



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

- (1) In the Health, Welfare and Deprivation of Liberty Report: the court is not a rubber stamp for clinicians and what does it mean to represent P's interests;
- (2) In the Property and Affairs Report: Professional Deputy Costs, and paying drug debts for P;
- (3) In the Practice and Procedure Report: capacity to conduct proceedings and the costs of inadequate disclosure;
- (4) In the Mental Health Matters Report: capacity to conduct Tribunal proceeding, and the independent investigation into the care and treatment of Valdo Calocane;
- (5) In the Children's Capacity Report: looking at other options before using the inherent jurisdiction to authorize a deprivation of liberty;
- (6) In the Wider Context Report: what happens if you never had litigation capacity and new books;
- (7) In the Scotland Report: AWI reform and the UK Protocol on Judicial Cooperation.

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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### Webinar: A protocol regulating communications between judges in Scotland, England & Wales, and Northern Ireland in children’s cases

In our [May Practice and Procedure Report](#), we covered the new [protocol regulating communications between judges in Scotland, England & Wales, and Northern Ireland in children’s cases](#). There will be a webinar on 24 June 2025 from 16:30-17:30 on this new protocol (which has been the subject of invitations to COPPA and CPBA members):

*The President of the Family Division and Court of Protection, Sir Andrew McFarlane, is pleased to invite you to:*

*A Webinar celebrating Judicial Collaboration in cases involving children, and adults who lack capacity across the United Kingdom*

*Presentations will be given by Sir Andrew McFarlane (England & Wales), Lady Morag Wise (Scotland) and Master Hilary Wells (Northern Ireland)*

**\*\*Tuesday 24 June 2025, 16:30-17:30, via MS Teams\*\***

*This Webinar marks the launch of a newly published [protocol regulating communication between judges in Scotland, England & Wales, and Northern Ireland in cases involving adults who lack capacity](#).*

*It also celebrates the release of the accompanying [Judicial Handbook](#) and an updated [Judicial Handbook on family law relating to Scotland and England & Wales](#).*

*The event will be chaired by Lady Wise, President of the Scottish Tribunals and a Senator of the College of Justice. Sir Andrew, Lady Wise and Master Wells will discuss the value and benefits in having intra UK judicial cooperation and collaboration.*

*The discussion will be followed by a live Q&A session. We invite attendees to submit questions in advance by [16 June 2025](#).*

*The event will be available to all those who register at the link below.*

*Please click [the following link](#) and complete the registration form in order to attend.*

*You are encouraged to register early as there is limited capacity for attendees.*

### Capacity to conduct proceedings

*Liubov Macpherson v Sunderland City Council [2025] EWCOP 18 (T3) (Theis J)*

*Aina Khan Law Ltd v The Legal Ombudsman [2025] EWHC 1319 (Admin) (29 May 2025) (David Pievsky KC, sitting as a Deputy High Court Judge)*

These two cases concern the assessment of capacity to conduct proceedings.

In the first case, Ms Macpherson had been involved in CoP proceedings for some time and had been found in contempt of court due to publishing information about her daughter online. She issued an application for permission to appeal in the committal proceedings, and the Court of Appeal was asked to deal with concerns raised by her legal representatives that she may not have capacity to instruct them. The Court of Appeal determined pursuant to s.48 MCA 2005 that there was reason to believe Ms MacPherson lacked capacity to conduct the proceedings, and sent the issue of her current capacity and her capacity a year previously to be determined at Tier 3.

Ms MacPherson did not want to undergo a face to face capacity assessment, so the only evidence available to Theis J was an assessment by a psychiatrist based on consideration of the papers. The psychiatrist had decided that Ms MacPherson had persistent persecutory delusions relating to professionals and institutions which prevented her being able to use and weigh information concerning the proceedings. Theis J disagreed, saying that his evidence was undermined by the lack of face to face assessment, the limited paperwork and absence of medical records, and a lack of balance or analysis of the paperwork that did exist given the previous examples of hearings at which the court had been satisfied that Ms MacPherson did have capacity. Ultimately, misguided and entrenched opinions did not amount to a mental impairment and did not give rise to a lack of capacity.

The second case, *Aina Khan Law Ltd*, was an application for judicial review by a family law firm which had been found by the Legal Ombudsman not to have adequately assessed a client's capacity to give instructions and directed to repay significant sums to the client. The claim was successful in that the finding of a failure to assess capacity was quashed. The court held that the Legal Ombudsman had conflated the existence of a mental health condition and the client's involvement with a psychiatrist with a lack of capacity, and had failed to explain why it was not

adequate for the solicitor to have formed a view on capacity herself and discussed it with leading counsel, and why it was the case that an expert assessment of capacity had been required. As in the first case, the court flagged the dangers of letting hindsight affect the assessment of a person's capacity.

### Varying a transparency order when material is already in the public domain

*Norfolk County Council v CA & Ors* [2025] EWCOP 16 (T3) (Arbuthnot J) 11 April 2025

*Media – Anonymity*

#### Summary

This case is a useful reminder to look to what material is already in the public domain when considering the appropriate terms of a transparency order in committal proceedings.

The Judge had presided over a contested fact finding in the COP in October 2024, in which she found a number of allegations proved against DA including that she had both verbally and physically abused CA, her 79-year-old mother as well as subjected her to undue influence over a number of months. The Judge handed down a judgment on 10 October 2024 (*Norfolk County Council v CA & Ors* [2024] EWCOP 64 (T3)). That judgment is available on the National Archives. In accordance with standard practice, the judgment identifies the local authority, but not CA or DA. It is clear from reading the judgment, what the relationship between CA and DA is.

On the last day of that fact finding hearing, the Court made injunctions against CA. CA also gave undertakings to the Court. As a result of CA's subsequent breaches of these orders and undertakings, committal proceedings were brought by Norfolk County Council. The committal proceedings, were held in public. During the course of those proceedings, there was argument about whether or not DA should be identified in the judgment. The Judge decided that she should be, but that CA was not to be named, and nor should the nature of the relationship between DA and CA

be made public. In order to give effect to this decision, a transparency order was made preventing "any material that identifies or is likely to identify the specific relationship between DA and the defendant" from being published.

The unintended consequence of this order is that reporters have been unable to link the committal judgment with the fact-finding judgment of 10th October 2024. This led Professor Celia Kitzinger to apply to the Court to vary the order made in the committal proceedings, by deleting the paragraph preventing the identification of the relationship between CA and DA from being made public. The main thrust of the application was that the public interest required the decision in relation to the committal proceedings to be linked to the fact-finding judgment of 10th October 2024 which was in the public domain to enable "*continuity of reporting between the 2024 blogs (and judgment) and the 2025 committal hearing.*" [24] It was said that the danger to a reporter of linking the two sets of proceedings was that it would be likely to identify the victim as being the mother of DA, the defendant in the committal proceedings, and thus amount to a breach of the Court order.

Professor Kitzinger's application was supported by Norfolk County Council but opposed by DA and CA's litigation friend, the Official Solicitor. The Official Solicitor's concern was that if the application was granted, it would be very easy to identify CA given that DA's name was already in the public domain.

In weighing up CA's Article 8 ECHR rights, Arbuthnot J accepted that if the proceedings were reported in CA's local newspaper, CA would be likely to read about it. The Judge also accepted that granting the application may lead to local gossip and that as CA still had a small, but nevertheless important social circle, she may feel embarrassed about details of the abuse she has suffered at the hands of her daughter being made public. The Judge accepted that '*such a light being thrown on CA's home life and her daughter's behaviour would be a significant interference with her right to privacy.*' [50] In conclusion on Article 8, the Judge held that

*"the risk of CA being identified by neighbours and her congregation is high but the risk of any consequential harm is very low."* [55]

Set against CA's Article 8 rights were the Article 10 rights of the press and the public at large. Ultimately Arbuthnot J was persuaded that it was important for the public to have a complete understanding of the proceedings that were in the public domain, which could only be achieved if the link between the COP and the committal proceedings was made public. Arbuthnot J came to the view that the public had a '*need to understand the context of the contempt proceedings. They have a right to understand the proceedings as a whole.*' The Judge therefore acceded to the application to amend the transparency order. She also agreed that the judgment on the contempt application should be published as it is of particular interest given that the sentence was a fine.

### Comment

While committal proceedings arising from breaches of Court of Protection orders are still relatively rare, there is a real tension between the very strong presumption that such proceedings should be held in public (see COP rule 21.8) and the COP practice of protecting the anonymity of the subject matter of the COP proceedings, where the contemnor is related to P. This is because the publication of the identity of the contemnor significantly increases the risk of P being identified. This is particularly the case where there is already a COP judgment in the public domain.

### The cost of inadequate disclosure

*Birmingham Women's and Children's Hospital NHS Foundation Trust v KB & Ors* [2025] EWHC 1292 (Fam)<sup>1</sup>

### Costs

Morgan J considered the threshold for costs in circumstances where a party's failure to make adequate and timely disclosure risked jeopardising the timetable of a final hearing.

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<sup>1</sup> Katie Scott, having acted in this case has not been involved in writing this report.

KB's original case (reported as *Birmingham Women's And Children's Hospital NHS Foundation Trust v KB LB Fatima and others* [2024] EWHC 3292 (Fam)) is unusual, being one of the very few applications by a treating hospital to withdraw treatment from a seriously ill child which has not succeeded (see also *Tafida Raqeeb v Barts NHS Foundation Trust* [2019] EWHC 2531 (Admin)).

Difficulties arose in the course of serious medical treatment proceedings as a result of poorly reproduced and partial records which did not include salient information such as records of MDT meetings. This gave rise to the need for an additional, unplanned case management hearing and a delay of the scheduled start date of the final hearing by two days. Some three thousand pages of previously undisclosed material was produced by the Trust within seven days of the final hearing. The quality remained poor, much of the copying having been outsourced to an outside provider, and there was a lack of proper indexing to allow for easy understanding of the material.

Morgan J invited further submissions on the issue of costs alone. She made the following observations:

18. i) *It is enormously disrespectful to families whose child is the subject of such an application to have repeated hearings at which there is focus on whether material does or does not exist / has or hasn't been produced/ will or won't be available in time to make effective a hearing which has been listed weeks perhaps months in advance, at which they know that the most serious of decisions is to be made about their child.*

ii) *It is unacceptable to take so casual an approach as there appeared to be here, to ensuring that the records required and directed are before the court. It has been in this case unacceptable also to put Ms Scott – in whose word both the court and the other counsel rightly have confidence – in the position of saying on instructions*

*one thing only to have to within days, sometimes hours, correct the position.*

iii) *That sort of approach to the production of material which everyone who acts in this sort of litigation knows will be needed so as to assess (in the case of the court) and argue (in the case of the parties) the best interests analysis is not good enough. Health Trusts are almost invariably both the applicants, and the holders of the records. There is no question that the significance of the material is not understood or that the applicants are not in the position to have that material ready or near ready as they come to make the application. That is not to say that 'everything' must be disclosed, but a Trust making this sort of application should be on notice that if not at the first then likely at the next hearing, the Judge is likely to be making directions for disclosure of at least some of the medical records and other information held*

iv) *It is unreasonable – and professionally beyond discourteous- to put Counsel in the position of having to spend time making applications for material with which they should already have been provided when that time has been set aside for preparation.*

v) *It is not right that decisions such as the one which fell to be made for this child in this case are made in circumstances where all involved are placed under unnecessary and unreasonable additional pressure. Neither is it acceptable to risk either that decisions might be made, or just as significantly may be perceived to be made, in a way which is rushed.*

Ultimately, Morgan J decided not to make a costs award – not least, it appears, because of the Trust's clear acknowledgement of its failings, its steps to change its systems and practices, and the hard work done by its counsel to manage the litigation in a timely manner (see [20-21]). She did, however, provide a helpful list of

“suggestions” of how such issues might be avoided in future.

*[21] i) An index at an early stage should be compiled by the applicant of the records held by the Trust including, as well as the clinical and medical records, any therapeutic records. A senior person at the Trust should be responsible for reviewing whether all categories of material have been included.*

*ii) It is likely to be helpful to identify a person with responsibility for ensuring that the index is kept up to date.*

*iii) If records are duplicated or held in more than one place, this should be indicated on that index.*

*iv) At the first hearing of the application the index should be available to the court.*

*v) Once disclosure into proceedings (or to the parties) is directed from the index the material disclosed should be indexed and paginated. Ideally pagination should be in a form which is then added to rather than changed.*

*vi) Once disclosure into proceedings (or to the parties) is directed any material which is copied from paper records should be inspected (and a person from the Trust identified to have responsibility for inspection) to ensure that the copies are of sufficient quality, before it is added to the indexed and paginated material.*

*vii) Recognising that human error may occur in any organisation a senior person should be identified with responsibility to ensure that material readied for disclosure is sent out.*

*viii) It is likely to be helpful at the first hearing of any application for the parties to have discussions before disclosure of material as to whether it is reasonably possible for that material to be disclosed in a form which makes it text searchable. It will not always be realistic, but it is an issue to be raised early rather than later in the process of disclosure into proceedings.*

Costs applications appear to us to be being made and succeeding more frequently. This very reasonable judgment is, however, a helpful reminder that (a) the presumption remains in the welfare jurisdiction that there will be no order for costs (b) the threshold for the award of costs remains high (c) there are obvious case management steps that all parties in COP proceedings need to follow, absent which costs applications will be considered. And of course, even in cases such as this where the costs application is not ultimately successful, there will be additional costs incurred in fighting the application.

### Covert Recordings in Family Law proceedings

The Family Justice Council has published '[Covert recordings in Family Law proceedings concerning children](#).' The guidance '*follows an increased use of covert recordings in family law proceedings and the need for clear guidance, and the protection and privacy of those subject to the recording.*

*In summary, the guidance:*

- *Outlines considerations undertaken by the court, referencing relevant laws and statutory frameworks involved with covert recordings in legal proceedings – including, the covert recording of children, professionals, and other family members.*
- *Explores the consequences and potential issues that may arise from the use of covert recordings in family law proceedings and provides guidance to promote consistency in the approach to these recordings.*
- *Emphasises the need for more guidance across professional bodies and organisations regarding the use of covert recordings in legal proceedings in the family justice system.*
- *Analyses key considerations of the courts when assessing covert recordings in legal*

### Comment

*proceedings, such as the authenticity and completeness of the recording, probative value, and relevance to the case.'*

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Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click [here](#).



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



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Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click [here](#).

## Conferences

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

Neil is running the following courses, with tickets available [here](#):

- BIA/DoLS refresher training: 26 June 2025, 16 July 2025.
- DoLS Authoriser Training: 4 July 2025
- AMHP/MHA 1983 Legal Update: 10 July 2025

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 July. 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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