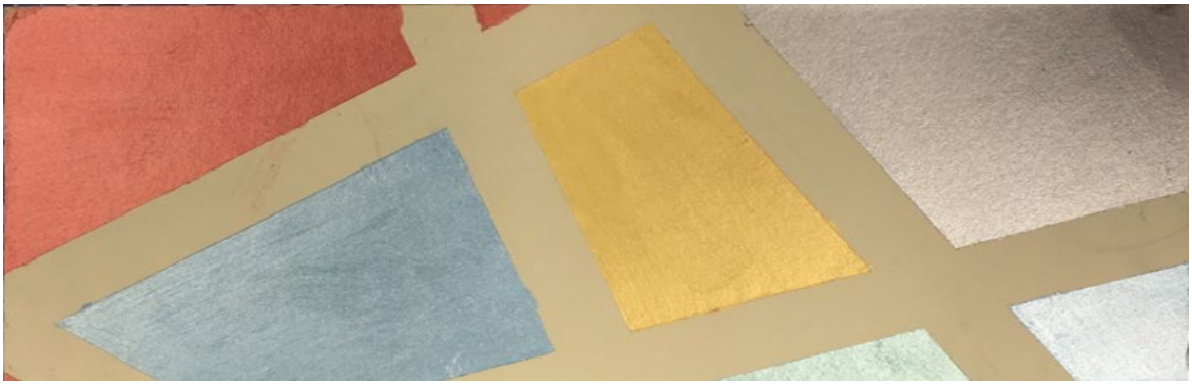

Welcome to the October 2025 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: time-specificity of capacity (again), a Welsh primer on key caselaw and urban myths around s.4B MCA 2005;

(2) In the Property and Affairs Report: two guest articles from new members of the Court of Protection on attorney elephant traps;

(3) In the Practice and Procedure Report: the purpose of transparency and the length of restrictions, and the contempt consequences of being found to have capacity;

(4) In the Mental Health Matters Report: progress of the Mental Health Bill and the CRPD and the United Kingdom in a stand-off;

(5) In the Children's Capacity Report: the Law Commission's Disabled Children's Social Care report and improving the outcomes of children in complex situations.

(6) In the Scotland Report: an update on AWI reform.

We do not have a Wider Context Report this month, but 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.

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.

Contents

Transparency in the Court of Protection – what is it good for and how long should restrictions last?

Re Gardner (Deceased)(Duration of Transparency Order) [2025] EWCOP 34 (T3) (Poole J)

Practice and procedure – transparency

Summary[1]

By accident or design, Poole J appears to have found himself the Tier 3 transparency guru. In *Re Gardner (Deceased)(Duration of Transparency Order)* [2025] EWCOP 34 (T3) he made a range of important observations about (and in passing raised some questions about) the operation of the transparency framework within the Court of Protection.

As Poole J identified at the outset:

1. *This is the third judgment I have published in these proceedings. The substantive proceedings have now concluded. They concerned an Advance Decision to Refuse Treatment ("ADRT") made by Carl Gardner, previously anonymised by the Court as AB. The earlier judgments were Re AB (ADRT: Validity and Applicability) [2025] EWCOP 20 (T3) and Re AB (Disclosure of Position Statements) [2025] EWCOP 25 (T3).[2] Following a final hearing of the substantive proceedings on 30 June 2025 I made an order on 4 July 2025 directing Mr Gardner's transfer to a hospice for palliative care in accordance with the choices he had made in his ADRT. He died on 8 July 2025. I have offered my condolences to his family, including to the Third Respondent, Danielle Huntington, his partner and fiancée, and to the Fourth Respondent, his mother who effectively, if not formally, speaks for the whole of Mr Gardner's large family.*

2. *The order of 4 July 2025, which all Counsel involved at that final hearing had agreed, included a direction that the "Transparency order dated 23 May 2025 shall cease to have effect from 30 August 2025". Mr Gardner was likely to die within a short time of his transfer to a hospice and so the Transparency Order ("TO") was to be discharged after a suitable "cooling off period" following his death.*

3. *This third judgment concerns the Fourth Respondent's application to extend the TO beyond 30 August 2025. The application was made on 5 August 2025 but could not be heard until after 30 August 2025 and so I made a direction on paper for the TO to continue in effect pending*

[1] Note: Tor having been involved in the case, she has not contributed to this note.

[2] Note, we understand that the Court of Appeal is still considering an application for permission to appeal this decision.

> *the hearing of the application which took place on 16 September 2025.*
>
> *4. The Fourth Respondent, represented then, as now, by Leading and Junior Counsel and solicitors, agreed to the discharge date of 30 August 2025 but she and the whole family have now had a change of heart. The TO allows for applications to be made to vary it and she is entitled so to apply. This is a stressful and distressing time for her and all those close to Mr Gardner and I acknowledge how raw feelings are given the prolonged litigation, the hostility that has arisen between Ms Huntington and members of the family about the ADRT and associated matters, Mr Gardner's severe brain injury, and his death. For the purposes of my determination on the application, I do not give weight to the fact that the Fourth Respondent, on behalf of the family initially agreed to the TO being discharged on 30 August 2025.*

The cast of those appearing before Poole J in relation to this question varied slightly from those who had appeared before, a notable addition being the joining, as intervener,[3] of Professor Celia Kitzinger, co-founder and co-director of the Open Justice Project.

Poole J identified that the TO in question had been in broadly standard form. He observed that

> *7. The TO is an injunction. It is not a contra mundum (against the world) injunction[4] but it applies widely, not only to the parties and their representatives, but also to witnesses, all persons who attend a hearing, all persons who by any means obtain or are given an account or record of a hearing or who obtain documents and information arising from the application, and any body or organisation and their employees and agents for whom any such person works or is giving evidence. A penal notice is attached to the TO warning that any person who breaches the injunctive parts of the order may be found guilty of contempt of court and may be sent to prison. The injunction prohibits such persons whether orally or in writing, directly or indirectly, from publishing or communicating the identified information or any part of it, or causing, enabling, assisting in or encouraging its publication or communication.*

Poole J analysed the (relative flood) of recent caselaw in this area in some detail, before noting that:

> *19. The standard order, as reflected in the TO in this case, prohibits not just the publication, but even the communication of the specified information. Accordingly, as Mr Patel KC rightly pointed out, even though the Court of Protection ordinarily sits in public, it is standard practice, in accordance with the COP rules and Practice Directions, for the Court to make an order restricting the publication and communication of information from the proceedings. That is a derogation from the principle of open justice but it is justified because the protection of P, the person who is the subject of the*

[3] In passing, it is interesting to note that this is another case in which a person / body has been joined as an intervener, even though the Court of Protection Rules do not, in fact, expressly provide for this.

[4] It is, with respect, not clear that this is true. An order which has the effect of binding any person who obtain the relevant information by any means is, to all intents and purposes, a contra mundum injunction, as it is an order which is not limited in its effect to a specific person or group of people.

proceedings, is required if the Court of Protection is to sit in public. Most Court of Protections hearings involve evidence and submissions about matters which would ordinarily be private and often confidential. Decisions about personal matters are often made by the Court in P's best interests when P does not have the mental capacity to make those decisions for themselves. The identification of P during the course of Court of Protection proceedings would be liable to interfere with the decision-making process. It is only because of their lack of mental capacity that P finds himself or herself in court proceedings with hearings in public. Whilst the decision whether to make a TO, and what its terms should be, is for the Judge, the COP Rules 2017 and Practice Directions assume that, ordinarily, the balance of Article 8 and Article 10 rights weighs heavily in favour of making a TO: it would be contrary to the administration of justice, the purpose of the proceedings and manifestly contrary to P's best interests to allow P to be identified and therefore information about them to be open to the public at large whilst proceedings were continuing. A different approach could be taken but that, at present, is the position prescribed by the law in the form of the COP rules and practice directions.

20. In the very recent Court of Appeal judgment in PMC v Cwm Taf Morgannwg University Health Board [2025] EWCA Civ 1126, the Master of the Rolls, set out a taxonomy of orders:

(i) A withholding order ("WO") to withhold or anonymise the names of a party or a witness including withholding information that would identify that person;

(ii) A reporting restrictions order ("RRO") to restrict the reporting of material disclosed during the proceedings whether in open court or by the public availability of court documents;

(iii) An anonymity order ("AO") to both withhold or anonymise names of a party or a witness and restraining the reporting of material disclosed during the proceedings.

21. Counsel agreed, with some hesitation from Ms Hearnden, that a TO is an RRO. In Hinduja (above) the Court of Appeal referred to the standard TO as an RRO, but it did not have the advantage of the Master of the Rolls' taxonomy from the subsequent judgment in PMC (above). With respect, the standard TO is, in my view, an AO since it both anonymises the names of parties and others and restricts the reporting of material from the proceedings (material likely to identify not only the anonymised persons, but also where they live and where they are being cared for). If so, then it should be acknowledged that, unlike in civil cases where cases are routinely heard in open court without reporting restrictions, it is standard practice in the Court of Protection to make an AO of the court's own motion at the outset of the proceedings. That is a derogation from the principle of open justice built in to the COP Rules 2017 and the Practice Directions and "ordinarily" applied. In other contexts the appellate courts have stressed that a WO or an RRO (and therefore an AO which combines them) may only be made if such an order is strictly necessary in the interests of justice –

> *see Scott v Scott [1913] AC 417, A v BBC [2014] UKSC 25, [2015] AC 588, and Wolverhampton City Council v London Gypsies and Travellers [2023] UKSC 47, [2024] AC 983. This may include the need to protect the identity of a vulnerable person as envisaged by Lord Reed in A v BBC at paragraph [41]. CPR r39.2(4) provides that "the court must order that the identity of any person shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of any person." In contrast, the COP Rules 2017 r4.3 does not restrict the Court's discretion to impose restrictions on the publication of the identity of a party or other person or restrict the publication of information relating to the proceedings: the rule merely refers to the relevant practice direction, PD 4C, which provides that the court will ordinarily make an order that an attended hearing will be in public and will ordinarily in the same order impose restrictions in the terms of the standard TO approved by the President of the Court of Protection. Hence, some caution is required when applying appellate case law which concerns civil or indeed criminal proceedings, to the Court of Protection.*

Importantly, given that the family of Mr Gardner were primarily seeking the extension of anonymisation in the case to protect themselves, Poole J then asked himself what the purpose of a standard TO is in the Court of Protection:

> *24. What is the purpose of a standard TO? Is it solely to protect the rights and interests of P or is it also to protect the rights and interests of others? The COP Rules and Practice Directions are not particularly helpful in answering those questions. Paragraph 27 in Part 2 of PD 4A does not apply when a standard TO is made under PD 4C but only when "different or additional restrictions on the publication of information relating to the proceedings are imposed in a subsequent order." (PD 4A, paragraph 3). Paragraph 27 states that the aim of any such subsequent order "should be to protect P rather than to confer anonymity on other individuals or organisations. However the order may include restrictions on identifying or approaching specified family members, carers etc … in cases where the absence of such restriction is likely to prejudice their ability to care for P or where identification of such persons might lead to identification of P and defeat the purpose of the order." Thus an additional RRO made subsequent to or alongside a PD4C TO circles back to P. The aim is to protect P even if the anonymisation of other persons is required to achieve that aim. No such "aim" of the standard TO is set out in PD4C.*
>
> *25. Charles J's judgment in V v Associated Newspapers [2016] EWCOP 21 persuasively demonstrates, in particular at paragraphs [73] to [78], that Court of Protection cases often involve an invasion into family and private life that extends beyond P's life "because it can directly and indirectly engage the family life of other members of P's family …" However, it does not follow that the standard TO made under PD4C is designed to protect the Article 8 rights of anyone other than P.*

Returning to this theme later in the judgment, Poole J identified that:

> *34. I have doubts that the purpose of a standard TO made under PD4C is to protect the interests or Article 8 rights of anyone other than P. The inclusion of family members within the protected information is designed to avoid jigsaw*

> *identification of P. No-one would be included in the list of names that cannot be published unless (i) publication of their names would lead to the identification of P, or (ii) their identification would hinder the care given to P or otherwise harm P's best interests, or (iii) some other very specific justification for their inclusion were put forward. I cannot know what was in the mind of the Judge who made the TO at the outset of these proceedings, but I made the TO in May 2025. The continuation of the inclusion of the family members within the protected information was not discussed. It was not controversial. There was no debate about the purpose of their inclusion. I do not recall any submissions being made that any specific family member required protection from identification for their own sake. On the other hand they had no need to make such submissions because the order already protected their anonymity in any event. Certainly, whilst the substantive proceedings were ongoing, and whilst Mr Gardner remained alive, it was necessary to protect his right to respect of his private and family life, protect the integrity of the proceedings, and to ensure that his treatment was not adversely affected by publicity or communications about information relating to the proceedings outside the courtroom. With the conclusion of proceedings and Mr Gardner's death, there is no need to protect the integrity of the proceedings nor to protect his own Article 8 rights or his best interests. Those considerations no longer apply. A cooling off period of the kind envisaged in Abbasi has now passed.*
>
> *35. I accept the observations of Charles J in V v Associated Newspapers (above) that proceedings will often invade the privacy of P's family members and I note that COP Rule r4.3 provides for the Court to make an order imposing restrictions on the publication of the identity of any party, P, any witness or "any other person". Nevertheless, the aim of the standard TO made at the outset of proceedings and before the first attended hearing, is to protect P, not to protect the anonymity of others. The standard order may be varied so as to protect others where there is specific justification to do so, but that is a different matter. In this case, I am satisfied that although the matter was never aired in Court during the substantive proceedings, the aim of the TO was to protect the anonymity, interests and Article 8 rights of Mr Gardner and no-one else. The injunction against identifying family members was to serve that aim and any protection of their privacy was incidental.*

As alluded to at paragraph 35 above, the question of the duration of the order could also turn on precisely whose interests were being protected.

> *29. The Supreme Court in Abbasi recognised that in cases concerning the serious medical treatment of children, which have some similarities to Court of Protection proceedings concerning the serious medical treatment of P, injunctions restraining publication are often made in circumstances of urgency, in proceedings that are not fundamentally adversarial, and when the Court's focus is on the best interests of the subject of the proceedings – see [38] to [45]. But the proceedings are also dynamic and the risk involved with allowing publication of information will change over time. At [142] the Court held that whilst some form of injunction is likely to be justified in the first stage of proceedings and indeed whilst the proceedings remain live,*

> *"an order is likely to need to be time-limited, either so as to expire automatically at the end of the proceedings or …. So as to expire at the end of a chosen cooling-off period thereafter; subject, in either case, to further application."*

I am satisfied that the same reasoning applies to TOs made in Court of Protection proceedings concerning serious medical treatment and in particular when it is likely that P will die if certain orders are made to withdraw or withhold life sustaining treatment. I have already noted that Part 2 of PD 4A does not apply when a standard TO is made, but only when subsequent, different or additional restrictions on the publication of information relating to the proceedings are imposed. But PD 4A, Part 2, paragraph 29 states that:

> *"Orders should last for no longer than is necessary to achieve the purpose for which they are made. The order may need to last until P's death. In some cases a later date may be necessary, for example to maintain the anonymity of doctors or carers after the death of a patient."*

That direction now needs to be read in the light of Abbasi. If it applies to additional reporting restrictions then, as a matter of logic, it ought to apply also to the initial TO. Certainly, Abbasi emphasises that open ended orders made during proceedings are to be avoided.

Taking all this into account:

39. Although I consider that the proper approach of any person - be they a clinician in the position of those considered in Abbasi, or a family member, seeking to restrict publication of information after the death of P in Court of Protection proceedings - is to make a freestanding application for an RRO, I shall consider the application before me, including consideration of a variation of the terms of paragraphs 6 and 7 of the TO as well as its duration. In doing so I accept, for the purposes of this application, that in principle the Court of Protection does have the power to make an RRO or AO and/or to continue a TO after the conclusion of proceedings when P has died. I do not need to rule whether such jurisdiction exists in order to determine this application.

40. Article 10(2) of the Convention allows for the exercise of the freedom of expression to be subject to restrictions prescribed by law as necessary in a democratic society for the protection of the reputation or rights of others or for preventing the disclosure of information received in confidence. Interference with the Article 10 right to freedom of expression is prescribed by domestic law through the COP Rules 2017 and Practice Directions. Following the structured approach set down in Abbasi I approach the question of whether the interference proposed in the present case is necessary by seeking to strike a fair balance when values protected by the Convention come into conflict, i.e. the values protected by Articles 8 and 10. Neither Article has precedence over the other but I also have regard to the dicta of the Master of the Roles in Tickle and PMC (both above).

On the particular facts of the case, and as might now be evident from the fact that the judgment refers to Mr Gardner by name, Poole J found that the balance came down in favour of bringing the TO to an end, summing his conclusions as follows:

42. In the great majority of cases a TO made in Court of Protection proceedings ought to be discharged upon P's death or within a short period after their death. The appellate courts might say that that should be the rule in all such cases. The purpose of the TO to protect the anonymity of P during the proceedings, or during their life, will have been served. I have considered the competing Article 10 and Article 8 rights in this case. Continuation of the TO, even in a narrower form, would significantly restrict the right to freedom of expression of Ms Huntington and others, including Professor Kitzinger, who wish to be free to discuss the important issues raised by the now concluded proceedings without impediment or fear of being accused of contempt of court. There is a strong public interest in them being free to comment on this case in which personal experiences of matters outside the proceedings are so closely linked to the issues raised within the proceedings.

43. I am unable to identify any countervailing interference with the Article 8 rights of members of the family sufficient to justify the continuation of the restrictions on the Article 10 right to freedom of expression that are imposed by the TO or any varied TO. Even if continuation of some form of restrictive order were justified, I cannot identify any form of TO that would effectively maintain the anonymity of members of the deceased's family without causing unjustifiable infringement of the Article 10 rights of others. The protection of Mr Gardner's care, his best interests and his privacy are no longer in issue since his death. The distress and unpleasantness caused by the litigation and the events surrounding Mr Gardner's injury, hospitalisation and death are raw. They will continue to inflict pain on those close to him and I have no doubt that, for some, they would be exacerbated by publicity about the case. But much of that pain is caused by matters and events which arose before the litigation began and which will not now disappear now that it has ended, even if it were never spoken about publicly. Ms Huntington, Professor Kitzinger and others want to speak and write about the important issues and experiences that arise, not just from the litigation, but from the events and experiences surrounding Mr Gardner's injury, his management in hospital, and his death. Continuation of the TO injunctive provisions for years after his death would amount to a considerable and unjustifiable interference with the rights and freedoms of them and others. The balance weighs firmly in favour of discharging the TO and removing any restrictions on communicating or publishing information or material relating the proceedings and the public hearings in this case. I refuse the Fourth Respondent's application and I shall discharge the TO.

Comment

Poole J's observations about the life of TOs after the death of P must be correct, although they do raise the interesting question of how and when others will know that P has died if they made outside the context of cases in which (for whatever reason) it is clear that P will die within a relatively short period of time. His observations about the inaptness of TOs to cover the interests of others are also important, and will assume particular importance when proceedings come to an end in terms of the requirement that active steps are taken (on an appropriate basis – as to which, in relation to professionals involved in treating roles, see *Abbasi)* to obtain an order specifically directed to that end.

Poole J's overview of the transparency provisions in the Court of Protection, and the fact that it takes in the recent caselaw from other

jurisdictions (even if, as he notes, it might need to be considered in its own light) really reinforces the fact that there is an increasingly pressing need for a framework that can be applied across the board based on:

1. Appropriate primary legislation (for the reasons explained here, the MCA 2005 has a significant hole, requiring in consequence inordinately clunky orders to be made in each case to protect the interests of P);

2. Consistency of language (are we now in RRO, TO, WO or AO territory?);

3. Consistency of procedural approaches: this is particularly relevant in cases which straddle both the CoP and the inherent jurisdiction (see, for an example of this, *Leeds and York Partnership NHS Foundation Trust v FF & Anor*[2025] EWCOP 26 (T3)). If an RRO, or at least an RRO amounting to an AO, is required in relation to the inherent jurisdiction case being heard in parallel with the CoP case, for instance, does the media have to be notified (whilst conventional understanding might suggest it does, the judgment in *PMC* might suggest not (see paragraph 102)?

4. A consistency of understanding as to the interests in play, and, to the extent that they might differ in the relevant jurisdictions, conscious uncoupling of approaches;

5. A consistency of understanding as to what 'open justice' means, and what is for. In this regard, it is of note that Poole J considered that the TO framework within the Court of Protection represented a derogation from the open justice principle (see paragraph 19 above). However, it also of note that the Supreme Court in *Abbasi* considered that the principle was not infringed in relation to the withholding of information disclosed in proceedings in private (see paragraph 119). Is there actually an infringement of the open justice principle when the Court of Protection simultaneously determines that it will sit in public and imposes restrictions on reporting of information revealed in that public hearing? Nb, before you all write in at once, we am not suggesting that a concept of 'open justice' is in some way irrelevant to the Court of Protection, but simply that, at a conceptual level, clarity is required as to what it means, why it matters, and what protections are required in relation to a jurisdiction where the subject of the proceedings did not choose to be there.

It is unfortunate, in this regard, that the Law Commission's contempt project currently expressly excludes from its terms of reference the substantive law relating to reporting restrictions and anonymity orders. It might be thought that they were the ideal body to look across the piece in the way that is required.

Contempt and the consequences of capacity

Macpherson v Sunderland City Council [2025] EWCA Civ 1159 (Court of Appeal (Asplin, Baker and Birss LJJ))

CoP jurisdiction and powers – contempt of court

Summary

In the latest of a long-running series of cases, Lioubov Macpherson appealed a finding of contempt of court and sentence of imprisonment imposed as a result of that contempt in proceedings in the Court of Protection. Ms Macpherson is the mother of 'FP' and has had "*sharp disagreement with many of the professionals who have treated and sought to assist*" FP (paragraph 2). Mc Macpherson did not accept findings made by the Court of Protection in 2020 that FP lacked capacity to make decisions about her residence, care and contact.

That court also made adverse findings against Ms Macpherson, and that the relationship between Ms Macpherson and FP led to FP to become distressed and her mental health to deteriorate. FP was ordered to leave Ms Macpherson's care and move to a care home. Orders were also made restricting Ms Macpherson from recording or publishing material about FP or care home staff. Ms Macpherson's conduct towards FP was said to continue, and in 2022, Poole J suspended Ms Macpherson's face-to-face contact with FP, as well as extending the orders prohibiting making recordings or publishing them. These orders were made with a penal notice, and Ms Macpherson's appeal against the orders was certified as totally without merit.

A series of committal applications were made in 2022, with Ms Macpherson ultimately admitted breaches of the orders prohibiting filming and publishing records of FP. A suspended, 28-day sentence was given. An appeal of this decision was dismissed in [2023] EWCA Civ 574. Further breaches of orders took place and a second committal application was made in 2024, by which time Ms Macpherson was asserting that she was entitled to act in the manner she had pursuant to her Article 10 ECHR rights. All of these arguments were rejected, and Ms Macpherson was found to have made recordings which were '"*unsettling and troubling*" and…showed the appellant manipulating FP into saying things and into fearing persecution which caused her distress. Although the appellant interpreted FP's distress as being caused by her treatment in the placement, it was clear to the judge that the real cause was the appellant's behaviour. He concluded that the injunctions were breached and that the breaches were a clear contempt of court.' [14] A three-month sentence of imprisonment was made, which was again appealed. The consideration was delayed due to concerns raised by Ms Macpherson's legal representatives about her litigation capacity; she was determined to have litigation capacity in respect of the contempt proceedings ([2025] EWCOP 18 (T3))

The most recent judgment considered Ms Macpherson's appeal against Poole J's 2024 findings of contempt, and imposition of a three-month sentence, with Ms Macpherson acting as a litigant in person. Ms Macpherson filed amended grounds relatively close to the hearing, which she was allowed to rely upon at the hearing. The appeal included a vast range of grounds, including challenges under Articles 6, 8 and 10 ECHR; allegations of procedural irregularities and abuse of process; bias of the judge and expert; the best interests decisions taken were invalid and the deprivation of liberty authorisation was ultra vires; Ms Macpherson did not have a transcript of a challenged hearing; and the injunctions made were arbitrary and disproportionate. In relation to the last ground, this was summarised at paragraph 28 thus:

> *(7) Arbitrary and disproportionate injunctions - The committal order punishes an alleged breach of an injunction that should never have been made. Poole J himself acknowledged that the injunctions were likely to do more harm than good to FP, undermining their legitimacy. Punishing the appellant for breaching such an order is, in these circumstances, perverse. The injunctions failed to protect FP's welfare, served only to restrict the appellant's ability to protest, and lacked any lawful or proportionate basis. This renders the committal order arbitrary, contrary to Articles 8 and 10 ECHR, and an abuse of the court's discretion.*

Ms Macpherson maintained that FP had been harmed by the orders made by the COP; "*that she had been entitled to act in the way she had*

because no one was listening to her and publishing information online was the only step she could take to protect her daughter" (paragraph 31); and "*that she had done nothing wrong by posting video recordings of her daughter on social media*" (paragraph 32).

Baker LJ, delivering the unanimous judgment of the court, held at paragraph 33 that:

> *In my judgment, none of these points undermines the central point on this appeal – that Mrs Macpherson knowingly and deliberately broke an order made by the court. The fact that she profoundly disagrees with the order does not entitle her to disregard it. There is nothing to support her repeated assertions of professional misconduct. Her very strong views have been aired on many occasions in the proceedings, but for the most part have been rejected by judges on the evidence. There is no merit in her assertion that the orders were unlawful. The straightforward position is that she was obliged to comply with the orders and deliberately chose not to do so.*

The Court of Appeal found that her breaches had been flagrant, and the content of the recordings was irrelevant to whether there had been breaches. There was "*no basis for questioning the judge's assessment of the recordings as set out above, and the harm caused to FP which they demonstrate*" (paragraph 34). Ms Macpherson's *'rights under Article 10 have no bearing on the outcome of this appeal. She was ordered not to publish information about her daughter and deliberately acted in contravention of the order*" (paragraph 35). Ms Macpherson did not persuade the court that the contempt hearing had been procedurally unfair due to her lack of legal representation where she did not seek an adjournment for this purpose and was prepared to argue her case. In relation to the proportionality of the sentence, Baker LJ found that Poole J had applied the correct legal principles, and:

> *37.* […] *a sentence of immediate imprisonment was plainly right having regard to the appellant's serious and repeated flouting of the order. She had already been given a suspended sentence on the earlier occasion for breaches of the order, and within a short space of time brazenly repeated the conduct during the period of suspension. Court orders must be obeyed, and although judges are reluctant to send someone to prison, particularly in the context of proceedings of this sort, repeated breaches of orders will almost invariably lead to custodial sentences being passed. The sentence of three months, with the activation of the earlier suspended sentence in addition, was in my view entirely proportionate and appropriate.*

Comment

This case is an extreme example of repeated breaches of court orders, and makes clear that where these are flagrant and persistent, a sentence of imprisonment may be the most appropriate option to address this conduct. They also make very clear that a conclusion that a person has capacity can be just as consequential as a finding that they lack capacity.

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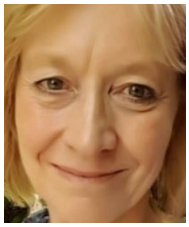

Jill Stavert: j.stavert@napier.ac.uk

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.

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 November. 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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Chambers UK Bar
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The Legal 500 UK
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Top Tier Set