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Court of Protection Seminar 2026

TO DISCLOSE OR NOT TO DISCLOSE? *RE GARDNER (DECEASED)* [2026] EWCA CIV 640



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CONTENTS

1. The facts

2. Principle take-aways

3. Practice points

1. THE FACTS



2. PRINCIPLE TAKE-AWAYS

- The Court of Protection is **private** by default;
- Position statements are documents on the **court record**;
- Rule 5.9 requires an **application** and the **court's permission** to provide position statements to an observer.

THE OBJECTIVE OF TRANSPARENCY *IS NOT...*



[para 62]

IT /S...

- **Two-fold:**

(i) to enable public scrutiny of the way in which courts **decide** cases;

(ii) to enable the public to understand **how** the justice system works and **why decisions are taken**.

[para 62]

PROVIDING POSITION STATEMENTS ENGAGES ART 8



- [para 62]
- (yes, regardless of the existence of a Transparency Order!)

- The person seeking access must explain **why** they seek them and how it will **advance the open justice principle** [para 63]
 - should be limited...to the extent **essential** to achieve those objectives **and no further**;
 - 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;
 - not for **curiosity, research, education, or personal interest**. [12, iii]

3. PRACTICE POINTS

- Skeletons v position statements
- Naming of parties
- Making requests
 - Where?
 - When?
 - How?
 - Guillotine - see the *Remote Observation and Recording (Courts and Tribunals) Regulations 2022*

ISSUES TO CONSIDER

- What is the reason?
- **Fact specific** balancing exercise: Art 8 /practicalities/proportionality/what **is essential** for OJ?
- As part of the this consider other means of promoting OJ:
 - Oral opening
 - Written judgment
 - Case Summary/Chronology/Sched of Issues [PD4B]

IF PROVISION OF POSITION STATEMENTS /SORDERED:

- How is **source material** to be treated?
- Is there any **restriction on reproduction of source material** or access to documents referred to?
- What parameters are in place in relation to how the data will be **held/used/destroyed** etc.

[get familiar with **FPR PD12R!**]



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- FPR PD12R/Family Transparency Order: <https://www.judiciary.uk/courts-and-tribunals/family-law-courts/open-reporting-provisions/>
- PD12R - 4.10 A Reporter must
 - (a) offer an email address for digital transmission of documents by legal representatives or litigants in person, which email address must be for a paid for (as opposed to free) account **which is properly maintained for compliance with data protection requirements** applicable in England and Wales; and
 - (b) be prepared to provide information **about how the data are to be handled pursuant to data protection requirements applicable in England and Wales**, upon request from the court, or any party, and assurances that the documents provided will be kept confidential.
- The Remote Observation and Recording (Courts and Tribunals) Regulations 2022

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PROCEDURE

July 2026

Arianna Kelly
Chiara Cordone

TOPICS

- Expert reports
- Closed material proceedings
- Fact-finding hearings
- Appeals

EXPERT REPORTS

- *Bristol City Council v CC & Ors* [2026] EWCOP 19 (T3) (Theis J)
 - Jointly-instructed expert report by a clinical psychologist on P's capacity
 - VP gave clear and useful guidance on instructing expert witnesses in the COP (endorsing agreed note of the parties)
 - Arose after concerns about an excessively long Letter of Instruction and 'incoherent management of the way documents were sent to the expert' who was sent 'large pdf bundles with no agreed guide as to what he should read/focus on'
 - Reminder of COPR 15 and PD15A on the instruction of experts – the test is necessity, and *'permission may only be given if it is necessary to assist the court to resolve the issues in the proceedings and could not otherwise be provided by a rule 1.2 representative or in a report pursuant to s49 MCA 2005 (rule 15.3(2) COPR 2017).'*

EXPERT REPORTS

- *Bristol City Council v CC & Ors* [2026] EWCOP 19 (T3) (Theis J)
 - Applications for expert report:
 - Draft letter of instruction should be included and approved by the court
 - If LOI not available on application, there should be ‘clear directions in the order for the letter to be finalised with the questions for the expert being approved or overseen by the court.’
 - Letter of instruction:
 - ‘must be focussed and adapted to the facts of the particular case.’
 - (1) *A brief neutral statement of the essential facts of the case.*
 - (2) *A list of materials with which they are being provided for the purpose of the assessment the expert is undertaking.*
 - (3) *A core legal framework setting out the central principles of the MCA 2005, a summary of the relevant sections of the MCA 2005 should suffice and, if appropriate, to reflect, for example, the order in which a capacity assessment should be approached, as set out by the Supreme Court in A Local authority v JB [2021] UKSC 52. Any such references should be kept succinct and must be relevant.*

EXPERT REPORTS

- *Bristol City Council v CC & Ors [2026] EWCOP 19 (T3) (Theis J)*
 - Letter of instruction (cont'd):
 - *(4) If assessing capacity, identification of the relevant decisions to be assessed, with the relevant information for each decision as agreed between the parties. If required there can be a brief explanation as to where the information derives, providing confirmation that what the relevant information consists of should ultimately be a matter for the relevant expert to determine when undertaking the assessment, and a reminder of the importance that the expert is not an arbiter of fact.*
 - *(5) Confirmation as to whether the proceedings are in public or private and details of any Transparency Order in place.*
 - *(6) Details of any person(s) the parties consider the expert should or may meet with, and remind the expert of the importance of there not being any unrecorded/informal discussions.*
 - *(7) The letter should clearly identify timescales for the report, dates of hearings/oral evidence, confirmation of who the report will be disclosed to, and a reminder about the ability to pose questions of clarification (rule 15.7. COPR 2017). It should also contain information about the expert's fees.*

EXPERT REPORTS

- *Bristol City Council v CC & Ors* [2026] EWCOP 19 (T3) (Theis J)
 - Questions:
 - Should be for the purposes of clarification only, and only by order of the court
 - Materials
 - *the parties should keep under active review what further evidence or documents should be sent to the expert with a suitable covering message identifying the relevant documents. If agreement is not possible, a COP9 application will need to be issued setting out the issue and the parties' competing positions with a draft order attached. This will enable the court, if appropriate, to determine the issue on the papers.*
 - Oral evidence: In advance of the hearing, the expert should have the court bundle, a list of updating documents since instruction 'which should highlight the specific documents that the parties consider that they should review in advance of the expert giving oral evidence' and any further documents likely to be referred to in questioning

EXPERT REPORTS

Re DA (Whether to replace a Single Joint Expert) [2026] EWCOP 7 (T2) (HHJ Burrows)

- 10-party case involving a wealth family; application for revocation of an LPA and appointment of a private deputy in the wake of a ‘yacht fraud’
- Jointly-instructed expert was appointed to assess P’s capacity
- Respondents 2-7 disagreed with the expert’s conclusion and wanted to replace him (opposed by other parties)
- Court did not accept that expert had behaved inappropriately (by, for example, having ex parte discussions with some parties)
- Court also considered that the report was to an adequate standard and was not ‘unhelpful’ – single jointly-instructed expert would not be replaced

EXPERT REPORTS

Re DA (Whether to replace a Single Joint Expert) [2026] EWCOP 7 (T2) (HHJ Burrows)

- However, question remained whether Respondents 2-7 should be allowed to instruct their own expert where they offered significant criticisms of the jointly-instructed expert
- Drawing on *Daniels v Walker* [2000] 1 WLR 1382, the court found that the instruction of a joint expert did not bar the parties from instructing their own
- Question remained necessity – where expert evidence was foundational, would not add to the court timetable, and joint expert had set out challenges in assessment, court accepts that the further evidence was ‘necessary’

CLOSED MATERIAL PROCEEDINGS

- *Bristol City Council v CC* [2026] EWCOP 4 (T3) (Theis J)
 - Judgment given in accordance with "*Guidance for the Court of Protection: 'Closed hearings' and 'closed material'*" [\[2023\] EWCOP 6](#)
 - Emphasis on following the guidance in *Re A (Covert Medication, Closed Proceedings)* [\[2022\] EWCOP 44 : The Guidance](#)
 - Applications for material to be withheld should be at Tier 3, and should benefit from judicial continuity
 - Prior to making the application:
 - Careful focus to only close materials which are strictly justified and necessary for the public interest
 - Careful analysis of the legal and evidential basis

FACT-FINDING

Nottinghamshire County Council v SV & Anor [2025] EWCOP 37 (T3)

- **Facts:**
 - Serious safeguarding concerns raised about SV's husband MB – Contested allegations of rape, domestic abuse, coercive control, stabbing. No prosecutions and little contemporaneous evidence.
- **Key issue:**
 - Contact with husband
 - Contact was being restricted on the basis of these allegations
 - Contact not being resumed on basis P was not requesting contact

FACT-FINDING

Nottinghamshire County Council v SV & Anor [2025] EWCOP 37 (T3)

Guidance

- Relatively rare
- Only question is – whether and when necessary:
 - No requirement to meet a ‘threshold’ (unlike care proceedings)
 - Similar (though not the same) as family proceedings
 - Analogous to Children Act cases
- Overriding Objective must be considered in managing cases where a fact finding hearing may be necessary

FACT-FINDING

Nottinghamshire County Council v SV & Anor [2025] EWCOP 37 (T3)

Guidance

–What makes a fact finding necessary?

- Facts sought must have a direct impact on the welfare decisions needed to be made
- Must be necessary for the determination of those welfare decisions
- Must be proportionate to the determination of those welfare decisions
 - In determining proportionality the following are relevant considerations:
 - » Likely cost to public funds
 - » Time taken and impact of any delay on P

FACT-FINDING

Denbighshire County Council v P [2025] EWCOP 43

- Facts

- 20yr old woman with serious concerns about her relationship with mother (A)
- A's previous partner, convicted of serious assault on minor and had targeted vulnerable people – A ignored these risks for a long time and lied about the relationship
- A now in another relationship who other family members said had previously been controlling though A denied this
- Lengthy proceedings

- Key Issues

- P's residence
- Contact with A

FACT-FINDING

Denbighshire County Council v P [2025] EWCOP 43

- Findings

- A carried on unstable relationships with two men who posed a serious risk of harm to herself and P
- A recorded P and staff at P's placement (admitted by A)
- P experienced significant instability in A's care
- A vandalised the LA's offices, vandalised the home of P's placement's manager, slashed tyres at P's placement, vandalised the sister placement
- A failed to provide directed information about P's finances
- A was not working honestly or cooperatively with her parents, the LA, or P's support staff putting P at risk, including threats to P's support staff
- Threats to breach the transparency order by A

APPEALS

- *London Borough of Camden v BW & Anor (Capacity Decisions; Reasons)* [2026] EWCOP 26 (T3) (Lieven J)
 - Appeal by a local authority against findings on capacity to make decisions as to whether to take medication and share information about care and treatment with family members
 - Appeal primarily based on adequacy of reasons; and
 - Were more extensive reasons needed to reject an expert report?
 - S.49 report authority (psychologist) had found that P had capacity in the relevant domains and court found that she did not (further appeals on BI declarations)
 - Reasons were given in an ex tempore judgment relatively briefly (where context was that P was overdue for medication and a decision needed to be reached as to whether she had capacity to decide to refuse it)

APPEALS

- *London Borough of Camden v BW & Anor (Capacity Decisions; Reasons)* [\[2026\] EWCOP 26 \(T3\)](#) (Lieven J)
 - The test of whether an appeal judge shall allow an appeal under the Court of Protection Rules 2017 is whether the first instance judge was "wrong" or "unjust, because of a serious procedural or other irregularity in the proceedings" (see r.20.14(3), CoPR 2017). The Judge heard oral evidence, and it is relevant to have regard to *Aintree University Hospitals NHS Foundation Trust v James* [\[2013\] UKSC 67](#), [\[2014\] AC 591](#) where Lady Hale observed..."if the judge has correctly directed himself as to the law ... an appellate court can only interfere with his decision if satisfied that it was wrong: *Re B (A Child) (Care Proceedings: Appeal)* [\[2013\] UKSC 33](#), [\[2013\] 1 WLR 1911](#). In a case as sensitive and difficult as this, whichever way the judge's decision goes, an appellate court should be very slow to conclude that he was wrong."

APPEALS

- *London Borough of Camden v BW & Anor (Capacity Decisions; Reasons)* [2026] EWCOP 26 (T3) (Lieven J)
- Lieven J adopted the approach adopted in 'South Bucks v Porter (No. 2) [2004] 1 WLR 1953' to an adequacy of reasons challenge: *The reasons must explain to a reasonably informed reader why the Judge considered BW did not have capacity. In doing so they must cover the principal issues, here the statutory requirements of the MCA, and they must show why the Judge departed from the view of the expert, Dr Sheehan. However, they are addressed to the parties who are familiar with the case; they do not have to be lengthy; and they do not have to recite all or even large parts of the evidence.*

APPEALS

- *London Borough of Camden v BW & Anor (Capacity Decisions; Reasons)* [2026] EWCOP 26 (T3) (Lieven J)
 - No enhanced reasons duty when disagreeing with a capacity assessment
 - *‘There is no doubt that the decision as to capacity is one for the Judge, and the Judge is fully entitled to depart from the capacity assessment, whoever it is undertaken by. As Ms Kelly submits it was not the Judge’s job to critique Dr Sheehan’s report. She had to reach a decision on capacity taking into account all the relevant evidence, including her own knowledge of BW. A fair reading of the judgment makes it perfectly clear why the Judge departed from Dr Sheehan’s views and what factors she took into account.’*



HOT OFF THE PRESS

2 July 2026

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RECENT DEVELOPMENTS IN THE COURT OF PROTECTION

- AGNI
- GARDNER
- TOWNSEND
- DEPUTIES
- News from the trenches



*IN A REFERENCE BY THE ATTORNEY GENERAL FOR
NORTHERN IRELAND OF A DEVOLUTION ISSUE UNDER
PARAGRAPH 34 OF SCHEDULE 10 TO THE NORTHERN
IRELAND ACT 1998 [2026] UKSC 16 – “AGNI”*

The reference:

Whether the proposed exercise of the Minister of Health's powers under s.288(4) Mental Capacity Act (Northern Ireland) 2016 ('MCA 2016') to revise the Deprivation of Liberty Safeguards Code of Practice issued under s.288 of that Act would be invalid by reason of s.24 Northern Ireland Act 1998 as incompatible with Article 5 of the European Convention on Human Rights ('ECHR').

A CONCEPT OF “VALID CONSENT”

- 2.11 P can **consent** to the arrangements for their care if P has the capacity to understand, retain, appreciate, use and weigh the fact that they are being confined, and can communicate their agreement to that confinement.
- 2.12 P can also be regarded as consenting even if he or she does not have that capacity, but they actively express positive wishes and feelings about the arrangements in place. It is not enough that P does not express objection, there must be evidence of a positive attitude to the care arrangements. For example, P could be regarded as consenting if he or she
 - a. regularly says that they like where they live
 - b. or appears keen to return to their home after a trip away
- and in either case, there is no evidence of resistance or objection to the arrangements in place.
- 2.13 The responsibility lies with those who are confining P to be able to explain at all times how P can be regarded as consenting.



THE STORCK TEST

- The Storck test, *Storck v Germany* 61603/00 at [74] by way of reminder:
- Limb (a) – the objective component
“confinement in a particular restricted space for a not negligible length of time”
- Limb (b) the subjective test – lack of valid consent.



CHESHIRE WEST CONSIGNED TO HISTORY

P v Cheshire West and Chester Council [2014] UKSC 19 “acid test”: *under constant supervision and control and not free to leave*”

45 “...it is axiomatic that people with disabilities, both mental and physical, have the same human rights as the rest of the human race.....

46 Those rights include the right to physical liberty, which is guaranteed by article 5 of the European Convention. This is not a right to do or to go where one pleases. It is a more focused right, not to be deprived of that physical liberty. But, as it seems to me, what it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities. If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person. The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. A gilded cage is still a cage.”

AGNI

- **AGNI: 53(vi)** *"...in setting out the acid test, the majority decision in Cheshire West departed from the longstanding multifactorial approach to determining whether a person is deprived of liberty within the meaning of article 5 and is wrong..."*

AGNI – OBJECTIVE LIMB

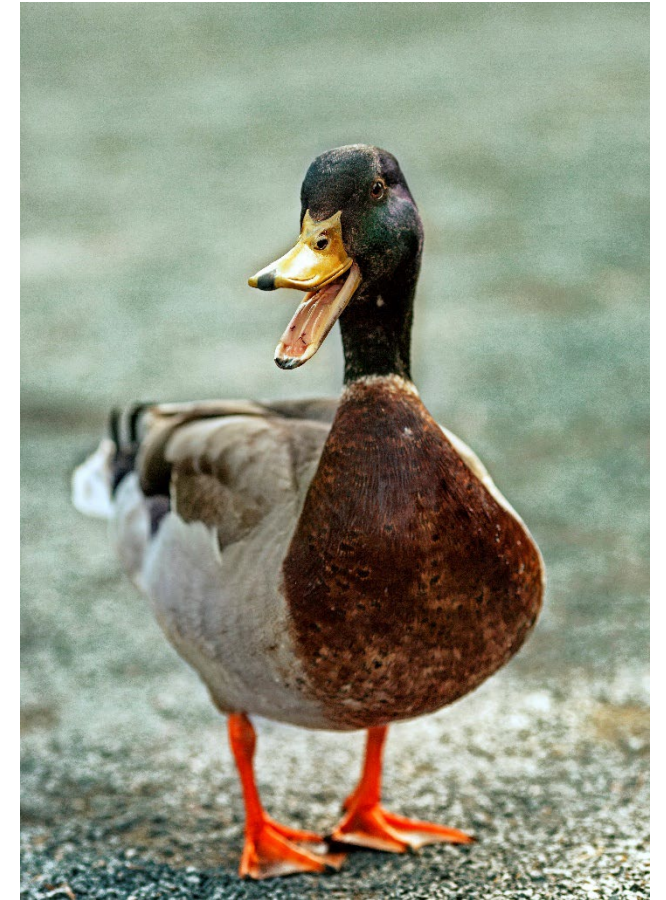
- A5 “does not concern mere restrictions upon liberty of movement” [118]
- The starting point is P’s “concrete situation” [118]
- “account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question”[118]
- look beyond appearances; “concentrate on the realities of the situation” [118]
- The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance: Guzzardi, [119]
- Restrictions should be considered “cumulatively and in combination” [119]
- context is an important factor in assessing how close the measure in question is to the paradigm of deprivation of liberty, which is confinement in a prison cell: [119]

AGNI – SUBJECTIVE LIMB

- “It is an autonomous concept and not to be equated with the concepts of consent for the purpose of waiver of rights under the Convention or of legal capacity in domestic law. **The fact that an individual lacks legal capacity to decide on their living and care arrangements does not necessarily mean that they are de facto unable to understand and consent to those arrangements in a manner that prevents those arrangements from becoming a deprivation of liberty.....** On the contrary, **an individual without legal capacity under domestic law, but who is conscious of their environment and has a basic understanding of their living circumstances so that they can express their view about their situation, who manifests their acceptance of the situation they are in, should have their opinion respected when an assessment is made of whether they are deprived of liberty under article 5.” [53(ii)]**

WHEN IS A DOL NOT A DOL?

- “practical and realistic approach” [127]
- Relative normality of the situation [193] [145]
- Context and concrete situation of the individual [145]



RAMIFICATIONS

- S.21A non means tested legal aid
- Review as part of proceedings

UK SUPREME COURT 2026 JUDGMENT ON WHAT CONSTITUTES A DEPRIVATION OF LIBERTY – GOV.UK

- For the avoidance of doubt, there is no longer an acid test when it comes to assessing the objective element of deprivation of liberty, although these factors remain relevant as part of the multifactorial assessment.
- The multifactorial assessment considers:
 - the type of restrictions (for example, locked doors, physical control, supervision, sedating medication social isolation and so on)
 - the duration of those restrictions
 - the effects of the restrictions on the person
 - the manner of implementation of the restrictions
 - whether the person objects
 - how far removed the case is from the situation of detention in a prison cell
 - the relative normality of the arrangements (for example, greater restrictions would be required at home in order for deprivation of liberty to arise)
 - the purpose of the arrangement, for example whether the arrangements are for care and protection, rather than punishment or coercion
- For there to be a deprivation of liberty, there must be an element of restriction being imposed on a person against their will. This means that it is unlikely to be a deprivation of liberty if a person's liberty is constrained by their own illness, condition or impairment. For example, if someone's physical disabilities prevent them from leaving a particular setting and they are unable to form any desire to leave, this will likely not be considered a deprivation of liberty."

TOWNSEND – LESLEY BARNOR TOWNSEND V EPSOM
AND ST HELIER UNIVERSITY HOSPITALS NHS TRUST [2026]
EWCA CIV 195

“no carve out for ‘clinical decisions’” [69]

Treatment “futile and clinically inappropriate”

“a clinical decision has been made, and it is that dialysis will not continue to be provided by this Trust.... We reiterate that there is no best interests decision for the Court to make” [25]



TOWNSEND: PERMISSION TO BRING APPLICATION

50 Applications to the Court of Protection

(1) No permission is required for an application to the court for the exercise of any of its powers under this Act—

- (a) by a person who lacks, or is alleged to lack, capacity,
- (b) if such a person has not reached 18, by anyone with parental responsibility for him,
- (c) by the donor or a donee of a lasting power of attorney to which the application relates,
- (d) by a deputy appointed by the court for a person to whom the application relates, or
- (e) by a person named in an existing order of the court, if the application relates to the order.

....

(3) In deciding whether to grant permission the court must, in particular, have regard to—

- (a) the applicant's connection with the person to whom the application relates,
- (b) the reasons for the application,
- (c) the benefit to the person to whom the application relates of a proposed order or directions, and
- (d) whether the benefit can be achieved in any other way.

TOWNSEND APPEAL

- “(3) The judge erred in holding that a “clinical decision” to withhold life sustaining medical treatment is not subject to best interests considerations and hence is not subject to the supervision of the Courts.” [32]
- Appellant: distinction between clinical and best interests decision-making not supported by the *NHS Trust & Ors v Y & Anor* [2018] UKSC 46; further, that it was in breach of case law – An the UK’s a2 obligations.
- Respondent: *R (Burke) v General Medical Council* [2005] EWCA Civ 1003, [2006] QB 273 – the court cannot compel doctors to provide treatment they consider clinically inappropriate; *N v ACCG and others* [2017] UKSC 22, [2017] AC 549 – the court can only choose between available options

TOWNSEND

- “Any decision about the care and treatment of a mentally incapacitated adult, including the withdrawal of life-sustaining treatment, must be taken in the patient’s best interests. There is no carve out for “clinical decisions”” [69]
- “The hospital cannot pre-empt court proceedings by unilaterally withholding or withdrawing treatment on “clinical” grounds. A decision whether or not to withdraw treatment has to be a best interests decision.” [72]
- “In cases such as Mr Barnor’s, where the view of the treating team and the second opinion experts is that continuing treatment is clinically inappropriate, the Court will scrutinise the evidence to determine whether withdrawal or withholding treatment is in P’s best interests. In many, perhaps most, cases, the Court will conclude that it is not in P’s best interests for treatment to continue, and it may reach that conclusion swiftly. In no circumstances can the Court compel the doctors to provide treatment that they consider clinically inappropriate. But the decision is for the Court, not the clinicians.” [74]

WELFARE DEPUTIES

Lawson, Mottram and Hopton [2019] EWCOP 22

“[t]he structure of the Act and, in particular, the factors which fall to be considered pursuant to Section 4 may well mean that the most likely conclusion in the majority of cases will be that it is not in the best interests of P for the Court to appoint a [personal welfare deputy]” [53(c)]

Parr v Cheshire East Council & Anor [2026] EWCOP 1 (T3)

[22] “Appointment of a deputy would not take away autonomy from Ruby because she cannot exercise autonomy in relation to anything except the most basic activities and needs. I would not view the appointment as being restrictive of Ruby’s freedom or right to self-determination.”

[40] this judgment is not an inducement to others to make applications for appointment as a PWD in cases where the appointment would not be appropriate. I have applied not departed from Hayden J’s judgment in Lawson, Mottram and Hopton.

RE XY[2025] EWCOP 55 (T2),

- *56. Where an application is made for appointment as deputy, it will always serve the applicant well to consider carefully which decisions they seek authority to make, and to spell that out clearly in the application papers, with reasons. Commonly a direction is made requiring the applicant to file a COP24 statement doing exactly that. Also commonly, the statement received in response fails to do that. As section 16(4) of the Act makes clear, welfare deputyship is not “parental responsibility for adults”.*

RE HDEB [2026] EWCOP 12

- [17] My starting point is HDEB's right to respect for his autonomy. He is a 22-year-old man; it has been more than 4 years since JB and SB held parental responsibility for him. HDEB's disabilities may mean that he is less able to exercise his autonomy than a non-disabled person, but that does not mean that his right to autonomy should be any less jealously guarded. As Hayden J stated at [53b] of *Lawson, Mottram and Hopton*, *'The young person who may lack capacity in key areas of decision making remains every bit as entitled to this respect as his capacitous coeval.'*
- HHJ Beckley noted the importance of "collaborative decision-making" and determined [26] that "day to day decisions are ones that Parliament intended to be made with the protection of section 5 MCA".

FROM THE TRENCHES.....

- *F v The London Borough of Hackney & Anor* [2026] EWCOP 20 (T3) – a8/a10 balancing for the purposes of determining an application to set aside a transparency order
- *University Hospitals Birmingham NHS Foundation Trust v EN* [2025] EWCOP 59 (T3) – reminder to follow Keehan J's guidance in *NHS Trust 1 v G* Practice Note [\[2014\] EWCOP 30](#)

BREAK TIME!



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Coffee Break
See you at 3.20pm

CAPACITY TO ENGAGE IN SEX: 5 YEARS AFTER JB

2 July 2026

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CONTENTS

- Why are we assessing capacity to engage in sex?
- Sex: the final frontier(s):
 - Do we need to find facts before we tailor the relevant information?
 - When sex isn't sex
 - The JB issue the Supreme Court didn't quite answer, "*P should understand that P should only have sex with someone who is able to consent.*"

WHY ARE WE ASSESSING CAPACITY TO ENGAGE IN SEX?

- We aren't doing it as a matter of routine (these cases used to be fairly specialist and rare – less so now).
- We are doing it:
 - If P is in a pre-existing *sexual* relationship;
 - If P is likely to have sex;
 - There is a reason to doubt P's capacity to engage in sex;
- We **are not** assessing P's capacity to enter into relationships, it is very much focused on sexual acts.

SEX: THE FINAL FRONTIER

DO WE NEED TO FIND FACTS BEFORE WE TAILOR THE RELEVANT INFORMATION?

- We can and do tailor the list of relevant information found in *JB*. Why do we tailor the relevant information? Because some of the information may not be relevant at all.
- Obvious example: why should someone engaging in homosexual sex have to understand, retain, use or weigh that pregnancy may result from the sexual act?
- The other piece of relevant information is in respect of risks relating to sex, in particular STIs. Should we assume monogamy in relationships when people are married?
- If we are tailoring the relevant information, who does the burden fall upon?

SEX: THE FINAL FRONTIER WHEN SEX ISN'T SEX

- Relationships -> likely contact
- (Risk of/avoiding) sexual offending -> likely contact, care, occasionally residence
- (Unlawful/inappropriate) masturbation -> likely care
- Online sex acts -> internet and social media
- Risky sexual partners -> Contact through the lens of TZ No.2 (albeit, there is scope in respect of particular partners to change the relevant information re sex)
- I am less than convinced that some fetishes (see for example AA Local Authority v RS (Capacity) [2020] EWCOP 29) and every non-penetrative sexual act falls within the same “matter” for the purposes of the Act / JB.

THE JB ISSUE THE SUPREME COURT DIDN'T QUITE ANSWER,
*“P SHOULD UNDERSTAND THAT P SHOULD ONLY HAVE SEX WITH
SOMEONE WHO IS ABLE TO CONSENT.”*

- JB the focus was on being able to understand, retain, use or weigh JB's sexual partner's consent to sexual acts;
- P's sexual partner's ability to consent was not central but does feature in the judgment, as does a concern that the criminal law and mental capacity law would not align. Supreme Court accepted that the criminal law and civil law wouldn't align.
- However, there does remain a degree of confusion in assessments, for example where it is stated where P wouldn't be able to, “assess the capacity of their partner” to engage in sex. I'd suggest as the very least P would have to understand that their partner has reached the legal age of consent and is not disabled from giving that consent.

HABITUAL RESIDENCE, FOREIGN TRAVEL & WRONGFUL REMOVAL

2 July 2026

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OUTLINE

- Habitual Residence
- The court's powers
- Locating P
- Wrongful removal
- Repatriation
- Reflections post *AGNI*

HABITUAL RESIDENCE

- Habitual residence is a question of fact to be determined by a wide range of circumstances of the particular case. **It is not a legal concept.**
- The test of habitual residence is *'the place which reflects some degree or integration by the [child/adult] in a social and family environment in the country concerned.'*
- Cases under the MCA should follow the same approach as cases relating to children:
- *"Habitual residence" is defined in neither the MCA nor the [2000 Hague] Convention. In An English Local Authority v SW and Others*[\[2014\] EWCOP 43](#), Moylan J (as he then was) held that the meaning to be given to habitual residence in the context of the Convention and the MCA should be the same as in other family law instruments such as the 1996 Hague Child Protection Convention and Council Regulation EC 2201/2003 (Brussels IIA) though he also acknowledged that different factors will be relevant and will bear differential weight (see [64]-[65]).

The Health Service of Ireland v IM & Anor [2020] EWCOP 51

HABITUAL RESIDENCE/ KEY PRINCIPLES

- Habitual residence is a question of fact and not a legal concept such as domicile: *A v A (Children: Habitual Residence)* [2014] AC
- The test adopted by the ECJ is the “*place which reflects some degree of integration by the child in a social and family environment.*” The child’s physical presence should not be temporary or intermittent.
- Consideration needs to be given to conditions and reasons for the child’s stay in the state in question: *Mcredi v Chaffe*
- The essentially factual and individual nature of the enquiry should not be glossed with legal concepts which would produce a different result from that which the factual enquiry would produce.
- Both objective and subjective factors need to be considered. Rather than consider a persons wishes or intentions, it is better to think in terms of the reasons why a person is in a particular place and his or perception of the situation while there- their state of mind: *Re LC (Children)* [2014] AC 1038
- It is to be assessed by reference to all the circumstances as they exist at the time of assessment: *FT v MM* [2019] EWHC 935

THE COURT'S POWERS

- The full range of the court's powers are based on the person being **habitually resident** in England and Wales
- The court may exercise its powers in relation to: **§7(1) to Schedule 3 (Part 2)**
- (a) an adult habitually resident in England and Wales;
- (b) an adult's property in England and Wales;
- (c) an adult present in England and Wales or who has property there, if the matter is urgent, or
- (d) an adult present in England and Wales, if a protective measure which is temporary and limited in its effect to England and Wales is proposed in relation to him.

HABITUAL RESIDENCE/ LOCATING P

- ***Re P (Property & Affairs Deputyship: Jurisdiction) [2024] EWCOP 77 (T2)***
 - During the currency of the proceedings, the parties became aware that P had left the country.
 - Through a series of attempts, and court orders, it was determined that P was in Italy: The court expressed grave concern for P's welfare and the conduct of his parents:

"After all this time, P appears not to have been seen by anybody relevant to this case other than his parents. That is extraordinary. I am unable to escape commenting that there has been complete obfuscation and stonewalling in this case by P's parents in relation to this court and the parties pursuing their son's interests here and in the High Court. The mother rhetorically asks, as a criticism what the Official Solicitor has achieved for P, what they have done in his interests, have they ever spoken to him? The answer is no, but the reason for that is they have been obstructed by the mother and the father in doing so" [47]

- The issues for the court at this interim stage were:
- (1) P's habitual residence; and
- (2) whether the court should revoke the orders appointing P's mother to act as his Deputy.

- HHJ Burrows confirmed that the CoP has the power to revoke a property and affairs deputyship, irrespective of whether the person is still in the jurisdiction [33]
- Habitual residence: the court determined that P remained habitually resident in England:
“My conclusion is, absent evidence confirming it, that P is still habitually residence here in England and Wales, I will review that conclusion whenever that evidence comes in.”
- In any event, the court has jurisdiction to make decisions about an adult’s property in England and Wales: see para **7(1)(b) to Schedule 3 MCA 2005**.
- The court discharged the orders appointing the mother to act as the Deputy and appointed the local authority.

' I am very concerned about P's welfare. I am sure we all are. He ought to be located. Although I have said I have no sound reasons to believe he has relocated to Italy, I am concerned he may be abroad, maybe as a means of removing him from the court's powers. I consider that even if the Court of Protection's jurisdiction under the Mental Capacity Act may be in doubt, my position is this is a case in which the inherent jurisdiction of High Court may well have to be brought in if it is necessary to do so.

So, for that reason I suggest this matter ought to go to Tier 3 to a High Court Judge.' **[54]**

LOCATING P– WHEN IS IT TIME TO CONCLUDE PROCEEDINGS?

***Re AB & Ors* [2025] EWCOP 27**

- The court had previously made best interests orders to remove AB from the care of her family to a place of safety.
- Before this order was implemented, the 2R unlawfully removed AB to Jamaica
- The court produced a judgment for two reasons:
 - (1) The court remained concerned for AB's welfare and directed that the judgment be sent to the Police Force in the UK, the Jamaican Police and the consular team at the British High Commission in Kingston Jamaica.
 - (2) There were steps that could have been taken to locate AB earlier when it became clear that the 2R would not comply with the return orders. The court said that it may be helpful for CoP practitioners to understand the steps that can be taken to locate missing persons. Such orders in the High Court are often used to locate missing children.

THE COURT'S POWERS

HM and PM and KH [2010] EWHC 870 Fam

34. None of these various orders would be thought surprising or unusual by those familiar with the practice of the Family Division when trying to locate and retrieve missing or abducted children. But before turning to consider the appropriateness of such orders being made in a case, such as this, where the abducted person is not a child but a vulnerable adult, there are two aspects of the jurisdiction which, however familiar to expert practitioners specialising in this field, merit some further elaboration.

35. The first relates to the power of the court to order third parties to provide information.

36. It has long been recognised that, quite apart from any statutory jurisdiction (for example under section 33 of the Family Law Act 1986 or section 50 of the Children Act 1989), the Family Division **has an inherent jurisdiction to make orders directed to third parties who there is reason to believe may be able to provide information which may lead to the location of a missing child**. Thus orders can be made against public authorities (for example, Her Majesty's Revenue and Customs, the Benefits Agency, the DVLA, local authorities or local education authorities, etc, etc) requiring them to search their records with a view to informing the court whether they have any record of the child or the child's parent or other carer. Similar orders can be directed to telephone and other IT service providers, to banks and other financial institutions, to airline and other travel service providers - the latter with a view to finding out whether the missing child has in fact left the jurisdiction and, if so, for what destination - and to relatives, friends and associates of the abducting parent. In appropriate cases, though this is usually confined to relatives, friends and associates, the court can require the attendance at court to give oral evidence of anyone who there is reason to believe may be able to provide relevant information. Compliance with such orders can, where appropriate, be enforced by endorsing the order with a penal notice and then, in the event of non-compliance, issuing a bench warrant for the arrest and compulsory production in court of the defaulter.

- McKendrick J was satisfied that the COP can make such third party disclosure orders.
- There is also the power to compel persons to file evidence and attend court to provide sworn evidence – *‘a useful tool, used sparingly to locate missing persons.’*
- It was the agreed position of the parties that the proceedings should be withdrawn, this as *‘misconceived’*.
- There may also be an application for contempt against the offending party.

WRONGFUL REMOVAL

- **Re QD (Jurisdiction: Habitual Residence) [2019] EWCOP 56**
 - A man in his sixties with dementia connect with atypical Parkinson's disease
 - Until September 2019, he was living with his second wife, KD in Spain and has been so for several years
 - Sept 2019 he flew to this county with son and daughter from his first marriage, TD and BS, without knowledge or agreement
 - TD and BS then sought a range of welfare orders in the COP including, in particular, that he reside in a care home in England, that he not return to Spain, and that he have only supervised contact with his wife, KD.
 - Listed for preliminary determination of jurisdiction.
 - Cobb J concluded he was HR in Spain and that he could only make temporary protective orders pending the transfer of the matter to Spain.

- Cobb J particularly influenced by the following factors:
 - When he had capacity, QD chose to live in Spain and this appears to have been his permanent home;
 - QD had lived in Spain for main years (he first moved there in 2012 and became a legal resident in Spain in 2014);
 - QD had more than one property in Spain;
 - QD received health care in Spain;
 - QD was integrated into life and a community in Spain where he appeared to have a social life;
 - It was conceded by TD and BS that prior to September 2019, QD was habitually resident in Spain;
 - QD's wife continued to live in Spain and sought to regularize the care arrangements for QD in Spain by initiating proceedings for legal guardianship in Spain some weeks before QD was relocated to England
 - QD's move to this country was achieved by stealth.
 - There was no urgent need to make substantive orders to avert an immediate threat to life or safety or an immediate need to for further or other protection.

- Cobb J concluded that the removal had been wrongful.
- He exercised the limited jurisdiction available to him pursuant to Schedule 3 para 7(1)(d) to make a protective measures order which provided that QD was to remain at and be cared for at a care home in England and that the authorisation of his DoL would be continued until such time as the national authorities in Spain determine what should happen next.
- He granted permission for the papers to go to the Spanish authorities and permission for an expert to be instructed on Spanish Law to advise on processes thereafter, he said it was “*for the Spanish administrative or judicial authorities to determine the next step, which may of course be to confer jurisdiction on the English courts to make the relevant decision(s)*”

WRONGFUL REMOVAL– A LEGAL DEADLOCK

QD (Habitual Residence) (No.2) [2020] EWCOP 14

- The advice from the Spanish expert was that the proceedings could not progress whilst QD remained in England. There was a legal 'deadlock'.
- *"here is, currently, no order of the Spanish Court directing the return of QD which is capable of recognition and enforcement by the Court of Protection under MCA 2005 Schedule 3, paras 19 and 22. It appears that the Spanish Court will not be able to exercise its primary jurisdiction to decide where QD should live (and whether he should return to Spain) unless QD is returned to Spain; the decision of whether he should be returned, how he should be returned, and when he should be returned, would primarily fall (unless it comes within Schedule 3, para.7(1)) to be to be considered by the Spanish Court."*

- Then the pandemic hit, and it was not possible to order a return- Cobb J adjourned the decision of whether to return QD for three to four months.
- QD passed away in that time. This would have been an interesting decision should the court have determined that QD should return to Spain for the Spanish proceedings to commence.

HABITUAL RESIDENCE, REPATRIATION AND BEST INTERESTS

Neath Port Talbot County Borough Council v CK & Ors [2025] EWCOP 47

- HHJ Miller had previously determined that CK was still habitually resident in Spain, the decision to move to Wales having been taken by his family, not him.
- Morgan J was invited to determine CK's best interests as regards his future residence and care arrangements.
- The primary issue for the court was whether it could determine that CK's habitual residence had now changed.
- The court was referred to the Practical Handbook on the Operation of the 2000 Protection of Adults Convention

By reference to *The Practical Handbook on the Operation of the 2000 Protection of Adults Convention* counsel for the applicant developed her submission, supported by the litigation friend that it is permissible and appropriate to review, by considering whether there has been a change in the Habitual residence of the adult concerned. In particular there is express consideration within paras 4.13 et seq **What happens when the “habitual residence” of the adult changes?** of the prospect that such a change may be including during pending proceedings for a measure of protection. (Explanatory Report to the convention para 51). Given the clarity of analysis which appears in QD I have paused to reflect carefully on whether I should accept that, HHJ Miller having reached the conclusion he did in June of this year, it is in the peculiar circumstances of this case right for me to look again **at CK's Habitual residence now**. I have narrowly concluded that it is and whilst there is much that is on all fours factually with the situation facing Cobb J in QD, very different here is **the very long passage of time between the reaching of the conclusion and the best interests decision to be taken at this hearing**. I accept Counsel's joint submission that it is permissible and appropriate to review (in the sense discussed, rather than by critique of HHJ Miller's original judgment) the question of CK's Habitual residence. That review is properly done by consideration of significant changes in the factual landscape or the emergence now, of facts which were not known in June 2025.

[20]

- The court determined that CK was now habitually resident in England & Wales, meaning that the court could then consider the full evidential landscape. The court have striking closing observations:

*It is not uncommon, sadly, for families to find themselves in situations where one of their members is diagnosed with conditions similar to CK, or is otherwise in failing health and where there are questions over their capacity, and that person is living outside of England and Wales. The parties have been at pains to emphasise that neither at this hearing or before HHJ Miller has any party invited the court to determine that the move of CK from Spain to the Z care home was made in bad faith. It is explicitly accepted by the Local Authority at this hearing that EK and JS did what they considered to be in CK's best interests. CK's circumstances have however illustrated all too clearly how the well intentioned can go wrong. At the outset of this hearing the litigation friend made the following overarching submission which encapsulates the wide anxiety: **'While the litigation friend considers that CK's habitual residence will revert to England and Wales, the litigation friend is troubled by a conclusion which ostensibly authorises CK being removed from the country where he had chosen to live, and the perverse incentives this may create for future individuals to avoid processes which protect vulnerable adults internationally. It should be emphasised that the circumstances confronting this court are unusual and confined to their own facts'**. [35]*

THE FACTUAL CONTEXT

- There is no property in Spain to which CK could return.
- He neither owns nor rents a property in Spain.
- His own care needs reflect his deteriorated physical and cognitive health
- He could not afford to pay privately to meet these in Spain
- His relationship with his wife is not straight forward
- She has had no contact with him since he lived in the current care home and has never visited him there.
- He *might* be eligible for a publicly funded care home but this is not certain and he would require assessment for which he would have to be physically present in Spain **before** any determination was made.
- His ability to travel is compromised
- His own wishes are clear but not congruent with the reality

GUIDANCE

- The court was asked to give **guidance for future cases**:
- Consideration of capacity should be given at an early stage and should be at the forefront of everyone's mind. Specifically, if what is under consideration involves a decision to leave one country and go to live in another, the person's capacity to decide that, must be considered at an early stage [37].
- If a public body becomes aware that there is a prospect of a person returning from a country where they are resident to the UK to be placed within a registered care setting, the public body should alert those involved of the need for the person to consent to that process and to follow the laws of the country in which they are habitually resident. [38]

- Registered care settings, should, before granting admission to a person who is resident in another country, satisfy themselves either that the person is consenting (i.e. that they have the capacity so to consent) to a return to the United Kingdom and placement within a care setting or that the return follows a lawful process in the country in which they are resident or there is a valid substitute or surrogate decision making power governing the process under that country's law [39]
- 40. Where a person has moved from one jurisdiction to another in circumstances such as CK did here, supervisory bodies for the purposes of Schedule A1 of the MCA 2005 should not authorise a deprivation of liberty by means of the administrative process of DOLS but should make urgently an application to the Court of Protection, within which application should be highlighted for the purposes of gatekeeping decision making that there is or is likely to be an issue to be determined in respect of habitual residence [40]

Post *AGNI* reflections

HABITUAL RESIDENCE, FOREIGN TRAVEL & WRONGFUL REMOVAL

2 July 2026

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CONTACT IN CARE HOMES

SB & PB V BOLTON BOROUGH COUNCIL

2 July 2026

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BACKDROP

- Controversy over contact restrictions imposed by CoP
- ITV headline (Feb 2026): “My daughter had been kidnapped’: the families blocked from seeing their disabled loved ones”
- *“Lawyers and disability charities have told ITV news they are seeing the use of so-called “contact restrictions” increasing, as more councils struggle to find alternative care for people with learning disabilities whose families complain, and so side with care providers to avoid care places being withdrawn”.*

FACTUAL BACKGROUND

- Lady (PB) in late 80s, with Parkinson's and Alzheimer's. No dispute re: capacity.
- Living in care home, but previously lived at home with daughter SB, with a package of care
- Long history of breakdowns in relationships between care providers and SB.
- DJ had decided that was in PB's best interests to remain at the care home, but contact with daughter should be supervised and limited (two hours per week).

THE BALANCE TO BE STRUCK

“This is an important issue in this case because it has a direct impact on PB’s best interests in two interrelated ways. Firstly, PB and SB are close, and it maybe in PB’s best interests for her to have extensive contact, as and when she wishes, with her daughter. Or, to put it another way, it may upset her and injure her best interests for that contact to be restricted. Secondly, however, the breakdown in relations between the caregivers and SB is also relevant to PB’s best interests. That is because it makes her tenure at the care home less secure, for the reasons I have already explained.”

HUMAN RIGHTS

- By virtue of s.73 Care Act 2014, care home taken to be exercising function of a public nature in providing care or support for purposes of HRA 1998, in circumstances where local authority has arranged / paid for the care.
- SB said DJ had failed to conduct structured proportionality analysis to determine whether restrictions were compatible with PB / SB's Article 8 rights.
- HHJ Burrows: when read as a whole, proportionality of A8 interference properly considered by DJ in determining whether loss of place in care home was more serious for PB than a reduction in her contact with her daughter.

LIMITS OF THE COURT'S POWER

“the Court of Protection must choose only between options that are legally and practically available. The court does not have a free-standing power to require public authorities, or private providers, to create services, placements or arrangements that do not exist or which they are unwilling to offer...

The point assumes particular significance where, as here, the court is faced in substance with a binary choice: either maintaining a single existing placement or risking its loss in circumstances where no alternative satisfactory placement has been identified or secured. In such cases the court is entitled, and in my judgment often required, to give decisive weight to the preservation of a stable placement, even where that stability is accompanied by restrictions that engage Article 8 rights.”

LIMITS TO THE COURT'S POWER

- HHJ Burrows recognised that providers under statutory obligation to facilitate visits and could be subject to regulatory action by CQC if they don't. But the court can't assume that CQC will take action.
- Rather, the court must “decide the case before it on the basis of present realities” and in doing so can take into account evidence that insisting on different contact arrangements would be likely to precipitate termination of the placement altogether.
- “That does not involve an abdication of the court's responsibility to scrutinise the proportionality of contact restrictions. Rather, it reflects and acknowledgement that the welfare jurisdiction operates within a wider legal and practical framework over which the court does not have direct control”

“In the circumstances of this case, where no alternative placement was available and the court was faced with a binary choice, I am satisfied that the judge was entitled to conclude that the maintenance of a stable placement was, for the time being, in PB’s best interests, even at the cost of restricted contact.”

CONCLUSIONS / IMPLICATIONS

- Very helpful explanation of the limits of the court's power, and why the issue of contact in care homes can become so difficult for the court in the context of very constrained options.
- Notable explicit statement that the preservation of a stable placement can be decisive, even where considerable restrictions placed on contact and therefore A8 rights.
- Providers only subject to HRA 1998 when care commissioned by local authority – should this be changed?

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