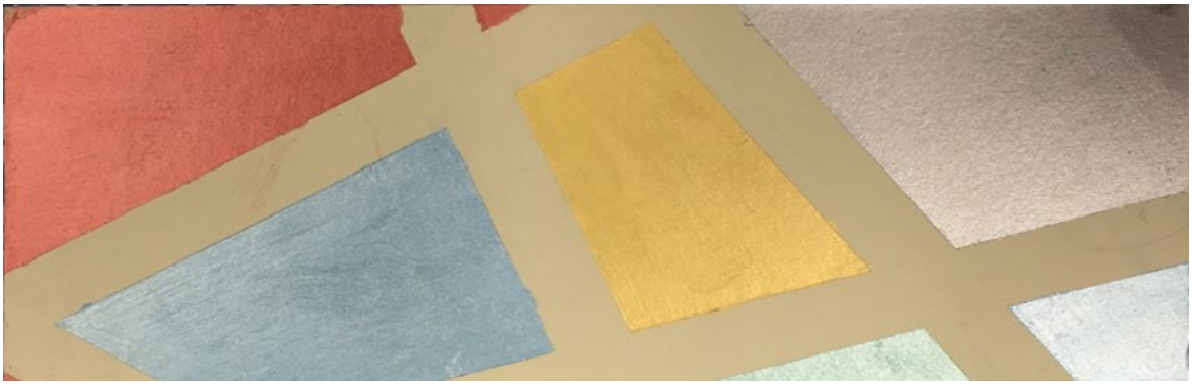

Welcome to the June 2026 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: coverage of 'year zero' as regards deprivation of liberty following the *AGNI* case;

(2) In the Property and Affairs Report: the SCCO and costs where P has died or regained capacity, and can you lie as to your own capacity;

(3) In the Practice and Procedure Report: the Court of Appeal resets transparency;

(4) In the Mental Health Matters Report: nominated persons resources and 20 years of Mental Health Law Online;

(5) In the Children's Capacity Report: overseeing consent;

(6) In the Wider Context Report: well-being and wishes, and capacity and divorce;

(7) In the Scotland Report: Scottish reactions to *AGNI*.

Nyasha Weinberg's practice having taken in a new direction, we say a farewell and thank you to her this issue; we are, however, delighted to welcome Alex Cisneros to the team.

A reminder that that whilst Chambers have launched a new and zippy version of our website which may look unfamiliar, all the content that you might need – our Reports, our case-law summaries, and our guidance notes – can still be found via here.

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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.

Contents

Personal welfare deputies in the Court of Appeal

The 'leapfrogged' appeal from the decision of HHJ Beckley in the *HDEB* case is to be heard by the Court of Appeal on 17 June.

Transparency must support justice, not overwhelm it

Re Gardner (Deceased) (Court of Protection: Disclosure of Position Statements) [2026] EWCA Civ 640 (Court of Appeal (Sir Stephen Cobb P, Peter Jackson and Coulson JJ))

Practice and procedure (Court of Protection)

Summary[1]

The Court of Appeal has set aside the decision of Poole J in *Re AB (Disclosure of Position Statements)* [2025] EWCOP 25 (T3) (summarised in the July 2025 Practice and Procedure Report). The tragic underlying factors of the case were set out in *Re AB (ADRT: Validity and Applicability)* [2025] EWCOP 20 (T3), and involved a dispute over the validity of Carl Gardner's Advance Decision to Refuse Treatment ('ADRT'), which once given effect, led to the cessation of treatment and the end of Mr Gardner's life.

A satellite issue in the underlying application had been an application by an observer, Professor Celia Kitzinger, for the position statements of the parties in the application. Mr Gardner's mother had opposed the disclosure of position statement (which was also the position other members of Mr Gardner's family). Professor Kitzinger was given leave to intervene in the proceedings before Poole J to make submissions on the disclosure issue, and was given leave to intervene in the appeal. The Official Solicitor was also given leave to intervene in the appeal in her own right, having ceased to be Mr Gardner's litigation friend in the proceedings on his death.

Writing the lead judgment (the first delivered as the new President of the Court of Protection), Sir Stephen Cobb gave a summary of his conclusions at paragraph 12:

> *i) Court of Protection proceedings are private by default (rule 4.1 of the Court of Protection Rules 2017) ('COPR 2017'), even where the court directs that hearings are to be held in public under rule 4.3 of the COPR 2017. Many hearings in the Court of Protection are of course in public, but a direction for a public hearing does not convert the proceedings into "public proceedings" equivalent to litigation in the civil courts*

[1] Alex and Katie having been involved in the case, they have not contributed to this note.

or tribunals. The judge below erred in treating the proceedings as public simpliciter and in importing openness principles from jurisdictions which are public by default;

ii) Once lodged, position statements are "court records" within the meaning of rule 5.9(2) of the COPR 2017 (following Dring v Cape Intermediate Holdings Ltd [2019] UKSC 38 [2020] AC 629) ('Dring'). However, they are not automatically disclosable to observers or non-parties, and court authorisation is required for disclosure of them to non-parties under rule 5.9(2) COPR 2017;

iii) Open justice does not entitle observers to access all material informing judicial decision-making. Access to documents must be justified by a demonstrable application of the open justice principle, not by curiosity, research, education, or personal interest;

iv) Disclosure of position statements which cite highly personal source material from the written evidence is a serious interference with Article 8 ECHR rights; in this case, the court failed to engage with rule 5.9(4) COPR 2017 and specifically consider whether disclosure should be: refused, redacted, or subject to use restrictions (e.g., in relation to source evidence);

v) The procedure for disclosing position statements to members of the public should be considered as a matter of priority by the ad hoc Court of Protection Rules Committee ('COPRC'); in the meantime, the guidance offered by the Judge at [J2/36] should not be followed; the court should in the meantime consider disclosing case summaries, chronologies and lists of issues to observers who request information;

vi) The Court of Protection exists for P's benefit. Transparency must support justice, not overwhelm it.

There were a series of hearings in the case, dealing with distinct and complex issues relating to the ADRT, and a number of applications were made for disclosure:

1. Professor Kitzinger made an application in advance of a hearing in March 2025 for disclosure of the position statements; Poole J gave 'permission' for the parties to release the position statements, but did not require them to do so (Mr Gardner's family declined, as did the ICB with responsibility for Mr Gardner's care). Mr Gardner's legal representatives "*made known to Professor Kitzinger that Mr Gardner's family had found the request for disclosure of the position statements distressing and intrusive given the intensely personal nature of the material involved*" (paragraph 20);

2. Following the March 2025 hearing, Professor Kitzinger applied for disclosure of the ADRT. All parties objected, and the court declined the request;

3. Professor Kitzinger made a further application for position statements filed for the May 2025 hearing. Again, Poole J granted permission for the parties to disclose these, stating that doing so was at the discretion of the parties. Again, Mr Gardner's family and the ICB declined.

The central conflict arose at the hearing on 30 June 2025, which was the first day of a hearing listed for four days. Mr Gardner's family withdrew their contentions that the ADRT had been made under undue influence and was fraudulent. Where all parties accepted that the ADRT was valid on face, the contents of the ADRT and associated documents were not subject to examination in

court. Poole J "*went on to make a number of welfare decisions to give effect to the withdrawal of treatment for Mr Gardner and his transfer to a hospice for the commencement of palliative care. The Judge resolved a minor dispute about final contact for Mr Gardner with members of his family and his fiancée*" (paragraph 23).

On the same day, Professor Kitzinger again (informally) applied for disclosure of the parties position statements. Poole J declined to consider this on 30 June 2025, but directed that Professor Kitzinger file a position statement on 1 July 2025 explaining the request, and the parties respond to it 24 hours later. In her written application, Professor Kitzinger now sought all positions filed throughout proceedings (including those which had not been disclosed by the family and ICB), not just those filed for 30 June 2025. Professor Kitzinger "*argued that the case was of legitimate public interest, illustrating the Court of Protection's role in end-of-life decision-making, and that meaningful open justice required access to position statements so that observers could understand, report on, and educate the public about how the case had unfolded*" (paragraph 24). The application stated (in part)

> *[11] I have explained that I am seeking disclosure of the Position Statements in order to better understand how this case unfolded over time and the (shifting) position the parties took on different issues. It's important for me to understand this for two reasons: (1) as an individual personally invested in making my own end-of-life plans in a manner than will hopefully convince medical professionals to act in accordance with my advance decisions and pre-empt judicial scrutiny (see (Determining the legal status of a 'Living Will': Personal reflections on a case before Poole J); (2) in my role as an educator and as author and editor for the Open Justice Court of Protection Project blog, which serves to inform and educate the public about the law – both statutory and case law – as applied by judges in the Court of Protection. In addition to my own blog posts cited above, I worked with another member of the public as editor on a third blog about this case …"* (emphasis added by Sir Stephen Cobb)

Mr Gardner was transferred to a hospice, where life-sustaining treatment was withdrawn. He died on 8 July 2025.

Poole J considered the submissions and directed disclosure of the position statements on 14 July 2025 from the four hearings, as well as directing that the Transparency Order would expire on 30 August 2025 (which was later the subject of further consideration).

Transparency and open justice

Sir Stephen Cobb observed that "[t]*he objective of transparency is not to put a non-party observer in the position of the judge on the bench, nor does it entail, as a condition of achieving that objective, that the observer be furnished with the entirety of the material underpinning the judge's decision. The objective of open justice is long-acknowledged to be twofold: first, to enable public scrutiny of the way in which courts decide cases, to hold judges to account for the decisions they make and to enable the public to have confidence that they are 'doing their job properly' (Dring at [42]); secondly it is 'to enable the public to understand how the justice system works and why decisions are taken'* […]" (paragraph 62).

Sir Stephen Cobb considered that the context of Court of Protection proceedings was important, and noted that in relying on the authority of *Dring* on transparency, "[i]t *is material to note that Dring was an asbestos-linked personal injury claim, and Article 8 ECHR rights were not engaged at all. In this case, there is no question but that*

Article 8 is firmly engaged, adding significantly greater weight to the privacy arguments which were outlined by Baroness Hale in Dring" (paragraph 62). At paragraph 63, he noted that Baroness Hale also observed in *Dring* that the "obvious" exceptions to the disclosure principle are: "*national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests more generally*"

Sir Stephen Cobb cited with approval the decision of Rajah J in *W v P* [2025] EWCOP 11, which raised as a consideration that those with capacity were entitled to deal with their personal affairs in private, and those lacking capacity should not necessarily lose this status. Cobb LJ considered that "*there are many legitimate reasons why extensive disclosure of court documents should not be ordered in cases involving such intensely personal matters arising in the Court of Protection*" (paragraph 63).

Sir Stephen Cobb was clear that it was for the person requesting documents "*to explain why they seek them and how granting them access will advance the open justice principle (see Dring at [45] and Re HMP at [23]). If there is no good reason for granting disclosure, that will be the end of the matter. Moreover, disclosure of court documents in the fulfilment of the transparency objectives (outlined above) should be limited, in my judgment, to the extent essential to achieve those objectives and no further*" (paragraph 63).

While recognising the importance of open justice, Sir Stephen Cobb emphasised that the administration of justice was the 'primary duty of any court,' and that "*disclosure of personal documents in the name of transparency may either support or jeopardise that aim. While public scrutiny undoubtedly strengthens the integrity of the process, it must not be forgotten that such proceedings exist for P's benefit. The administration of justice must never be compromised in the name of openness*" (paragraph 64). He gave two specific examples of this:

1. Justice would be impeded if a witness withheld material from the court due to concerns about it being available to non-parties; and
2. While the MCA has a 'core aim' the participation of P in decision-making as far as possible, "[t]*he quest to achieve openness should not operate as a deterrent to P from direct engagement in the proceedings, nor should it (as it might do) add to confusion for them*."

Sir Stephen Cobb was clear that open justice should support, rather than overshadow, the court's core purpose. "[S]*atellite disputes about the form, content or disclosure of position statements risk obscuring the key issues and objectives of the proceedings' and 'that judicial office holders should guillotine the process, or even decline to deal with an application if they would otherwise be disabled or impeded from administering justice in the case itself, or diverted from other pressing judicial duties*" (paragraph 80).

Sir Stephen Cobb found that Poole J had fallen into error in considering the Court of Protection proceedings "public" (paragraph 71). The starting point was that the open justice principle does not apply in Court of Protection proceedings (due to their 'default' status as private). Poole J had therefore fallen into error "*in determining this application (i.e., for disclosure of position statements) when he wrongly relied on guidance from judgments delivered in jurisdictions which operate in public*" (paragraph 72). Further, "*in civil or public law proceedings for example, when the court is balancing the competing considerations of privacy and openness, no consideration needs to be given to the welfare of P as must happen in the Court of Protection*" (paragraph 73).

Peter Jackson LJ agreed "wholly" with the lead judgment of Sir Stephen Cobb, and added his own observations on the nature of transparency:

> *85. The Court of Protection decides questions of often fundamental importance for those who lack capacity to decide them for themselves, and for their families. It is strongly in the public interest for the public to be able to reach its own conclusions about how the court is working, and to do so on the basis of reliable information. However, as My Lord has so clearly explained, the amount of information that can lawfully be put into the public domain has to be controlled so that proceedings that exist to protect vulnerable individuals do not become a means of harming them. The rules of court are accordingly designed to help judges to strike the balance in a way that can enjoy the confidence of parties, practitioners, reporters and members of the public, including those with an informed interest, such as Professor Kitzinger, who has made such a signal contribution in this field.*
>
> *86. Court of Protection proceedings are private by default but they will often be heard in public under the protective umbrella of a Transparency Order. Although the order is necessarily framed in restrictive terms, it is in fact the means by which the greatest possible transparency is achieved. Its restrictions are no more than the price that has to be paid to make it lawful for the proceedings to be heard in public. I accept that this is somewhat counter-intuitive, as Males LJ recently remarked in Pringle v Nervo [2026] EWCA Civ 266 at [72]. He commented that the sole purpose of a Transparency Order is to ensure privacy, and that it is odd that it does "precisely the opposite of what it says on the tin". However, as I have explained, the purpose of a Transparency Order is much wider than that. By ensuring that, where it is appropriate, these important decisions can be taken in public, these orders decidedly advance the interests of open justice rather than hampering them.*

Status of position statements in the Court of Protection and who discloses them

Sir Stephen Cobb noted that Court of Protection proceedings do not involve formal pleadings, and position statements are not formally 'filed' with the court nor do they have a statement of truth, though they are a well-established practice in the court. C Sir Stephen Cobb considered that the interchangeable use of 'skeleton arguments' and 'position statements' was unhelpful, and they should be identified accordingly. Where position statements are not mentioned in the COPR or COP Practice Directions, there was no explicit provision to be found within the rules for their treatment.

None of the parties in the appeal adopted the approach of Poole J that position statements could be obtained directly from the parties without an approach to the court, nor that the parties were obliged to prepare anonymised versions of position statements if disclosure was directed. Sir Stephen Cobb agreed with both of these submissions, noting that while protection of P may require anonymisation of judgments, it was not necessary for position statements disclosed along with transparency orders.

Disclosure of position statements

All Court of Protection hearings are private by operation of the COPR; however, Practice Direction 4C has created a default position that attended hearings are to be in public, subject to reporting restrictions as set out in a standard transparency order. An attended hearing may be held in private if there is good reason for doing so.

Part 5 COPR governs the 'supply of documents to a non-party from court records.' There is a general right to inspect judgments or orders made in public. However, access to any other documents is subject to an application under Part 10 COPR, and if minded to give disclosure, the court will consider whether to give it on an edited basis.

It was agreed between the parties (and accepted by the court) that "[o]n*ce position statements have been lodged with the court (whether to the court office or to a judge's clerk) they become "documents and records which the court itself keeps for its own purposes" (Baroness Hale in Dring at [22]) and therefore fall within the class of "any other documents in the court records" within the terms of COPR 2017 rule 5.9(2)(a)*" (paragraph 51(iv).

Sir Stephen Cobb noted that Professor Kitzinger never made a formal, written application for documents in accordance with Part 10 (but the court has the power to dispense with the requirements of any rule, and was entitled to consider an informal application). Sir Stephen Cobb, however, found that Poole J had erred in giving Mr Gardner's family no warning that she was extending her application to all position statements in the case (thus returning to reconsider earlier, unchallenged decisions in proceedings), leaving Mr Gardner's family only 24 hours to respond to this request. This was particularly challenging in light of the orders made on 30 June 2025, which put Mr Gardner on an end-of-life pathway and move to palliative care, and Sir Stephen Cobb considered that the family was justified in their 'strong complaint' about the timing of the request. "*There was no need for the Judge to determine the disclosure application at that precise point in time, and it was, I believe, unfair to place the family under pressure to deal with it; whilst this was a foreseeable consequence of the timing of the application, we accept the submission of Ms Sutton that this was not Professor Kitzinger's intention*" (paragraph 66(ii). Sir Stephen Cobb also found that Poole J had erred in viewing the family's earlier refusal to provide position statements as somehow un-cooperative or obstructive, even though the court had left disclosure at the discretion of the family.

Sir Stephen Cobb further considered that Professor Kitzinger's reasons for wishing to see all of the position statements (which focused on understanding "*how the case had "unfolded" given her wish to "pre-empt judicial scrutiny" in relation to her "own end-of-life plans" and separately "in my role as an educator and as author and editor" for the Project's blog*" (paragraph 67) did not "*support the case for retrospective disclosure of sensitive information in order to 'advance the open justice principle' (Dring at [45]) for the benefit of members of the general public*" (paragraph 67).

Sir Stephen Cobb considered that "*the provision of position statements to an observer which contain large amounts of highly personal and sensitive source evidence (including allegations which were disputed and never subject to findings) without redaction or restriction on the use of such material, represented a significant intrusion on her Article 8 ECHR rights and those of the family, which was neither necessary or proportionate*" (paragraph 76). While a Transparency Order protected Mr Gardner's identity, it did not protect the personal and sensitive document found in his ADRT and the position statement, and in any event, expired after his death.

Process and procedure

Sir Stephen Cobb considered this issue should be referred to the Court of Protection ad hoc Rules Committee for further consideration (and we understand such a referral has now been formally made by Senior Judge Hilder), but

offered some practice points in the interim at paragraph 80:

> *(a) that it would be appropriate for the observer / non-party to make some form of application to the court for sight of the filed documents in accordance with rule 5.9 COPR 2017 so that the respondents know what is in issue and have the chance to express views,*
>
> *(b) the decision about disclosure should be that of the Judge, not the parties or their legal representatives, and*
>
> *(c) the issue should (unless impractical) be dealt with proportionately and briskly in advance of (or at the very outset of) a hearing so as to ensure that observers are best able to understand the hearing, and to avoid disputed issues of disclosure arising after the substantive determination.*

Sir Stephen Cobb considered that the initial stage would need to be consideration of whether there is a 'good reason' for the request for disclosure. The process must respect P's Article 8 ECHR rights, be proportionate to the open justice principle. Sir Stephen Cobb suggested that disclosure of the following would generally support the open justice objective:

a. *The case summary;*
b. *Chronology of relevant events; and*
c. *Issues for determination.*

Sir Stephen Cobb considered that "[t]*hese documents are generally expected to be short and uncontentious; indeed, they should ideally be agreed. The case summary will usually set out the essential background to the proceedings without any, or any material, quotation from the source material (i.e., the filed evidence), and should also comply with the Transparency Order*" (paragraph 78). These documents would "*meet the needs of the observers to receive basic information about the case and fulfil the objective for open justice. With the benefit of the information contained within such documents, an observer can, if they feel compelled to do so, then make an application to the judge (on a more informed basis than they would at present) for disclosure of other documents, in accordance with rule 5.9 COPR 2017*" (paragraph 79).

Comment

This judgment is a welcome appellate clarification in relation to what can often be very inconsistent practice in the Court of Protection as to how requests of this nature should be addressed and by whom. We consider it clearly correct that the application is made to a judge (rather than directly to advocates) and taken by a judge with adequate notice to the parties, and taking into clear consideration P's own wishes and feelings, and Article 8 ECHR rights. We also welcome Sir Stephen Cobb's clear and robust statements that the administration of justice is the primary role of the court and if the presence of observers is leading to satellite issues which are interfering with the court's role, the judge may 'guillotine' that process to ensure focus remains on the application before the court.

We would note that while Sir Stephen Cobb cites the COPR's provisions on the need to file a case summary, chronology and list of issues for determination (which are to be agreed if possible), these documents are very often omitted in practice, and changes will need to be made to standard practice in the COP to routinely produce these documents.

We would consider that this change of practice may very well be a positive development in the welfare jurisdiction. COP proceedings can often suffer from drift, particularly where there is not judicial continuity, as many of the individuals at

the heart of Court of Protection welfare proceedings can have many challenges and complex circumstances. There can sometimes be a push to consider "*every conceivable legal or factual issue, rather than concentrating on the issues that really need to be resolved*" *A & B (Court of Protection: Delay and Costs)* [2014] EWCOP 48 at paragraph 15.

By virtue of a change to the template orders held by the Court of Protection, we understand that orders will provide that case summaries are now to be prepared and provided at the time of the provision of the bundle (which is typically several days ahead of the provision of position statements). We consider that this may offer several benefits:

1. As in family proceedings, a chronology and case summary document can be prepared at the start of proceedings by the solicitors issuing the case, and updated as necessary to reflect developments. We would anticipate that work around these documents at subsequent hearings should be limited, and focused on the significant developments.

2. It would appear sensible to hold round-table meetings ahead of the preparation of the case summary, and for the content of the issues to be determined to be agreed at the round-table meeting. This would hopefully help to clarify the extent of any disputes in good time ahead of a hearing, or else identify that the parties are not in dispute and allow for timely consent orders to be submitted (rather than these being filed shortly prior to a hearing).

3. Agreed case summaries and chronologies would likely be of considerable assistance to judges hearing COP matters. COP bundles are often hundreds of pages long, including lengthy care planning documents or assessments. When hearings are listed for one hour, it is simply unreasonable to expect that a judge will have time to read those hundreds of pages of material in detail prior to the hearing. Chronologies and case summaries of a few pages highlighting the significant events in P's life and setting out a clear, concise list of what disputes exist would likely assist in helping judges in their preparation.

The use of a case summary may also help to address what are often excessively long position statements in the Court of Protection. Where the case summary document sets out the agreed facts and the judge has a chronology available, the position statements do not need to recount that information, and can instead simply focus on the position of the parties on the issues in dispute (which would have already been identified in the case summary). We consider that considerably shorter, focussed position statements which clearly articulated what the parties wanted the court to do and why the parties argued the court should do it would help to improve the efficiency of Court of Protection proceedings both in and out of court.

Short note: upholding the Article 8 / 10 balance

F v The London Borough of Hackney & Anor [2026] EWCOP 20 (T3) concerned an appeal (brought by the mother of P, 'EF') against an order of District Judge Elllington refusing to discharge a Transparency Order. McKendrick J stated that he had 'little difficulty' refusing the appeal, which was opposed by the local authority and supported by the Official Solicitor.

District Judge Ellington had considered s.21A MCA proceedings in respect of P, who had had a turbulent history and had repeatedly been detained under the MHA. P had been in a residential placement from 2021 which had been agreed on an interim basis, but it appeared that

there had been significant delays in identifying a permanent home for P. An alternative placement was found in 2024, and P's move there was agreed by all parties (including EF). Following the move, the reports were that P was doing very well in the new placement, which was again agreed by all parties. P required a judicial authorisation of her deprivation of liberty (which was uncontentious, and to be heard under the streamlined procedure in the future).

After the final hearing, EF made an application to discharge the Transparency Order (which appears to have been in the standard terms). EF's reasons for doing so were summarised by McKendrick J at paragraph 4):

> a. *She set out her understanding of the TO (including its breadth), which meant that if she told someone her daughter was the subject of Court of Protection proceedings, she would be in breach of it.*
>
> b. *She emphasised that P's article 8 rights are not just concerned with her privacy but ensuring her care needs are met, seeing her family and being in the community where she grew up.*
>
> c. *She explained how she feels like she is being gagged by the terms of the TO and that she cannot have normal everyday conversations with her friends and family (including seeking their support), which has caused her great distress and has led her to feel isolated.*
>
> d. *She also wants to raise issues arising from the proceedings publicly, such as the lack of local provision for people in P's position, her concerns about P's care needs not being met. The Court of Protection proceedings are intrinsically linked to this history. Her witness statement said:*
>
> *"I also think it is particularly relevant that the court has spent a number of years trying to identify suitable provision in Hackney and the local area for [P], and that it has found that the only option identified during this time did not have sufficient experience or expertise to care for someone of [P]'s complexity, and that the only option is for her to be cared for away from her family and local community."*

McKendrick J considered that DJ Ellington had handed down a careful and detailed judgment refusing the application, weighing up the competing Article 10 rights of EF and Article 8 rights of P. DJ Ellington's conclusion was reproduced at paragraph 23 of McKendrick J's judgment, and stated that it would be a disproportionate breach of P's Article 8 rights to discharge the Transparency order:

> *[P] is a young woman whose deeply sensitive personal information has been put before the court. Disclosure of the entirety of that information or some of it would represent a grave invasion of her privacy. Her identification whilst living at the current placement may interfere with the stability of the placement and her stability at the placement. It is not any attempt to police what is written about the care provider to note that discharging the Transparency Order completely leads to a risk of door stepping at the address and asking for comment from hard pressed staff at the placement. It is not possible to have formal evidence on this before making this decision because once the full details are in the public domain, the damage would be done. Precisely because EF seeks a full public debate, without the protection of the Transparency Order, [P]'s the address would be known.*

I have no information as to [P]'s wishes and feelings about this. I have no submissions as to the degree to which she would be able to express them. I have no submissions or evidence that she would want to be a public figure or campaigner. I have found that it is in her best interests to see her family and I have found EF to be a devoted mother. I have found that [P] is happy at the Placement and it is in her best interests to live there currently. She requires the continued protection of the Transparency Order, the purpose of which is to protect her and the integrity of the proceedings.

As I have found, none of the cases relied on have a similar factual matrix to [P]'s situation. They assist on the process to be followed and factors to be considered, but not on the decision I should reach. [P] is alive, subject to continuing court proceedings, highly vulnerable and has experienced a high number of placements which have failed in the past, as well as detentions under the Mental Health Act 1983.

Neither EF not the Official Solicitor have offered any alternative to full discharge of the Transparency Order. I have recognised the need to support EF so far as is proportionate and appropriate in her aims, taking into account [P]'s Article 8 rights.

I am willing to consider giving EF permission to discuss the case with close supporters, such as her adult children or her siblings, provided she serves the Transparency Order on them. I would need details of any person or category of person proposed. I am also willing to consider giving EF permission to discuss the case with her MP. Two observers from the Open Justice Transparency Project attended the hearing and I understand were provided with position statements and served with the Transparency Order. They can blog about [P] whilst complying with the Transparency Order in the same way any members of the press can, using pseudonyms as appropriate. For the avoidance of doubt, EF can raise safeguarding concerns about [P] with the relevant Ombudsman and Local Authority as she has done throughout. As I said at the hearing, EF can liaise with the Department of Work and Pensions as any mother might.

Whilst I acknowledge the 'chilling effect' of the Transparency Order, the analysis I have reached is that with appropriate safeguards to support EF, the order is necessary and proportionate for the protection of [P]."

EF advanced five grounds of appeal, which were broadly that the judge gave insufficient weight to Article 10 in her balancing exercise, that the judge had erred in finding that proceeding had not concluded, and in finding that PD4A did not apply to the Transparency order.

After a detailed summary of the law, McKendrick J gave his judgment relatively briefly, accepting the local authority's submissions on all points and dismissing the appeal. He considered it clear that DJ Ellington had directed herself correctly on the law, and weighed up Articles 8 and 10 ECHR in the balance. The judgment considered proportionality, and the sensitivity of the information which would be made public if the Transparency Order were lifted (which appeared to create a real risk of destabilising the placement, the address of which would be public knowledge if the Transparency Order was lifted). McKendrick J considered it entirely correct that the Transparency Order did not prevent EF from raising safeguarding concerns. He held that DJ Ellington had given a clear, structured and reasoned analysis, correctly summarised the law and offered a proposal that the Transparency Order could be modified to allow EF could speak with a specific list of people (who would be served with the Transparency Order themselves). McKendrick J found that *"the*

judge's assessment of proportionality was perfectly sound" (paragraph 50). and acknowledged the human rights dimension of the decision. Minor internal inconsistencies did not undermine the judgment as a whole, which demonstrated that the judge was well aware of the competing arguments. Grounds 1, 2 and 4 thus failed.

On Ground 3, McKendrick J held that DJ Ellington had been correct that proceedings had not concluded, as the proceedings remained open to authorise the deprivation of liberty, and a review hearing was listed.

On Ground 5, it was "*accepted that the Judge made an error, as Part 3 of PD4A did properly apply to the TO*" (paragraph 55). EF's argument was that the Transparency Order might preclude her from seeking informal counselling. However, DJ Ellington had offered EF an opportunity to "*identif*[y] *a number of informal support people and they could have been provided with the TO and the Judge would have granted permission for Mrs EF to discuss the proceedings with them. As guardian of her own Article 8 rights Mrs EF chose not to disclose her informal support network to the court. The Judge, as the guardian of P's rights, was entirely right to protect her Article 8 rights even if this prejudices with whom the appellant can talk to about P's role in these proceedings. The Judge's proportionality evaluation was correct and in no way impacted by this minor error. This ground is dismissed*."

Goldilocks decision-making in the medical context

NHS Kent & Medway Integrated Care Board v OQD & Anor [2026] EWCOP 23 (T3) (Lieven J)

Best interests – medical treatment

Summary[2]

The involvement of the Court of Protection in medical treatment cases is very much on the radar at the moment as we wait to hear whether the Supreme Court has granted permission to appeal in the *Townsend* case. Whilst the case is not mentioned in the decision of Lieven J in *NHS Kent & Medway Integrated Care Board v OQD & Anor* [2026] EWCOP 23 (T3), it is difficult not to see it lurking behind her judgment. The case is the follow up to an earlier decision about the same man, who had been in a prolonged disorder of consciousness receiving Clinically Assisted Nutrition and Hydration under the care of the Royal Hospital for Neurodisability ('RHN') for 12 years. At the point of acceding to the application by the ICB responsible for commissioning his care for endorsement of the withdrawal of CANH, Lieven J had been critical of the delay in bringing proceedings. The second judgment focused specifically on the issue of delay.

Lieven J set out in some detail the cases that had been heard by Hayden J and Theis J concerning the RHN, starting with *North West London Clinical Commissioning Group v GU* [2021] EWCOP 59. She summarised the evidence of both the RHN and the ICB, and concluded as follows:

> *30. The sequence of events, since GU, is deeply troubling. That the RHND takes a careful and sensitive approach to these emotionally difficult decisions is both understandable and commendable. I also appreciate that they have a large number of patients in PDOC (there were 70 relevant patients in the cohort being considered after GU and new patients will continue to arrive on a very regular*

[2] Katie has not contributed to this note given her involvement in cases involving the RHN.

basis). However, the striking absence of urgency which is apparent from OQD's chronology indicates a lack of focus on the patient's own best interests. Throughout those 4 and a half years OQD has been suffering burdens which have ultimately led to a unanimous view of professionals and the Court that CANH should be withdrawn. The RHND (and ICB)'s failure to address the issue timeously has led to the prolonging of these burdens, and the undermining of OQD's human dignity, as explained so eloquently by Hayden J.

31. In my view, a significant issue for the RHND is its focus on the views of the family and on reaching consensus with the family on a decision. As Hayden J sets out in both JP and GU, the views of the family are sought primarily in order to illuminate what the P would have wished, not for their own sakes. There is a degree to which the RHND appears to have put the views of the family concerned above focusing on the best interests of the patient. This is plainly wrong.

32. There was over a year in this case (February 2022 until summer 2023) when OQD's best interests were not being addressed, whilst the RHND sought the family's views in a not very effective manner. This is clear evidence of putting the family's views, and what was perceived to be their interests, before those of OQD.

33. I am also concerned about the lengthy and in my view misguided efforts to establish what OQD would have "wished" if he had been able to express a view. It goes without saying that P's wishes are a very important part of making a best interests decision under the Mental Capacity Act 2006. They must be given great weight and in many cases they will be determinative.

34. However, by the time of GU, OQD had been in a vegetative state for 7 years with no prospect of recovery. There is no evidence, and there has been no suggestion, that he had turned his mind before the injury to the prospect of any such situation. It would be fairly extraordinary for anyone to do so. In those circumstances there is only so far that P's wishes before losing capacity can take the determination of what is now in his best interests. Even if OQD had expressed a wish to be kept alive as long as possible, it is hard to imagine that he would have contemplated the burdens that have been placed upon him by his injuries, (e.g. the storming) and the indubitable evidence of there being no hope of any form of recovery.

35. The lengthy delays, and therefore the prolonging of the burdens upon OQD and the impacts on his human dignity, are not possible to justify on the facts of this case.

36. I am sufficiently concerned both about what has happened here, and by the apparent pattern of similar cases at the RHND, that I intend to send this judgment to the Secretary of State for Health and the Chief Executive of NHS England.

Before turning to the two '*Townsend*' points lurking behind the judgment, we think it is important to emphasise that, whilst – and rightly – there has been very specific attention paid to the RHN in these cases, there are likely to be very many more people in PDOC being provided with CANH in other facilities, often for very sustained

periods of time.[3] The fact that there are very few cases concerning them is in many ways as much, if not more, alarming than the delays identified in relation to the RHN: in other words, we simply have no idea of whether best interests decisions are being made and routinely revisited in the way required by good clinical practice and by the MCA 2005.

We cannot emphasise enough in this regard that we are not suggesting that treatment should be stopped in all of these cases; we just do not know whether the assaults that are being perpetrated by the administration of non-consensual (and intrusive) methods to deliver CANH are justified by being in the person's best interests (and hence the organisations in question are able to rely on the defence contained in s.5 MCA 2005).

The two *Townsend* points lurking underneath the judgment are, first, the role of the ICB, and second the problem caused by pursuing consensus at all costs.

As to the first, Lieven J was critical of the ICB's 'hands-off' (my words) stance, and the fact that it relied upon the RHN. ICBs, as commissioning bodies, rarely have the degree of day-to-day operational knowledge of the situation that the provider does. In *Townsend*, the Court of Appeal suggested that it was the ICB which should apply to court wherever there is a dispute, even where the patient is in a hospital run by an NHS Trust. That is:

1. At odds with practice to date (the number of applications brought by ICBs in serious medical treatment cases is vanishingly small – the RHN cases are an outlier because the RHN is a charity, with care being commissioned, via CHC, on an individual basis);
2. Likely to cause delay and additional expense as those with the information (the Trust personnel) liaise with those who commission at a population level (the ICB).

The second *Townsend* point arises in relation to Lieven J's emphasis on the way in which a desire to place weight on the views of the family and to reach consensus can lead to sight being lost of whether the person is, in fact, being harmed. If every decision relating to an incapacitated adult is a best interests decision, as the Court of Appeal held in *Townsend*, then s.4(6) MCA 2005 undoubtedly requires that the voices of those who are close to the person are heard. They can very often bring expertise in the person (including, where relevant – sadly not *OQD*'s case – about what the person might have wanted),[4] but Lieven J's judgment can be read as an important reminder that:

1. Good clinical practice requires a continued evaluation of whether treatment is helping or harming the person;
2. There will be situations in which the person's views simply are not known, so it is not possible to add into the mix what the person might have thought;
3. There will be situations where what the person might have thought about their position cannot alter clinical reality;

[3] See, for instance, the 2022 iteration of the Parliamentary POST Note on PDOC, estimating that were between 4,000–16,000 patients in nursing homes with VS, with three times as many in MCS.

[4] But to the extent that Lieven J, and before her, Hayden J, proceeded on the basis that relaying the views of the person was the sole relevance of families, this is to go beyond what the MCA provides. The family's own independent views about what should happen are a part of the mix, given that the MCA best interests test is not a pure 'substituted judgment' test to identify what decision P would have taken.

4. The search for consensus is very important, and true consensus can often be achieved;[5]

5. But a search for consensus must not become the imposition of a 'rotten' compromise which puts the (understandable) interests of family over the interests of the person – for more on this, see this recent and important paper by Jordan Parsons and Jonathan Ives;

6. There is therefore a clear application of the Goldilocks principle in judging how long to work towards consensus, and when to recognise that other steps are required.

Townsend makes clear that, where there is a disagreement which cannot be resolved, the case must come to the Court of Protection. However:

1. The Court of Appeal made clear that the Court of Protection cannot ultimately require the clinicians to provide treatment they do not consider appropriate. Unless the clinicians have been clear about (1) to (3) above, they cannot give a clear answer to the court if asked a direct question about whether they would be willing to continue treatment. Honest communication with families requires such clarity before as well as in court;

2. A failure to identify (5) above means that cases which **should** be coming to the Court of Protection because there is a dispute which cannot be resolved doing proper justice to the interests of P are not in fact coming.

[5] So the sample which reaches the court is, to that extent, a skewed sample upon which to draw wider conclusions.

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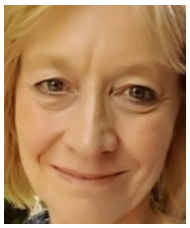

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Alex also does a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

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