



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

- (1) In the Health, Welfare and Deprivation of Liberty Report: capacity, presumptions and the Care Act 2014; and the most comprehensive first instance 'run' at AGNI so far;
- (2) In the Property and Affairs Report: deputies and direct payments, and the Court of Protection and the validity of wills;
- (3) In the Practice and Procedure Report: the AGNI effect starts to show in the statistics;
- (4) In the Mental Health Matters Report: HSSIB's investigation into mental health care in the emergency department;
- (5) In the Children's Capacity Report: desperate deprivation of liberty and consenting to confinement;
- (6) In the Wider Context Report: Anglo-Welsh legal differences and asserting your own capacity;
- (7) In the Scotland Report: what listening to children tells us about listening to adults.

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.

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Direct payments and deputies

Re Various Applications in respect of 'Direct Payments' [2026] EWCOP 42 (T2) (HHJ Hilder)

Deputies – property and affairs – costs

Summary¹

In *Lumb v NHS Humber & North Yorkshire ICB* [2024] EWCOP 57 (T2), HHJ Hilder held that managing direct payments under the National Health Service (Direct Payments) Regulations 2013 did not fall within the 'general authority' of a property and affairs deputy, because complying with those Regulations required some decisions of a welfare type to be made. She held that the Court of Protection could confer authority to manage such payments, but that authority would have to draw on both the welfare and the property and affairs 'streams' of its jurisdiction.

Those who hoped that *Lumb* would turn out to be a one-off, confined to NHS direct payments, will be disappointed by HHJ Hilder's 70-page judgment in this case. That judgment has already prompted the Senior Courts Costs Office (SCCO) to issue guidance of its own, discussed at the end of this summary.

Seven professional deputies from four firms brought the applications. All were already managing direct payments in what they considered to be their capacity as deputies, and none was willing to do so outside a deputyship appointment. They "*unanimously contend[ed] that the Lumb decision was wrong in its conclusion that welfare-decisions are involved in the process of managing Direct Payments in accordance with regulatory requirements*", and sought retrospective and prospective authority, if they did not already have it (paragraph 3). The applications were heard together but not joined. The Public Guardian was joined as respondent, and the Official Solicitor acted as *amicus curiae*.

HHJ Hilder referred to the person benefitting from the payments as P, to the public body which "foots the bill" as F, and to the person who receives and manages the payments as R. That identification is continued here.

The fundamental dispute

The deputies' core argument was that the role of R is "operational." On this view, R implements a care plan decided on by the public body, and the role is ancillary to property and affairs authority, falling within the proposition in *Re ACC* [2020] EWCOP 9 at paragraph 53.7(c) that a property and affairs deputy's authority "*does encompass*

¹ Tor and Arianna having been involved in the case, they have not contributed to this note.

the application of P's funds to meet the costs of care arrangements." The Public Guardian and the Official Solicitor both considered that some welfare-type authority was required, save possibly in the case of certain SEN nominees.

HHJ Hilder first concluded that, even if the deputies were acting purely operationally (which she doubted, noting the disputes about adequacy of funding in which several had become involved), management of direct payments could not fall within the 'general authority':

65. *With the benefit of extensive argument, it seems to me difficult to say that management of Direct Payments within a regulatory scheme is an 'ordinary' part of managing property and affairs. Even viewed as a purely administrative function, 'operational' management of Direct Payments is a specific, distinct responsibility, easily identifiable, and involving complexities which are not of a 'day to day' type – such as deployment of funds within specific constraints, engagement with the paying public authority to satisfy that authority that the constraints are observed, and the repayment obligations. These (and other) aspects of managing Direct Payments are not 'ordinary' features of managing an estate, large or small. [...]*

[...]

67. *Further and relatedly, I agree with the Public Guardian that, whether or not the applicant deputies have indeed been acting purely 'operationally', such description does not answer the fundamental dispute in these proceedings, which is what the role of R properly requires. If Direct Payments are to be managed via deputyship, the authority conferred by the Court of Protection must be sufficient to enable the Deputy to discharge the role fully as*

conceived by the relevant regulations, not how the applicant deputies say they have interpreted it to date.

HHJ Hilder declined to depart from *Lumb* in relation to the NHS Regulations. However, she recognised that the other three schemes are "much less prescriptive" about what is required of R. Ultimately though, the judge found that all of them are underpinned by the same 'choice' agenda. Paragraph 10.2 of the Care and Support Statutory Guidance was, she said, "particularly challenging to the approach of the applicant deputies" (paragraph 72(a)). Having looked at the care plans in each of the seven cases, she concluded:

73. [...] *I cannot agree with the applicant deputies that they are 'prescriptive' to the point of rendering R's role simply a question of applying funds as directed. There is a great deal of leeway remaining as to how the specified extent of support is made manifest. The applicant deputies themselves acknowledge that this is the key advantage to Direct Payments. As the Official Solicitor notes, perhaps the decisions involved are not 'high level' and are being made in collaboration with others. Nonetheless, Rs are still making welfare-type decisions when, in accepting the role at all, they indicate their judgment that Direct Payments are an appropriate way of meeting P's needs for care and support; and thereafter, when they actually deploy the Direct Payments.*

74. *I am concerned, with the Public Guardian, that a purely 'operational' interpretation of the role of R fails to recognise the underlying purpose of Direct Payments, renders the 'choice' agenda illusory, and thereby does P a disservice.*

75. So I conclude that, in all of the Direct Payment schemes currently under consideration, some authority beyond what is incorporated in the 'general' authority of a property and affairs deputy, and beyond simply 'operational' management of money, is required if Direct Payments are to be managed within deputyship.

The 24 questions

HHJ Hilder then answered 24 questions that the parties had agreed. In summary:

Can deputies be authorised at all (Q1–Q2)? Yes, but only for P aged 16 or over. Acting as R involves some welfare-type decision-making. Since s.2(5) MCA 2005 prevents welfare powers being exercised in relation to under-16s, “[i]t is the substance of the authorisation that matters, and welfare-type decisions for under 16s are not the province of the Court of Protection” (paragraph 83).

For younger Ps, such as children who sustained brain injuries at birth, public bodies, families and case managers may therefore need to consider the alternative identified in *Lumb*, under which a case manager acts as R.

Under the NHS and Care Act Regulations, a deputy cannot simply “stand in the shoes of P” to request direct payments. Instead, the deputy must use the route provided by the regulations for an incapacitated person. Under the SEN and Children Act Regulations, however, an appropriately authorised deputy can make the request for a P aged over 16.

What does standard authority cover (Q3–Q5)? Very little in relation to direct payments. A standard-terms property and affairs deputy is not generally authorised to request direct payments, negotiate whether they are sufficient, or use and manage them. The exception is the preparation of employment contracts for directly

employed carers, which has been within general authority since *Re ACC*.

HHJ Hilder rejected the deputies' attempt to rely on *Re ACC* as authority for two broader tasks: negotiating public funding and arranging private care packages. As she put it, “‘negotiating sufficiency’ cannot sensibly be described as an administrative task” (paragraph 94).

What form of authority is required (Q6–Q10)? The authority is a mixture of property and affairs and health and welfare powers. A trust corporation cannot therefore be given the authority, because s.19(1)(b) MCA 2005 permits a trust corporation to be appointed only in relation to property and affairs. Nor would it be appropriate to confer the authority on an individual director of a trust corporation deputy, given the practical difficulties of having two decision-makers.

HHJ Hilder set out model wording in Schedule 1 to the judgment:

The deputy is authorised to consent to, receive and manage Direct Payments made for the benefit of [P] by any statutory body, in accordance with the requirements of relevant regulations. In order to give effect to this authority the Deputy is in particular authorised to:

(i) request a statutory body to carry out an assessment of [P]'s needs;

(ii) request a Personal Budget or a Personal Health Budget for P;

(iii) request Direct Payments as a means of a statutory body meeting its obligations to provide care and/or support for [P];

(iv) make representations to the statutory body making or proposing to make Direct Payments for the benefit of [P] as to i. whether [P]'s welfare would be

best promoted by that statutory body making direct payments or not, and/or ii. whether the statutory body's decision as to the level of direct payments or nature of the services included in any care plan is sufficient for [P];

(v) exercise any rights which are available to the recipient of Direct Payments within the relevant regulations to seek and/or participate in a review or re-consideration of the statutory body's decision(s) or care plan;

(vi) to use or apply the Direct Payments, which may include by way of direct employment of carers, in the best interests of [P] and subject to compliance with any conditions applicable as specified by the relevant statutory body or/or the relevant regulations.

(For the avoidance of doubt, nothing in this order authorises the deputy to appeal, or instigate proceedings for judicial review of, any decision made by the statutory body in respect of Direct Payments without further order of the Court.)

Where this authority is included in a new deputyship order, the words "AND MANAGEMENT OF DIRECT PAYMENTS" should be added to the title. An existing deputy can instead apply for a free-standing order.

Agency, indemnity and remuneration (Q11–Q12). A deputy can act as principal when employing carers. This enables the deputy to meet the requirements of the NHS and SEN Regulations while remaining entitled to an indemnity from P's estate under s.19(6). The usual rules on expenses and remuneration continue to apply.

HHJ Hilder nevertheless repeated her observation in *Lumb* that a capacitous person

receiving direct payments would not ordinarily pay someone to manage them. It is therefore difficult, at least as a starting point, to see why P should bear the cost of doing so.

Case managers (Q13). A standard property and affairs deputy cannot appoint a case manager as R under the regulatory schemes. The case manager must obtain that role independently. The deputy can, however, engage a case manager and pay them from P's funds to manage the direct payments. The deputies told the court, with some candour, that very few case managers were willing to take on this role.

Applications and best interests (Q14–Q15). An application should address the alternatives and P's best interests. Schedule 2 to the judgment identifies 13 matters that should be addressed in the evidence. Before applying, a deputy should consider whether someone else could act as R and ask F whether it will meet the deputy's costs. F's response is not, however, a precondition to making the application.

HHJ Hilder was emphatic that deputyship management is not a "last resort." Where more than one person could act as R, the decision should be made in P's best interests, "*without hierarchy other than that which follows from the regulations themselves*" (paragraph 151). Relevant considerations include familiarity with P, the cost to P, and administrative competence and convenience.

F does not need to be formally notified. HHJ Hilder endorsed an agreed, non-exhaustive list of best interests factors but declined to set a financial threshold below which an application would automatically be disproportionate. As she explained, "*[s]uch thresholds always age poorly as costs rise over time*" (paragraph 162).

Retrospective authority and costs (Q16–Q21). Deputies who have managed direct

payments without specific authority, and charged for doing so, must seek retrospective authorisation. Such an application is “in substance an application for relief from liability” (paragraph 164).

A current deputy does not need to seek ratification of a former deputy's management. The deputy should, however, consider whether it would be in P's best interests to apply to recover the former deputy's costs.

As to the relevant cut-off date, HHJ Hilder held:

170. [...] The Lumb [2024] decision was the first occasion when the Court was called upon to consider, and deputies were put on notice of the Court's view as to, the scope of deputyship authority required for management of Direct Payments. In my view, the proportionate approach is to regard the date of the Lumb judgment – 11th October 2024 – as the long-stop date from which applications for retrospective authority are required in respect of cases involving Direct Payments from any of the various schemes.

Accordingly, the answer to Q19 was that, subject to case-specific factors arising from the judgment, retrospective approval is not required for steps taken or costs incurred before 11 October 2024.

For costs already finally assessed by the SCCO, the answer to Q20 was ‘no’: it is neither necessary nor proportionate to seek to reopen the assessment. The only available route would be an appeal out of time, and “it is likely to be a rare case in which it is in P's best interests to reopen an assessment” (paragraph 175).

Bills already awaiting assessment should not be withdrawn. Instead, HHJ Hilder suggested that deputies notify the SCCO which outstanding bills

contain claims requiring retrospective authorisation.

The costs of managing direct payments should be identified on a “but for” basis. Thus, for example, the employment costs of a care team that was already privately employed before direct payments began are not costs incurred in managing the direct payments.

Supervision (Q22–Q24). Full welfare supervision by the OPG is not required. The welfare elements of the authority are “circumscribed by the relevant regulations” (paragraph 192). The deputy's supervision report should nevertheless explain what decisions have been made about direct payments and why.

The OPG estimated that around 750 property and affairs deputies are currently involved in managing direct payments (paragraph 189). Its supervision extends only to deputyship functions. It does not, therefore, supervise a person who manages direct payments in their personal capacity.

HHJ Hilder concluded with an observation of wider significance:

201. It is within the jurisdiction of the Court of Protection to appoint a deputy with authority to make decisions of a type which involve a mixture of both the property and affairs, and the health and welfare, streams of the Court's jurisdiction. The separation of work streams in the Mental Capacity Act 2005 and in court processes is only a matter of workability and convenience. It does not reflect how people lead their lives, and it does not restrict the Court's ability to respond to lived experience.

The individual applications were not finally determined. The parties were invited to agree a draft order setting out the further directions required in light of the judgment.

The SCCO guidance

As HHJ Hilder anticipated, the SCCO has now issued its own guidance, Senior Courts Costs Office Guidance. It proceeds on the basis that retrospective authority is required where a deputy has claimed costs for managing direct payments from 11 October 2024 onwards. Where a final costs certificate has already been issued, it simply refers practitioners to Q20 of the judgment. Otherwise the guidance provides clarity on what would happen.

Comment

HHJ Hilder's central reasoning is hard to fault. Direct payments exist to give choice and control to the person receiving care, or to someone properly authorised to act for them. If whoever controls the payments is treated as doing no more than paying for a care package someone else has designed, that choice becomes "illusory". The deputies' own case also contained a tension. They wanted to manage direct payments because of the flexibility and continuity of care those payments allow. But someone has to exercise that flexibility, and doing so inevitably involves judgements about how P is cared for.

Paragraph 201 is a welcome recognition that the line between property and affairs and health and welfare is drawn for administrative convenience, not because people live their lives that way. It may prove relevant wherever the two jurisdictions overlap, and deputies and the OPG will need to think through its implications. The judgment does not expressly address s.16(4) MCA 2005. However, the tightly drawn model wording, and the emphasis on the welfare element being "circumscribed by the relevant regulations", go some way to meeting any concern that welfare decision-making is being handed to deputies too readily.

The practical consequences are nonetheless considerable:

- On the OPG's estimate, some 750 property and affairs deputyships involve direct payments. Each will need specific prospective authority and, for the period from 11 October 2024, may need retrospective authority as well. The cost will generally fall on P's estate.
- Trust corporation deputies, common in the personal injury field, cannot hold the authority at all. They will have to hand the role to an individual deputy or rely on the case manager route in Q13. The deputies' evidence was that few case managers are willing to take that role on.
- Deputyship is not available for under-16s, so solutions will have to be found outside the court, along the lines identified in Lumb.

The SCCO guidance sensibly follows HHJ Hilder's suggestion at paragraph 179 that affected bills be paused rather than withdrawn. Two points arise:

- The guidance treats 11 October 2024 as a bright line. The judgment, however, qualified its answer to Q19 with the words "unless there are case-specific factors which become apparent in light of this judgment". Deputies should not treat the guidance as conclusive on whether earlier periods need retrospective authority.
- It is to be hoped that the model wording and the Schedule 2 checklist will allow most applications that now need to be made to be dealt with quickly on the papers. Deputies can help by applying promptly and addressing Schedule 2 in full from the outset.

Finally, HHJ Hilder was clear that management of direct payments by a deputy is not a "last resort." Where more than one person could act as R, choosing between them is itself a best interests decision, with no hierarchy beyond what the regulations provide. The judgment undoubtedly adds a significant procedural burden. Its purpose, though, is to ensure, in the Official Solicitor's words, that *"the machinery of the MCA does not have the effect of inhibiting or restricting choice of individuals in so important a domain as care provision."*

Short note: certification incompetency

In a case which clearly troubled Senior Judge Hilder, not least because of the fact that the issue was only identified almost by chance, she has found that:

- (1) a Mr Robert Cornford was not a person competent to act as certificate provider;
- (2) Robert Cornford did not actually satisfy himself of matters about which a certificate provider is required to satisfy themselves; and
- (3) the process of execution of the instruments did not comply with legal requirements.

Re AR, HR & MH [2026] EWCOP 47 (T2) represented the determination of three test cases brought by the Public Guardian, with 24 other matters 'on hold' pending the outcome of the proceedings. The judgment merits reading in full because Senior Judge Hilder set out the whole sorry saga in some detail. This was, in part, because Mr Cornford was acting in person, but in part also to highlight the fact that, for instance, the Society of Will Writers – whom Mr Cornford was for a period of time, and made play of – at least at the material time did not check whether those wishing to be accredited by it had a criminal conviction (as Mr Cornford had, under a previous name, for fraud). As Senior Judge Hilder laconically put it: "in my view, if the Society

of Will Writers wishes to be taken seriously in its stated purpose, this procedural lacuna is an obvious matter to address" (at paragraph 61).

Of wider interest, perhaps, is the confirmation by Senior Judge that, for a person acting as a 'professional' certificate provider (i.e. rather than one providing the certificate on the basis of personal knowledge of the donor for at least two years), it is for that provider reasonably to consider that they are competent to do so (paragraph 20); in the instant case, Senior Judge Hilder was satisfied that that Mr Cornford was manifestly not competent when discharging that professional function.

As regards the question of what a certificate provider must do to satisfy themselves of the required matters,

It is of course necessary to retain a sense of proportionality. Reliance on his 'acquaintanceship' with AR and HR over a sustained period, knowing them both to be health professionals with a good level of understanding about lasting powers of attorney, is perhaps sufficient; but simply asking MH if he was under pressure, whilst his daughters were making a cup of tea close by, is too cursory. At best, Mr. Cornford made assumptions. More probably, he simply did not consider the substance of what he was certifying. He treated all cases as the same ('generic'), which is why he cannot give individual explanation of steps he took in respect of individual donors.

As Senior Judge Hilder noted, her conclusions in respect of what actually happened in respect of the certifications in question "should be to put beyond doubt that the OPG and the Court expect certificate providers to take their duties seriously, and to be able to demonstrate that they have done so" (paragraph 78).

Senior Judge Hilder also made clear that using "Do Not Date" stickers in relation to LPAs is profoundly problematic:

85. *It is clear and undisputed that Mr. Cornford routinely told donors for whom he acted as certificate provider that the date could and would be added administratively at some point after the signatures had all been collected. He followed a practice of using 'Do Not Date' stickers. I agree with the Public Guardian that the only logical purpose of such an approach is to preserve the possibility of signatures being added in an order deemed convenient, as opposed to the order which meets the legal requirement. Inevitably, it means that Mr Cornford was knowingly submitting to the OPG – or allowing to be submitted by the administrative part of the organisation through which he worked – incorrect documents.*

86. *The donors and attorneys acknowledge that they went along with the 'Do Not Date' process, because they relied on the 'expertise' of Mr. Cornford – who was charging for the service, at least as part of a package.*

87. *That being the evidence, the Court cannot be satisfied that any of the instruments currently under consideration were executed in the correct order. In so far as the final account of AR and HR allows for the possibility of the correct order having been followed, the reliability of their account is undermined by earlier versions. In respect of MH, I prefer the account of his daughters to the account of Mr. Cornford, given that they did this process only once, whilst he is unable to produce any contemporaneous evidence to support his 'generic' answers and positively supported entering an entirely fictitious date for all signatures.*

88. *On the balance of probabilities, I conclude that the process of executing all six instruments currently under consideration failed to comply with the legal requirements of Regulation 9. Accordingly, pursuant to paragraph 18(a) of Schedule 1 of the Act, I must direct the Public Guardian to cancel their registration.*

The Court of Protection and the validity of wills

Croll v Estate of Margaret Mary Thorpe Deceased & Ors [2026] EWHC 2232 (Ch) (Chancery Division (Master Clark))

Summary

This decision of Master Clark, given in a probate claim with a "long-running and bitterly acrimonious history," is an important reminder of two things: (1) the limits of the Court of Protection's jurisdiction over wills that P has already made; and (2) the limited status of findings made by the Court of Protection in subsequent proceedings.

Mr Thorpe suffered a stroke in 2017. In 2021, he went to live with his daughter, the claimant, and subsequently granted LPAs for property and affairs and health and welfare in favour of the claimant and her two daughters. He also made a new will, leaving his estate to the claimant, or to her children if she predeceased him. His previous will left his estate to his wife, or equally to their three children.

In September 2021, at the claimant's instigation, divorce proceedings were brought in Mr Thorpe's name against Mrs Thorpe. A capacity assessment commissioned by his divorce solicitors in May 2022 recorded a MoCA score of 8/30 and concluded that he lacked capacity to conduct the proceedings.

Three applications were subsequently made to the Court of Protection:

- the OPG applied to set aside the LPAs;
- the claimant and one of her daughters applied to be appointed as deputies for property and affairs; and
- the second defendant, Jackie, applied for a declaration that the LPAs were invalid because Mr Thorpe lacked capacity to execute them, together with *"the revocation of the 2021 will and the 'reinstatement' of the 2001 will."*

Mrs Thorpe was not a party to any of these applications.

The applications were heard over three days in November 2023 by HHJ Robin Tolson KC, alongside the divorce proceedings and an application for a non-molestation injunction. In his judgment dated 18 December 2023, the judge did not identify the validity of the 2021 will as an issue requiring determination. He found that Mr Thorpe lacked capacity to execute the LPAs and that the claimant had improperly influenced him. He also addressed the will at paragraph 51:

"I must mention the position of [Mr Thorpe]'s will. The will cannot stand. No medical professional assessed [Mr Thorpe] at the time but a lucid moment for [Mr Thorpe] seems impossible on this evidence."

HHJ Robin Tolson KC indicated that the 2001 will might need updating, and that a statutory will might therefore need to be made. His order of 19 December 2023, however, went further, both reciting that the 2021 will was invalid and providing:

IT IS DECLARED PURSUANT TO SECTION 15 OF THE MENTAL CAPACITY ACT 2005:

...

6. That [Mr Thorpe] lacked testamentary capacity to execute a Will in 2021

7. That the Will executed in 2021 is invalid.

On 11 January 2024, the Official Solicitor declined the court's invitation to act as Mr Thorpe's litigation friend. She raised a concern that s.15 appeared to permit the Court of Protection to make declarations only about a person's present capacity. She also drew attention to the statement in *Re M (Statutory Will) [2009] EWHC 2525 (Fam)* that "the Court of Protection has no jurisdiction to rule on the validity or invalidity of any will."

In an email on 15 January 2024, the judge acknowledged the point. He said that "the most appropriate course is now to remove that recital". The order was not, however, amended. In October 2025, the judge declined to amend it, on the basis that he was *functus officio*.

Mr Thorpe died on 7 February 2024, before any steps had been taken towards a statutory will. Mrs Thorpe died in May 2025. The claimant then brought a claim to propound the 2021 will.

The first defendant was Mrs Thorpe's estate (as the beneficiary under the 2001 will), which Jackie and her brother Peter were appointed to represent. The defendants challenged the 2021 will on the grounds of lack of testamentary capacity, want of knowledge and approval, undue influence and fraudulent calumny. They applied to strike out the claim, or for summary judgment, on the basis that it was inconsistent with the Court of Protection's final judgment and order. All parties were acting in person.

Master Clark dismissed the application in this case. She began from the principle that estoppels only bind the parties to the earlier proceedings and their privies:

33. However, these principles only apply where the parties to the subsequent proceedings were parties to the earlier proceedings. Judgments are only conclusive as to the issues decided as between the parties and their privies (persons treated as having the same legal interest).

As to the Court of Protection's jurisdiction, having set out s.15 MCA 2005, she held:

38. The wording of the section clearly, in my judgment, limits the scope of the declarations pursuant to it to the relevant person's capacity at the date of the declaration. It does not extend to declarations as to past capacity. The decision referred to in the Official Solicitor's letter dated 11 January 2024 – Re M (Statutory Will) [2009] EWHC 2525 (Fam), [2011] 1 W.L.R. 344 – records at [44(i)] the judge's endorsement that the Court of Protection has no jurisdiction to rule on the validity or invalidity of any will. [...] His endorsement, although not strictly necessary for the purpose of deciding the case before him, is to be treated as highly persuasive. In any event, the claimant has a real prospect of success in showing that the COP's jurisdiction is limited in this way.

Having noted that a will is ambulatory and has no effect until the testator's death, she concluded:

40. In my judgment, the COP judge's decision cannot give rise to an issue estoppel binding Mrs Thorpe's estate.

41. Mrs Thorpe was not a party to the COP applications. The factual findings of the COP judge in relation to those

applications do not therefore bind the claimant in a claim as against Mrs Thorpe, or the defendants, who stand in her shoes in their representative capacity as her executors; nor are they admissible as evidence in this claim.

42. In any event, in making declarations in his order in respect of Mr Thorpe's testamentary capacity in 2021 and the validity of the 2021 will, the judge, in my judgment, lacked jurisdiction to do so for two reasons. First, (as the judge himself acknowledged) he had no jurisdiction under section 15 of the 2005 Act to make declarations as to capacity in the past. Secondly, and additionally, at the date of his decision, Mr Thorpe was still alive. The 2021 will had not yet taken effect and remained revocable. Issues as to the validity of the will as an effective testamentary disposition had therefore not yet crystallised; and, when they did, would be properly determinable in a probate claim, not in the COP. Whilst this lack of jurisdiction may not affect the position as between the parties to the COP proceedings, it is at least arguable with a real prospect of success that it prevents an issue estoppel from arising.

The same applied to the judge's findings in the divorce proceedings, to which the claimant had not been a party. The defendants' application was therefore dismissed. Master Clark was careful to add, though, that this "does not mean that they will not ultimately be successful in defending the claim," and that Williams J's comments were "a strong indication of the likely outcome of this claim" (paragraph 44).

Comment

Although it appears to have caused considerable stir, the decision contains nothing that should surprise those familiar with the Court of Protection's statutory will jurisdiction, but it is a

useful reminder of the limits of that jurisdiction. Two points about Master Clark's first reason are worth drawing out.

1. First, the present-tense reading of s.15(1)(a) and (b) ("has or lacks capacity") is consistent with the statutory language. Section 15(1)(c) looks backwards ("any act done, or yet to be done"), but it concerns acts done *in relation* to P, not P's own past acts. Where Parliament wanted the Court of Protection to look back at P's capacity at a particular moment, it said so: s.22 empowers the court to determine whether the requirements for the creation of an LPA were met. That is why HHJ Tolson KC's findings about Mr Thorpe's capacity to execute the LPAs were, and remained, squarely within jurisdiction. There is no equivalent provision for wills.
2. Second, the decision underlines, perhaps uncomfortably for some families, that findings of fact made by the Court of Protection do not bind those who were not parties, and are not even admissible as evidence against them in later civil proceedings. That is simply the ordinary rule set out in *Phipson* at 43-77, but it may come as a surprise to those who assume that a hard-fought Court of Protection hearing has settled matters "for good". The evidence underlying the findings can, of course, be deployed afresh. Given Williams J's observations, one suspects that the defendants may yet succeed at trial. It should also be remembered that this was a summary application.

The interaction with VAC v JAD

Master Clark was not referred to *VAC v JAD & Ors* [2010] EWHC 2159 (Ch) (also reported as *Re D (Statutory Will)*), a decision of HHJ Hodge QC sitting in the Court of Protection. That case, however, provides useful context for *Croll*, and

illustrates what the Court of Protection could have done differently.

In *VAC*, Mrs D had made a number of wills, the validity of the two most recent of which was seriously disputed. Her daughter applied for a statutory will.

HHJ Hodge QC held that the Court of Protection should not itself determine whether the disputed wills were valid. It could, however, take the doubts about those wills into account when deciding whether a statutory will was in Mrs D's best interests. In particular, an earlier will could be relevant to the wishes and feelings evidence under s.4(6)(a) MCA 2005, although no weight should be given to a will shown to have been made when P lacked capacity. The court therefore declined to rule on the validity of the later wills but, because there were serious doubts about them, authorised a statutory will which essentially reproduced the terms of the earlier 1995 will.

VAC and *Croll* therefore fit together in three important respects.

1. Both decisions recognise that the Court of Protection does not determine the validity of an existing will;
2. This does not mean that the Court of Protection must ignore concerns about an existing will. *VAC* shows that those concerns may be relevant when the court is deciding whether to authorise a statutory will. The distinction is between considering the existing will in order to decide a question within the Court of Protection's jurisdiction and making a declaration that the will is invalid.
3. *VAC* illustrates the route by which the Court of Protection could have addressed the underlying problem. It could not revoke the 2021 will or reinstate the 2001 will. It could,

however, authorise a statutory will which revoked the earlier wills and, if appropriate, reproduced the terms of the 2001 will.

The practical point is therefore relatively simple. If serious doubts about P's existing will arise while P is alive, the Court of Protection should not seek to determine whether the will is valid. Instead, the court should consider whether a statutory will application is appropriate. That application should involve the appropriate parties (see Practice Direction 9F) and, particularly where P is seriously ill or elderly, be dealt with promptly. Otherwise, questions about the existing will will ultimately have to be determined by the probate court after P's death.

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Alex has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court and European Court of Human Rights. He also writes extensively, has numerous academic affiliations, including as Professor of Practice at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click [here](#).

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



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Annabel has a well-established practice in the Court of Protection covering all areas of health and welfare, property and affairs and cross-border matters. She is ranked as a leading junior for Court of Protection work in the main legal directories, and was shortlisted for Court of Protection and Community Care Junior of the Year in 2023. She is a contributor to the leading practitioners' text, the Court of Protection Practice (LexisNexis). To view full CV click [here](#).



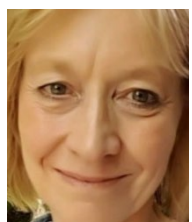
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Alex regularly appears in health and welfare and property and affairs cases in the Court of Protection. He has appeared in leading cases to do with deputyship and published a textbook about LPAs. His recent doctoral thesis explores the impact of changes to mental capacity law in England and Wales. To view a full CV, click [here](#).



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



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Conferences

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

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

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity [My Life Films](#) in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in November. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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