB 92, para. 16). Accordingly, and doing the best I can on the available evidence, I find as a fact that the Defendant had no capacity to contract from 22<sup>nd</sup> June 2021.

44. It would be hard for the Claimant to argue that it was not affixed with actual knowledge of the Defendant's lack of capacity from, at the very latest, 29<sup>th</sup> July 2021, when Cobb J delivered his judgment in Re K: T (& Another) v. L (& others) (Inherent Jurisdiction: Costs) (ibid). Indeed, while the Claimant was not instructed in the High Court claim, it seems clear from the parties' respective submissions in this case, that the material produced in the High Court, specifically the medical evidence, was available contemporaneously. To be cautiously clear, however, I find as a fact that the Claimant had actual knowledge of the Defendant's lack of capacity as a contracting party on 29<sup>th</sup> July 2021. I have seen no persuasive evidence to suggest that the Claimant had constructive knowledge of the Defendant's condition prior to that date. As ever, reaching such absolute conclusions in a case in which bright-line certainty is characteristically absent,

*is a challenging process. But my conclusions accord with the expert findings and the manner in which this evidence was construed in the High Court proceedings.*

*45. In summary, therefore, the Defendant had capacity to enter into the contractual retainer agreed with the Claimant on 4<sup>th</sup> October 2020. He maintained such capacity until 22<sup>nd</sup> June 2021 when, on the balance of probabilities, his dementia had deteriorated to the extent that he no longer had the capacity to contract. The Claimant's solicitors had actual and/or constructive knowledge of this from 29<sup>th</sup> July 2021.*

## Comment

We would respectfully suggest that it would have assisted Costs Judge Whalan considerably had been addressed on whether his assumption that “[c]apacity is presumed under the MCA 2005 until the party challenging the presumption discharges the burden of proving otherwise” is correct when considering matters retrospectively. For the reason that Alex has discussed in greater detail in this [paper](#) (which is framed around testamentary capacity, although the principles are the same<sup>1</sup>), he at least would suggest that:

1. The statutory presumption<sup>2</sup> of capacity is ‘real time’ – i.e. it applies when considering whether the person currently has capacity to make the relevant decision.
2. When assessing the position in retrospect, the question is whether proper doubts have been raised that the person lacked the

relevant capacity. The evidential burden then shifts to those person(s) seeking to establish that the relevant capacity was present.

Looking through this lens, the question for Costs Judge Whalan was whether the barrister had adduced evidence sufficient to give rise to proper doubts as to his lack of capacity at the material time. It may well have been that he would have reached the same conclusion, but he would have done so by an analytically different route.

## The forfeiture rule and Dignitas

In an unreported case helpfully the subject of a [note](#) prepared by the Counsel involved (the order being [here](#)), Deputy Master Bowles confirmed that, where all potential beneficiaries are adult and have capacity and agree to abide by the deceased's wishes in the will notwithstanding the potential application of the forfeiture rule following assistance in enabling a person to travel to Dignitas, their agreement is not contrary to public policy, but will be binding on, and can safely be actioned by, the personal representative, avoiding the need for costly and distressing court proceedings.

## Short note: undue influence and the Supreme Court

In *Waller-Edwards v One Savings Bank Plc* [2025] UKSC 22, Lady Simler (giving judgment for the Supreme Court) made some interesting observations about undue influence. Although they were given in the context of decision-making by a bank about lending, they have wider resonance – in circumstances where it should be remembered that financial abuse can constitute

<sup>1</sup> Not least because the capacity to make a will is, at present, a common law test, in the same way as capacity to enter into a contract.

<sup>2</sup> Technically, of course, it is not a “presumption” but an “assumption” in s.1(2) MCA 2005, but we have it on good

authority that the two words are intended to mean the same: Lady Hale when at the Law Commission thought that the latter was easier to understand.

coercive or controlling behaviour as well as domestic abuse.

As she put it in the first paragraph:

*The law recognises that there are certain (non-commercial) relationships where there is a heightened risk that one party has an undue influence over the other: the husband-and-wife relationship is an obvious example but there are others too. In certain circumstances the vulnerable party to such a relationship (say, a wife) who has been induced to enter into a financial transaction by the undue influence of her husband, is entitled to have it set aside as against the husband. The question that can then arise is whether the undue influence as between husband and wife affects the lender with whom the husband has been dealing, even where the lender has entered into the transaction in good faith and without actual knowledge of the undue influence.*

[...]

*6. I should make clear at this stage that, in the discussion below, I refer to the non-commercial relationship of husband and wife, and to the wife as the vulnerable party since that is the fact pattern in this appeal, and an all too common one. However, the same points apply equally to other non-commercial relationships open to abuse and men can also be abused or exploited by their intimate partners.*

She also emphasised that, whilst:

*38. [i]t might have been thought that the increased participation of women in the labour market over the decades since O'Brien coupled with an increase in their levels of financial and other independence would mean that the prevalence of economic abuse between women and their spouses or intimate*

*partners has reduced. But the evidence shown to the court in the form of reports and regulatory activity suggests that is wrong. Indeed, a report published by the Financial Conduct Authority suggests that as many as one in six women in the UK has experienced financial abuse by a current or former intimate partner: see "The hidden cost of domestic financial abuse: working together to improve outcomes" by Joanna Legg, 17 May 2024. Legislation and greater regulation in this area suggest an increasing awareness and understanding of economic abuse as a form of domestic abuse (see for example section 1(3) of the Domestic Abuse Act 2021) and its damaging effects.*

### Testamentary capacity – how to identify an unhelpful report

Time may be running out for *Banks v Goodfellow* if the [Law Commission's proposals](#) are adopted, but for the moment it remains alive and well. It featured in *Parfitt v Jones & Anor* [2025] EWHC 1552 (Ch). The case is of interest for the fact that, notwithstanding there had been an expert report prepared for purposes of Court of Protection proceedings considering the testator's testamentary capacity in 2024, HHJ Keyser KC found that the challenge to her capacity at the point of making the contested Will in 2008 to have been without merit, such that he suggested that it was "rather unsavoury and disrespectful to the dead to advance what I regard as a groundless case that a clearly capable testatrix lacked testamentary capacity" (paragraph 81). This conclusion was reached, in part, on the basis of HHJ Keyser's analysis of the factual evidence that was before the court about matters in 2008, but his observations about the expert report from the 2024 proceedings merit setting out in full as the issues raised are ones we see too often:

80.1 I accept that Dr Thompson had expertise to qualify him to give an opinion in the case. However, I do regard his expertise as limited and consider that this lessens the weight to be placed on it. Dr Thompson has a very impressive array of academic credentials, including (among many others) an MPhil in Clinical Psychology and a PhD in dementia assessment. However, it appears that his experience is entirely academic and that he has no experience as a treating psychologist. He certainly has no medical qualification, as was envisaged by the order giving permission for expert evidence. When the question of his professional, as distinct from academic, credentials was raised by those acting for Carolyne, Vicky's solicitor wrote to him as follows:

"It has been suggested that they can find no record of your medical credentials, in particular that you are registered with the GMC and HCPC or British Psychological Council. I am sure that this is not the case and I would be grateful if you could let us have full details of your medical qualifications showing your status to prepare the report."

In reply, Dr Thompson referred to his extensive list of qualifications in the report and continued:

"4. You will see that I have considerable expertise in the subject area and that I am a Full Member of the British Neuropsychological Society, Principal Fellow of the Higher Education Academy and registrant of the UK Register of Expert Witnesses.

5. I do not belong to the HCPC [the Health and Care Professions

Council] which is for practitioners nor am I registered with the GMC [General Medical Council] which is for doctors!"

80.2 Dr Thompson did not have the advantage of examining Mary. This necessarily limits the weight that can be placed on his opinion. Indeed, when Dr Thompson was questioned by Carolyne's representatives about the Mini Mental State Examination results in 2006, he accepted that Mary's score was within the expected range but went on to add that MMSE was "a simple and sometimes unreliable measure" and should always be considered together with questioning by a professional and the impression gained by a professional. (He gave a similar response in respect of the results of the 6-CIT examination in 2011.) Dr Thompson never had an opportunity of forming an impression of Mary.

80.3 Dr Thompson did not have the advantage of familiarity with the witness evidence. Of course, he could not see the witnesses give evidence at trial, as I have done. But as appears from the letter of instruction and from his report, the documentation provided to him comprised only: the medical records; the statements of case; the Will and the LPA and the documents relating to their preparation and execution (though this will not have included Mrs de Vall's notes, which were only produced at trial); and court orders. If one cannot form an impression of a testatrix from a direct encounter, there is much advantage in doing so from considering the evidence of those who knew her. In addition, there are objective facts (such as the accuracy and cogency of testamentary instructions) that are or might be relevant to the question of testamentary capacity, but the existence or significance of which one is unlikely

to be able to assess without reference to the wider body of evidence.

80.4 For reasons set out below, I regard Dr Thompson's conclusion as to testamentary capacity as inadequately reasoned and evidenced. I think it was Lord Goff of Chieveley who remarked that an ounce of reasoning is worth a pound of opinion; whoever made the remark, it has much to commend it.

80.5 As mentioned above, section 4 of the report contains Dr Thompson's summary of the "main points" in the documents. The only paragraphs that seem to have any possible bearing on Mary's testamentary capacity in 2008 are paragraphs 4.4, 4.5 and 4.6. (Those, indeed, are the paragraphs that Dr Thompson identified, as being relevant to memory problems in 2008, when he responded to questions put by those acting for Carolyne.) The three points in these paragraphs are: (i) memory problems in 2006; (ii) confusion over dates in August 2006; (iii) a diagnosis of dementia in July 2011. I have commented on points (i) and (iii) above and shall do so again below. As for point (ii), the "confusion over dates on 2 August 2006", the document referred to by Dr Thompson is an entry by a practice nurse in the GP records, which reads:

"Telephone encounter with patient slightly confused over dates for inr [International Normalized Ratio: a blood test to assess how long blood takes to clot], book says to have inr taken on 15th but also has appointment on Friday for inr at St Woolos. Advised Friday because of facial pain and medication dr wants inr to be checked. Appointment given to attend surgery on 15th as per inr clinic instructions."

I do not think it reasonable to treat that entry as a genuine piece of evidence

relating to testamentary (or any other) capacity. To refer to it as evidence of "confusion over dates" is to give a misleading impression. Those acting for Carolyne asked Dr Thompson whether he agreed "that the confusion is not a general confusion but specific to the fact that Mrs Wadge was given 2 appointments for inr tests within 2 weeks of each other (because she had reported facial pain and was taking warfarin) and was querying whether this was correct." Dr Thompson replied, "Yes, this may have been in respect of dates." I do not regard the entry as having any evidential value on the issue of testamentary capacity.

80.6 The answer to question no. 1 (paragraphs 5.1 to 5.4) is, in my view, poorly reasoned and inadequately supported by evidence. There is no doubt that Mary was experiencing memory problems in 2008 and that she was diagnosed with dementia in 2011. Neither fact implies that she had any wholesale inability to make or remember decisions at the earlier or even at the later date. Dr Thompson does not identify the nature of the decisions that he thinks Mary could not make or remember in 2008; he just says that she "did not have the mental ability or capacity to make decisions or to remember important decisions made by her during 2008." As it stands, that is obviously wrong: regardless of whether or not she had testamentary capacity, Mary was plainly able to make some decisions in 2008. Not only is this clear from the evidence as a whole; it is positively stated in the joint assessment of Pam O'Brien and Dr Linton (both of whom had actually examined Mary on several occasions) in November 2012. Dr Thompson does not engage with that assessment. In fact, there seems to be no evidence at all that Mary was incapable of making decisions of whatever sort in 2008.

80.7 On the specific issue of testamentary capacity, Dr Thompson correctly referred to the test in *Banks v Goodfellow*, to which he had been directed in the letter of instruction. However, the reasoning that led to his conclusion is, in my view, unconvincing and indeed opaque. The reason he gives for his opinion is that Mary had memory impairment in 2008. As I have said, and as seems to me to be obvious, memory tends to deteriorate with age; this is especially true of short-term memory, as appears to have been the case with Mary. A degree of memory impairment is capable of being consistent with testamentary capacity. *Banks v Goodfellow* does not lay down a memory test. Rather it requires (to paraphrase) that the testatrix understand the nature of the act she is performing, the extent of the property of which she is disposing, and the claims to which she ought to give effect. Memory impairment is relevant to testamentary capacity only if it takes away this understanding. The question whether a person had testamentary capacity is one for the court to answer on the basis of all the available evidence. There is, in my view, no evidence that, either when she gave instructions for the Will or when she executed it, Mary was in any way lacking in relevant understanding or had any relevant lapse of memory.

80.8 Perhaps because he did not have the benefit of witness statements, but only of statements of case, Dr Thompson did not actually address the question whether there was evidence that Mary did indeed lack the necessary understanding. As I have said, in my view there is not such evidence. Unless one accepts that Mary did not know what she was doing and that the instructions for the Will were given not by her but by Carolyne—which I find not to have been the case—, Mary appears

to have understood the nature and extent of her estate; indeed, the defendants have not suggested the contrary. She also appears as a matter of fact to have understood the nature of what she was doing in making a will; and I so find. As for the claims to which she ought to give effect, she was positively scrupulous in identifying those who might reasonably expect to be provided for in the Will. The only serious questions in that regard concern the small provision made for James and the express decision not to benefit Vicky. I have dealt with those matters above. Dr Thompson does not mention them or, apparently, consider them.

80.9 A diagnosis of dementia a little more than two years after the Will was made can hardly support a conclusion of incapacity at an earlier time. What is required is evidence of capacity or incapacity at that earlier time. It may, perhaps, be that Mary's memory impairment from about 2006 was due to incipient, undiagnosed dementia. But that, if so, is not the point: the question is not whether there was some incipient, undiagnosed dementia at the earlier time but whether Mary had testamentary capacity. Further, it is surely of significance that, unlike Ron, Mary was not diagnosed with dementia in 2008 or until 2011. It was only in answers to questions by those acting for Carolyne that Dr Thompson engaged with the tests of mental capacity that had indicated the likelihood that, notwithstanding her own concerns about memory deficit, Mary's cognitive functioning was within the normal range well after the Will was made. Even then, his answers (to the effect that the test results are fallible and must be taken in conjunction with the assessment of professionals), while no doubt correct, serve only to highlight his disadvantage in having no impression of his own with which to counter the test results or the

*absence of any diagnosis of dementia at the earlier dates.*

*80.10 Those acting for Carlyne asked Dr Thompson whether he agreed "that generally most but not all people with mild dementia will retain capacity to make a will". He replied, "No, it is very much on an individual basis. Dementia is complex." This answer only throws the problems with Dr Thompson's evidence into sharper relief.*

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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.

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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](mailto:marketing@39essex.com).

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