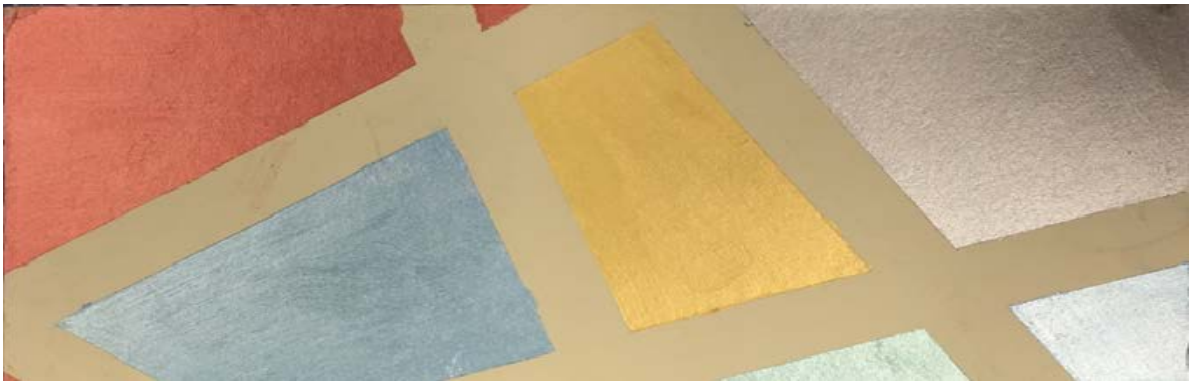

Welcome to the September 2024 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Court of Appeal on belief and capacity, and both sexual and medical complexities before the courts;

(2) In the Property and Affairs Report: a guest post updating deputies and attorneys on important responsibilities;

(3) In the Practice and Procedure Report: which decisions are for doctors, and which for the courts; jury-rigging Article 5(4) compliance in community DoL cases, and transparency under the spotlight;

(4) In the Mental Health Matters Report: a Mental Health Bill on the way, the hard edges of the MHA 1983 and the CQC and Valdo Calocane;

(5) In the Wider Context Report: the limits of Article 3 in the context of the inherent jurisdiction, the CQC and covert medication and Lord Falconer's Assisted Dying Bill;

(6) In the Scotland Report: the Scottish Government consults on legislative measures to respond to the Scott Review and a report from the World Congress on Adult Care and Support.

There is one plug this month, for a free digital trial of the newly relaunched Court of Protection Law Reports (now published by Butterworths. For a walkthrough of one of the reports, see here.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

# Contents



## Education and training standards for AMHP and BIA courses

Having (in essence) given up on the LPS coming into force any time soon, if ever, Social Work England have launched new education and training standards for both BIA courses and AMHP courses, to be used to approve new courses and reapprove existing courses from summer 2025.

## The inherent jurisdiction, Article 3 ill-treatment, and the limits of the State's obligations

*Re P (Vulnerable Adult: Withdrawal of Application)* [2024] EWHC 1882 (Fam) (High Court (Family Division) (Gwynneth Knowles J)

*Inherent jurisdiction*

### Summary[1]

How far can the State be expected to go in seeking to secure the rights of those in challenging situations? A few months after this issue was looked at (albeit slightly curiously) from the perspective of Article 2 ECHR in *R (Parkin) v His Majesty's Assistant Coroner for Inner London (East)* [2024] EWHC 744 (Admin), Gwynneth Knowles J has looked at it from the perspective of Article 3 ECHR. In *Re P (Vulnerable Adult: Withdrawal of Application)* [2024] EWHC 1882 (Fam), she was asked to consider the question of whether she should continue to use the powers of the High Court to compel a 29 year old woman to live apart from her father.

P's circumstances were summarised by Gwnneth Knowles J thus:

> *9. The local authority first became aware of P following a referral from the police in early March 2022. X* [P's mother] *had reported her concerns to the police, namely that Y exercised control over P; that P lacked access to basic necessities such as heating and food; and that P was financially dependent on her father who lived on a very limited income indeed. P and Y were living together in the family home*

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

*at this time. The initial police report detailed how P - then aged 27 years - appeared to look like a young teenager, being underweight, and pale with sores on her mouth. Following the referral, the local authority attempted in vain to engage P, making over 17 visits to the family home between March 2022 and May 2023. The social work evidence showed a concerted effort by P and Y to evade health and social care professionals and the police. It is important to note that, at that time, P had never been known to Children's Services and, save for obtaining the Covid vaccine, had last attended her GP a decade earlier for a minor ailment. She left school at 16 without any qualifications and appeared never to have been in paid, formal employment or to have claimed state benefits. She was socially isolated with no friends or contact with other family. P has a brother, Q, who has been diagnosed with a serious psychotic illness and was hospitalised in March 2022. He has never returned to the family home since then and presently resides in a mental health unit as a voluntary patient. Q has said almost nothing about his sister's circumstances in the family home.*

*10. In April 2023, P and Y were evicted from the family home because Y had failed to pay the mortgage and the property was repossessed. Thereafter, both P and Y slept in a car parked on the property's driveway, using an external mailbox at the property to collect post. There was no evidence that P or Y were trying to find somewhere else to live or making a claim for state benefits to enable them to do so. In May 2023, two separate referrals were received from members of the public expressing concern about P's living circumstances.*

*11. Concern about P's circumstances was heightened by the information gleaned about X's experiences in the family home before she left in 2015. Both X and P's brother, Q, reported Y to be controlling, paranoid about government, and suspicious of professionals. X described family life as "cult-like" with Y assigning family members roles in the family home so that he could concentrate on his health. X gave an account of her life to the local authority detailing prolonged domestic abuse by Y in which P and Q had been required to participate. Neither X, P or Q were allowed to leave the family home unaccompanied by Y, work, or claim state benefits. Shopping was done as a group and Y controlled the family finances, only allowing £1.50 a day for food for the entire family. Food was rationed and measured out in small amounts and the family diet often consisted of bread and jam/mustard. X reported that P and Q had to wear covert recording equipment to school so that Y could monitor their interactions with others. Y had refused to sign a learning agreement which resulted in a B-Tec course for P being terminated. His control over the family appears to have extended to limiting showers; cutting the family's hair himself; and restricting P's access to funds so she could purchase sanitary towels.*

Proceedings under the inherent jurisdiction of the High Court were started by the local authority in July 2023. Orders were made by HHJ Burrows to the effect:

*11.* [....] *that it was in P's best interests to be accommodated at a care home and to be transported to that place, if necessary, with the use of force. The recital to the court's order explained that the court had concluded, on the available evidence, that P was under the influence and control of Y and that P was at significant risk of serious harm because she was living in a car with Y in cold weather, appearing to be*

*malnourished. In those circumstances, the court determined that the need for protective action was urgent and that the conveying and accommodating of P at the care home amounted to a deprivation of her liberty, authorised in accordance with Article 5(1) of the European Convention on Human Rights (ECHR). HHJ Burrows did not impose restrictions upon P that prevented her from leaving the placement during daylight hours. When the matter returned before the court on 16 November 2023, HHJ Burrows authorised continuation of the placement in circumstances where the car in which P had been living with her father had been repossessed by the finance company, thus depriving P anywhere at all to go should she leave the placement. HHJ Burrows recognised the draconian nature of the orders he made but considered them necessary so that P's circumstances could be assessed away from the influence of her father. He emphasised the critical importance of P being represented and encouraged both her and her father to obtain legal advice. He stressed the court's and the local authority's genuine concern for her welfare but made clear that there may come a point where the court was unable to alter P's mindset and circumstances, rendering the proceedings otiose.*

*12. In December 2023, the court directed a report from a consultant psychiatrist, Dr Ince, and listed the matter for further review. Y was prohibited from having contact with P at any place other than the residential placement, such contact to be prearranged and supervised; and prohibited from behaving in any way so as to prevent P from attending court or having access to health or social care professionals or to Dr Ince.*

*In order to prepare his report, Dr Ince spoke with P in January 2024 but P refused to leave her room and speak with him on his next visit in early February 2024. Having considered all the material and interviewed Pon one occasion, Dr Ince concluded that P did not have a mental disorder or mental impairment. Her behaviour and views were a manifestation of the undue influence of her father arising from coercion and control. As a result, P lacked the capacity to conduct the proceedings and to make decisions about residence, care, contact with her father and state benefits. In his opinion, P did not recognise the impact of Y's beliefs and behaviour upon her own well-being or broader decision-making and Dr Ince drew attention to the positive impact of her relationships with staff at placement as a protective factor, these allowing objective but supportive challenge to P. Though hesitant to make significant comments about P's best interests, Dr Ince suggested that P was developing some confiding and supportive relationships with the current care team together with social connections in the placement. Should the court be satisfied that P continued to require the protection of the inherent jurisdiction, Dr Ince was of the opinion that her continued placement within a supportive environment would be a positive step towards a greater level of independence. Without such a framework or if there were to be a hasty removal of the placement, there would be a significant risk that P would not have developed the relevant and necessary skills to prevent a return to her father's control and a re-establishment of her prior dependence, enmeshment, and coercion.*

> *13. In March 2024, HHJ Burrows declared that P lacked the capacity because of undue influence to conduct the proceedings and to make decisions as to residence, care, contact with her father, and applying for state benefits.* [2] *The placement arrangements did not any longer deprive her of her liberty but were a necessary and proportionate interference with her rights under Article 8 of the ECHR. He invited the Official Solicitor to act as P's litigation friend, appointing her to act as such if she accepted the invitation to do so. Directions were given for the filing of further evidence and the matter was set down for trial before me on 2 July 2024 with a pre-hearing review on 7 June 2024.*

Unfortunately, the move to the residential placement did not achieve any positive benefit for P:

> *16. P was conveyed to the residential placement without the need to use restraint or force. Following her move, P was unwilling to provide information about herself but eventually she seemed happy to engage in some activities. She had a set list of food that she would eat which was rather limited. P appeared to spend considerable time researching the law relevant to these proceedings which she explained to staff, appearing to be reading from a script. She was focused on some matters but did not appear to have an understanding of the court order as a whole. By the time of this hearing, P continued to engage superficially with the psychological help provided at the placement but would not take part in formal sessions. She did however engage with staff and participated in planned activities and appeared to have formed some friendly relationships with other residents. She now ate the food provided at the placement and no longer appeared to be underweight. P had declined state benefits despite an application for Universal Credit being made on her behalf by the local authority. She had some engagement with an Independent Domestic Violence Advocate via email and information about controlling behaviour and undue influence was going to be sent to her but P had ended the contact before this could take place. P had declined to meet with the social worker to discuss alternative residential options.*
>
> *17. The local authority social worker was of the opinion that, during P's residential placement, there had been little progress made in either P's understanding of the risks arising from her enmeshed relationship with her father or her recognition that she had been subject to controlling, coercive and abusive behaviour. P was unlikely to make significant progress unless contact with her father could be prevented, but the only means by which this could be achieved would be placing P in a locked setting and restricting her access to the internet and social media. In those circumstances, the social worker considered it would be disproportionate to require P to continue living in the placement.*

[2] Note, this may seem confusing, but is correct. The inherent jurisdiction applies to a person who is unable to make their own decision (i.e. in a broad sense does not have the 'capacity' to do so), but who does not fall within the scope of the MCA 2005. The MCA 2005 only applies to those who cannot make their own decision (defined as being unable to understand, retain, use and weigh the relevant information and communicate any decision they have made) because of an impairment of or disturbance in the functioning of their mind or brain.

> *18. It is important that I record that, throughout the proceedings, P has challenged the local authority's actions in a series of letters and emails, many of which are in the court bundle. I have read them all. These polite but insistent communications make crystal clear P's consistent refusal to accept help and support to alter her living arrangements. She wants nothing to do with the local authority or any services it might offer her and wants to leave the placement to return to her old way of life. Those wishes are also expressed in all P's dealings with local authority or other care staff involved with her. For example, on 23 November 2023, during a visit from the team manager, P said that she wished "to get my own accommodation and have my own life and to know you won't be there". She added that "I want to be left alone to be with my dad. I want to be in a house or a flat… You might not be happy with my life choices but it's my life".*

As the local authority recognised when seeking the permission of the court to withdraw the proceedings:

> *19.* […] *the hearing marked an important crossroad in P's life. Having spent it all so far under the influence and control of her father, this had been her first opportunity to live a life independently of him. However, P was either unable or unwilling to take that opportunity and had declined all efforts of support. The local authority recognised that safeguarding measures such as the residential placement - though necessary - had with the passage of time become disproportionate and that more draconian measures would be required to cut off all ties between P and her father. Given the strength and consistency of P's will and the limited reason to believe that such measures would be effective, the local authority had come to the conclusion that further protective orders were disproportionate.*

However, and importantly:

> *Given the risk of P returning immediately to her father, Miss Butler-Cole KC submitted that the court needed to be satisfied that neither the local authority's obligations under the ECHR nor those of the court would be violated if the proceedings ended with no ongoing orders. She therefore invited me to determine whether ending the current protective measures would breach the State's positive obligations. On a careful analysis of the future risks in the event of the discontinuation of protective orders, the local authority submitted that there was no real and immediate risk that P would experience degrading treatment by her father such as to engage Article 3 of the ECHR.*

P's mother made clear that she would "*very much prefer C submitted that she would very much prefer the current orders to remain in force and feared that, once lifted, P would return to a life of chaos and coercion*" (paragraph 20), but reluctantly agreed that the residential placement did not seem to have made any difference. The Official Solicitor, acting as P's litigation friend, shared the analysis of the local authority.

Gynneth Knowles J then set out a detailed analysis of the nature of the State's obligations under Article 3, drawing on the local authority's position statement. I do not set it all out here, but one passage is particularly interesting. At paragraph 35, she cited the following:

> *"the toolbox of legal and operational measures available in the domestic legal framework must give the authorities involved a range of sufficient measures to choose from, which are adequate and proportionate to the level of risk that has been assessed in the circumstances of*

> *that particular case": Tunikova and Others v Russia (55974/16, 14 March 2022 at [95]). A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State: O'Keeffe v Ireland (35810/09, 28 January 2014 at [149]).*

In other words, and in the context of a risk posed by an identified third party, the ECHR requires that the State must have the power not only to punish the third party after harm has been caused, but also have a set of tools which allow it to take steps to prevent such harm from occurring in the first place.

Gwynneth Knowles J, endorsing the local authority's application to withdraw the proceedings, identified that:

> *36. This is a difficult and sensitive case and I agree with Miss Richards KC that there are, in reality, no good outcomes for P. P's mindset has not been altered during her time in the residential placement – she is as firm as ever about her desire to decline help from the local authority and to do what she wants. Sadly, she has no insight into the dysfunctional relationship that she has with her father and it is likely that, once she leaves the placement and whatever she might say about wanting her own place to live, P will be drawn back into his orbit and surrender herself once more to his control. I am wholly satisfied on the evidence before me that P is a vulnerable adult who lacks capacity because of the ongoing undue influence of her father. However, P's refusal to engage and accept offers of help does not necessarily discharge the local authority of its statutory responsibilities.*
>
> *37. The stark choice is thus between the cessation of the protective framework with the overwhelming likelihood that P will return to live with her father (in circumstances where it is unclear where they will live and how they will support themselves) or a further prolonged period of residential care which is likely to be as ineffective as the previous period in helping P gain insight into her circumstances and free herself from the undue influence of her father.*
>
> *38. Applying the case-law cited above and on fine balance, the real and immediate risks to P – though very concerning – fall short of establishing a real and immediate risk of degrading treatment for Article 3 purposes. Whilst there appears to have been financial and psychological abuse of P by Y, he does not appear to have physically assaulted her and his treatment of her is not such as to cause anguish and inferiority capable of breaking P's moral and physical resistance. Destitution - which P faces given her reluctance and that of her father to claim state benefits - is not sufficient to amount to degrading treatment. Even if I am wrong about all that and a real and immediate risk of engaging Article 3 exists, I find that the local authority has, in the recent past, taken all reasonable steps to negate that risk including bringing these proceedings and accommodating P in a residential setting. P has consistently refused all offers of help and accommodation and has failed meaningfully to engage with domestic abuse and mental health services. Further, though the police declined to intervene in April 2023, I consider that P would not presently support any criminal prosecution of Y for his behaviour towards her. In those circumstances, I endorse the view shared by the represented parties that it would be disproportionate to make*

*further protective orders in respect of P. The inherent jurisdiction is not unboundaried and, given that all investigations into P's circumstances have now concluded, there is no lawful justification for the continuance of protective orders. Further protective orders in circumstances where they are unlikely to manifestly alter P's situation would represent an unjustifiable interference with P's Article 5(1) rights to liberty and security of person. I am thus satisfied that, despite the risks to P's welfare should she reject the offers of support from the local authority and return to live with her father, further orders regulating her residence or otherwise constraining her choices are unjustified and disproportionate.*

*39.The local authority made some proposals which it asserted were an appropriate discharge of their statutory obligations to P. First, it is proposed that the local authority will set up a prepaid card with a balance of £500 which it will make available to P via her advocate or the library where P spends much of her time. This will be a safety net for P should she wish to make use of it. Second, the local authority has agreed to withdraw the claim for state benefits it made on P's behalf and to inform the Department of Work and Pensions that P should not be assumed to lack capacity to make any future application for state benefits. Third, a pack of information which might help P access help and support should she wish to do so has been prepared and will be given to P's advocate to give to her in case P maintains contact with her advocate following her departure from the residential placement. All of the above represent a reasonable response to the reality of P's situation and I am satisfied that they are an appropriate discharge of the local authority's statutory obligations to P.*

Gwynneth Knowles J concluded by thanking not only the advocates in the case, but the social workers "*involved with P who have tried hard to engage her and promote true independence for her*" (paragraph 40), but that:

*41.Regrettably, I think it is almost inevitable that P will come to the attention of the authorities in future. I hope this will be in a context where she is seeking help to forge her own course in life, free from the undue influence of her father but I suspect that, unless something significant changes, future contact is likely to be at a time of crisis for P.*

*42. P should have access to a copy of my judgment if she wishes to read it. I wish her well for the future and, notwithstanding my endorsement of the consent order, I remain concerned about her wellbeing.*

## Comment

Given the calibre of those involved in the case, it appears clear that this must have been a case in which every identifiable potential cause of incapacity within the scope of the MCA 2005 must have been explored and eliminated, leaving this a 'true' inherent jurisdiction case.[3] Perhaps strikingly, though, the actual relief that was granted at the outset was essentially the same

[3] For comparative purposes, we note that P might well be found to lack capacity for purposes of the equivalent legislation in Ireland, where there is no requirement for the inability to make the relevant decision to be caused by an impairment of or disturbance in the functioning of the person's mind or brain.

as it would have been had it been a case determined within the Court of Protection – i.e. an order requiring P to live apart from her father in a specified placement, and authorising her deprivation of liberty there. Similarly, on the facts of the case, it might well have made no actual difference to the outcome had she been found to lack capacity to make the relevant decisions for MCA purposes, because the court could well have reached the conclusion (in P's name) that it was simply not in her best interests to seek to keep her at the placement where it was not achieving any good.

The more blurred the lines become between the inherent jurisdiction and the MCA 2005, the more some might think that it might be time to dust off Part IX of the Law Commission's report on Mental Incapacity – when framing what became the MCA 2005, it always recognised that this could not stand in isolation, and it was necessary to have a set of "*legal and operational measures* [to] *give the authorities involved a range of sufficient measures to choose from, which are adequate and proportionate to the level of risk that has been assessed in the circumstances of that particular case*" (to use the language of *Tunikova*). Those measures were never taken forward, leaving the courts in the difficult position of having to craft them on an ad hoc basis.

## Covert medication and the CQC

*R (Seabrooke Manor Ltd) v The Care Quality Commission* [2024] EWHC 2203 (Admin) (High Court (Administrative Division) (HHJ Karen Walden-Smith, sitting as a judge of the High Court)

*Best interests – medical treatment – other proceedings – judicial review*

### Summary[4]

A care home company judicially reviewed a 'Requires Improvement' CQC rating, which was reached after an unannounced inspection. The main focus of the challenge related to the CQC's policy on covert medication. In particular, it was argued that the policy - which recommends that a medicine care plan should include how the medicines are to be administered covertly - went beyond the NICE guidance so the CQC was acting irrationally to impose this as effectively a mandatory requirement. In response, the CQC argued that this is non-statutory, best practice guidance whose purpose is to provide basic advice to care providers about the administration of covert medication.

In dismissing the application, HHJ Walden-Smith noted the definition of covert medication is "*when medicines are administered in a disguised format, such as when they are hidden in food and drink without the knowledge or consent of the person who is receiving them*" (paragraph 50). Key aspects of the guidance were set out, including the importance of the MCA 2005 and how:

> *Covert administration is only likely to be necessary or appropriate where:*
>
> - *A person actively refuses their medicine and*
> - *That person is assessed not to have the capacity to understand the consequences of the refusal. Such capacity is determined by the Mental Capacity Act 2005 and*

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

- *The medicine is deemed essential to the person's health and well-being.*

HHJ Walden-Smith noted:

> *52. The CAM Guidance goes on to set out that covert administration must be the least restrictive option after trying all other options; that a functional assessment should be carried out to try to understand why the person is refusing to take their medicines; and alternative methods of administration should be considered. This is a sensible, logical and rational piece of advice pointing out the potential dangers of giving medicines covertly.*

The recommendation for the way in which medicines are to be administered covertly to be included in the medicines care plan was "*a sensible and rational piece of advice to prevent errors in the covert administration of medication by ensuring that care homes maintain proper detailed recording of the provision of covert medicines for any particular patient. It is not necessary for that information about the administration of medicines covertly to be within one document, and the care plan may refer to other documentation containing information about the resident's covert medication*" (paragraph 53). Nothing in the guidance ran counter to the NICE guidance. Moreover:

> *69. It appears that the Claimant does not accept that a covert medication plan should include the amount of food or drink to be used, the priority in which medicines should be given, nor whether multiple medications can be covertly given in the same food or liquid. In my judgment, there is nothing irrational or unreasonable about the CQC expecting the covert administration of medicines to deal with these specifics. It is an obvious concern that if a resident is being given covert medicines and starts to refuse to take food or liquid that it is known how much of the covert medicine has been consumed. It is also an obvious concern that if some medicines are more essential to administer that they should be ranked higher than other medicines, should a resident start refusing to take food or liquid and for the care home employees who administer covert medicines to know if they can be concealed in the same cup of liquid or plate of food.*

### Comment

This judgment is a helpful reminder of the importance given to the proper administration of covert medication to those lacking such capacity. It emphasises that the CQC guidance is not statutory in nature but contains best practice and that to expect details of how covert medication is to be administered to a specific person is an entirely rational approach for the CQC to take. Not only could the administration method determine whether or not the medication is being given on or off licence, but it could also undermine its effectiveness. For example, in one resident's case it stated that liquid risperidone should be given with tea or juice, when, clincally, the advice is that risperidone must not be given in tea as it denatures the active ingredient.

## Rethinking the UK's approach to dying: lessons from an end-of-life helpline

The charity Compassion in Dying has published a comprehensive and powerful report based on analysis of calls and emails received on its information line, together with a YouGov poll, outlining how talking about end of life decision-making in the United Kingdom is not currently working. Entitled *Rethinking the UK's approach to*

*dying: lessons from an end-of-life helpline*, the report finds that:

- Talking about dying is not enough to ensure people's wishes are followed.
- Opportunities to help people consider, discuss and record their preferences are missed.
- The healthcare system can be dismissive of people's attempts to make decisions:
    - Advance decisions to refuse treatment are not always respected
    - Health attorneys are not always listened to
- People cannot make informed decisions without realistic and straightforward information

The report recommends that government, health and voluntary and community organisations collaborate to:

- Introduce an advance care planning conversation guarantee, initially through the NHS health check
- Deliver a public health campaign on advance care planning
- Create more opportunities for people to record what matters to them at the end of their lives
- Introduce a duty of openness and transparency in end-of-life conversations to enable properly informed consent around treatment decisions
- Develop mandatory training for healthcare professionals on end-of-life decision making under mental capacity legislation
- Develop mandatory training for healthcare professionals to recognise when a person is approaching the end of their life and to support a transition to comfort care

Although not a substitute for the steps recommended, some may find this video on advance care planning of assistance (based on the law in England & Wales).

One point that it is important to understand is that the report is based upon the law as it currently stands. Many will be aware of political initiatives to change the law to make the provision of assistance with dying legal: for those who want to think this through, this video may be of assistance. Without taking a stance for or against legalisation, one point that we would highlight as requiring consideration in any moves towards legalising assisted dying is as to the impact that it would have on conversations of the nature that the report highlights as of being so necessary.

## Assisted dying – Lord Falconer's Private Member's Bill

Lord Falconer's Private Member's Bill is is now available. At the time of writing, there is no date yet set for Second Reading in the House of Lords. As the Parliament website explains, Second Reading "is the first opportunity for members of the Lords to debate the key principles and main purpose of a bill and to flag up any concerns or specific areas where they think amendments (changes) are needed." The progress of Lord Falconer's Bill can be followed here.

Alex has a page of resources which may be of assistance for people wishing to educate themselves about the issues. It includes a table of cases decided in Canada in a period in 2016 when the equivalent of High Court judges were deciding applications brought by individuals

seeking (in effect) confirmation that they met the criteria for assisted dying. Lord Falconer's Bill would require the consent of High Court judge in each case; the extracts from the cases in the table may be of interest for those wanting to think about what the role of the judge would be.

We would also recommend the resources of the British Medical Association on physician assisted dying for those who want to understand the issues in context (including the international context).

## Co-Producing Accessible Legal Information

The Co-Producing Accessible Legal Information (COALITION) Project has recently published its concluding report (and accompanying Easy Read version) The project used facilitated coproduction research workshops to explore barriers to access to legal services for people with learning disabilities, and to investigate how legal services could be made more accessible to disabled people with cognitive impairments. There were two interlinked aims in this project: first, to model ethical co-production practice in academic research, and second, to understand the potential that accessible information holds for access to justice and access to legal services for disabled people with cognitive impairments. The core outcomes from the project were:

1. An Accessible Research Toolkit to support academic research involving disabled people with cognitive impairments.
2. A set of materials to support access to legal services for disabled people with cognitive impairments.
3. Priorities for accessible legal information and for future research in this area.

Key findings from the research were that:

1. Using easy read participant information sheets and consent forms to support research practice can help to ensure that people with learning disabilities give informed consent to participate in research.
2. Skilled specialist facilitation helps to equalise power relationships in co-production research, modelling how to work together across difference. Specialist facilitation also helps to ensure that researchers are fully involved in the co-production process.
3. People with learning disabilities experience barriers to access to justice at every stage of seeking advice about a legal problem. This includes difficulties in accessing general information about law that can help them to identify when to seek legal advice, difficulties in accessing legal service and choosing the right service provider, understanding complex terms 4 of business and 'client care' letters, and in understanding legal jargon when they do receive legal advice and services.
4. People with learning disabilities have high levels of unmet legal need, which can be assisted by the development of high quality accessible legal information on a range of different legal topics.
5. The project generated 6 recommendations:
6. Researchers working with people with learning disabilities should use easy read research materials to support informed decision-making about participation.
7. Co-production research should be carried out using specialist co-facilitation partners to ensure inclusive research practice.
8. Legal regulators, legal service providers and disabled people's organisations should work

together to develop an accessible web database of easy read information about law.

9. Legal regulators should develop a 'disability-friendly' quality service mark for law firms and increase the emphasis placed on accessibility of legal services in existing quality marks.

10. Legal service providers should develop tailored easy read client information to improve accessibility of their services.

11. Legal service providers should develop easy read information about common legal issues to support disabled clients.

## What's in a name? Competence and capacity (and is it enough for a child?)

*Re BC (Child in Care: Change of Forename and Surname)* [2024] EWHC 1639 (Fam) (High Court (Family Division) (Poole J)

*Other proceedings – family (public)*

### Summary

In *Re BC (Child in Care: Change of Forename and Surname)* [2024] EWHC 1639 (Fam), Poole J approved a request by a 15 year old subject to a care order to change both her first and last name "*because they are attractive to her and the actual initials of her new name would be of significance to her in relation to her recovery from the trauma inflicted by her father*" (paragraph 2). The local authority opposed the application because it was concerned that "*BC's actions concerning her names do not match her expressed wishes, that the change of names will be detrimental to her relationship with her family, that she is vulnerable to the impact of others asking her why she has changed her names, and that she will regret the decision*" (paragraph 5).

As Poole J noted:

> *20. An adult can change their name by usage. Now, however, changing one's name by usage alone will not carry much weight with agencies such as the Passport Office or the DVLA. For an adult to change their name they should execute a deed poll. A deed poll is a declaration signed by two adult witnesses. Deeds poll can be enrolled which is a process governed by regulations involving notification in The Gazette and enrolment at the Royal Courts of Justice with the payment of a fee.*
>
> […]
>
> *22. I note that the GOV.UK website states that you can change a child's name (a child being someone under 18) by an enrolled or unenrolled deed poll, but that a 16 or 17 year old child can change their own name by making their own unenrolled deed poll. The Mental Capacity Act 2005 applies to 16 and 17 year olds as well as to adults. It provides that a person is assumed to have capacity unless otherwise proven. I have not been referred to and am unaware of any statutory provision that a 16 or 17 year old who is not subject to one of the orders set out below may or may not change their name without the consent of those with parental responsibility, but it is clearly the convention, operating to allow people to change their names by unenrolled deed poll, that a 16 or 17 year old can do so without the consent of any person with parental responsibility or the leave of the court.*

However, by operation of a number of parts of the Children Act 1989:

> *24. […] a 16 or 17 year old may not cause their own surname to be changed without the consent of every person with*

> *parental responsibility or the leave of the court if they are the subject of a care order, child arrangements order with a "lives with" order, or a special guardianship order. Other 16 to 17 year olds may cause their own surname to be changed without consent or leave. They could do so by executing an unenrolled deed poll. The Enrolment of Deeds (Change of Name) Regulations 1994, as amended, prevent any deed poll executed by a child under the age of 18 being enrolled except by someone with parental responsibility for the child (unless the child is a female aged at least 16 who is married). A child who is 16 or 17 has themselves to consent to the enrolment. But enrolment is not a pre-requisite for a formal change of name.*

Poole J asked himself why the position of a 16 or 17 year should vary depending on whether or not they are subject to (amongst other things) a care order, and it is fair to say that he did not seem entirely convinced that there was a good reason. He directed himself by reference to the (now relatively old) authority of *Re S (Change of Surname)* [1998] EWCA Civ 1950, [1999] 1 FLR 672, the Court of Appeal was concerned with an application by a child in care aged 15 to change her surname (not their forename). He noted that:

> *42. In my judgment, care has to be taken in applying some of the authorities to the case of an application by a Gillick competent 15 year old, or indeed a capacitous 16 or 17 year old, in care. I reject the submission that the court may only permit the change of a name if the continued use of the current name would be likely to cause the child "significant harm". In Re C [2023] Cobb J said that, "The issue of whether there is a power within the inherent jurisdiction to prevent a parent with parental responsibility from naming their child with a particular name is dependent on whether the court is satisfied that to allow such a name to be used would likely cause that child significant harm." He was dealing with an infant whose name was said to be unsuitable, similarly to the name 'Cyanide' considered in Re C [2016]. As Thorpe LJ found in Re S, some of the principles in the authorities do not stand transplanting into an application of the kind now being considered.*
>
> *43. I acknowledge that there are differences on the facts between Re S and the present case including that BC is asking to change both her forename and surname. I accept that the double name change requires particular consideration. BC is not asking to adopt her mother's surname in place of her father's surname. A request to change to a name that has no association with the family is a matter to be weighed in the court's determination. On the other hand, it might be said that even more weight should be given to BC's wishes and feelings than in the case of the young applicant in Re S because (i) BC was the actual victim of the sexual abuse by her father and so her motivation to make the change might be given even more weight, and (ii) the father has been found by the Family Court to have sexually abused her whereas no findings had been made in the Re S case. Findings have also been made against her mother as set out above.*
>
> *44. I consider that I should follow the authority of Re S and consider very carefully the wishes, feelings, needs, and objectives of the applicant when giving paramount consideration to her best interests. It is not disputed that BC is competent to make a decision for herself about her change of name. The evidence from her school is very persuasive that she is mature for her age. She will be 16 in a few weeks from*

*now. She will have capacity to make the decision to change her names. Change of name deeds poll are effective for 16 year olds who are not in care, and not subject to child arrangements orders or special guardianship orders.*

*47. A change of either a forename or a surname is a serious matter. Whatever the reason why the law requires the consent of those with parental responsibility or the leave of the court for a change in surname for a 16 or 17 year old in care or subject to relevant orders, but not for others of the same age who are not subject to relevant CA 1989 orders, the law is clear. The court should not give leave simply because a Gillick competent child applies for leave. The court must consider the benefits and harm to the applicant from either granting or refusing the application but taking into account also that rights under Article 8 of the European Convention on Human Rights are engaged and that when the child is 18 they will be able to change their name without consent or leave. The views of those with parental responsibility including the Local Authority, and other relevant individuals and agencies should be taken into account.*

Having reviewed the material before the court, Poole J concluded as follows:

*61. A change of forename and/or surname for a child is a serious decision whatever the age of the child. The court's paramount consideration is the best interests of the child. The views of others, in particular of those with parental responsibility, are to be taken into account. The family's views are relevant insofar as they may affect their conduct and attitude and therefore affect the welfare of the child. The views of the Local Authority, having parental responsibility in respect of a child in care, are of importance. The court must take into account the child's competence to make the decision, their age and maturity, the steadfastness of their wish to change their names, and the reasons behind the wish to make the changes. The court should consider the choice of name(s) – are they frivolous or would they be liable to be detrimental to the welfare of the child because of their nature or associations? The court should have close regard to the impact on the child of allowing them to change their name(s) as well as the impact of refusing them leave to do so. In the case of an older child, the court can have regard to the fact that a 16 or 17 year old not in care and not subject to a relevant child arrangements order or special guardianship order, could change their name without consent or leave, as could any 18 year old.*

*62. Having regard to the legal framework and all the evidence and circumstances in this case, I have little hesitation in allowing the application and in giving leave to BC to change her forename and surname so that she shall be known as JKL. I suggest that if she wishes to do so, once she is 16 years old, she should be assisted to change her name by unenrolled deed poll. My order gives her leave to do so. I give considerable weight to the settled wishes of a mature, competent 15 year old who has good reason to wish to change both her forename and surname, who has chosen sensible new names that are not frivolous or provocative or liable to be detrimental to her welfare in any way. I am content that she has thought through the decision and is aware of the significance of the changes proposed. I am confident that she will be well supported at school and in her foster placement in the change process, that she will enjoy psychological and emotional benefit from the changes, and that she would be liable to suffer*

> *psychological and emotional harm were her application to be refused. The Local Authority might consider funding further therapy to support her though the process of the name changes (and the pending trial of her father). I do not believe that her family relationships will be harmed by the proposed name changes. In my judgement it is clearly in BC's best interests to allow this application.*
>
> *63. I have referred throughout this judgment to BC but from the making of my order she may be known as JKL. I wish JKL well for the future.*

## Comment

It is easy to see why Poole J was somewhat sceptical about why it should necessary make a difference that a child is subject to one of the relevant provisions of the Children Act 1989. The more important issue is arguably whether they have the ability to make the decision themselves. Whilst it was common ground before the court that BC (now JKL) was competent to make the decision, there does not appear to have been any discussion of what the relevant information was that she needed to be able to process in order to make that decision, nor what (when she turned 16) she would need to be able to process in order capacitously to make that decision. In an unreported case Alex was involved in, the Court of Protection approved the following list of relevant information that a 16 or 17 year old needed to be able to understand, retain, use and weigh:

- *You want to change your name and have people call you by your new name;*
- *You are making a document which has a legal effect;*
- *You are making a document which you can use as proof of your new name;*
- *You may not be able to do everything that you would like with this proof;*
- *When you turn 18 you can do something more formal which would allow you to prove to everyone that you have a new name; and*
- *If you want to have a formal proof now which everyone can accept, someone else will have to do this for you.*

One important point to note is that enrolling a deed poll (which an adult can do, but must be done on behalf of a 16 or 17 year old) is a step which has some stark consequences which the 16 or 17 year would need to understand if they were to have the capacity to request someone to apply on their behalf. In the context of a change of gender, these were set out by Master McCloud in *W, F, C and D (minors)(Name changes disclosing gender reassignment and other matters)* [2020] EWHC 279 (QB) at paragraphs 27-28:

> *28.* […] *the current position in respect of formal Deeds is that the enrolment of a Deed is very public and leads to publication of the child's new and old names on the internet by the Court office, by way of publication of a notice in the London Gazette.*
>
> *29. The internet enables easy search for people and makes it very easy to identify that a child such as Child W was formerly known as X and was from a particular date known as Y. Enrolling a name change Deed to all intents and purposes makes permanently public the name change and will in many instances therefore amount to what will later be taken as disclosure of a change of social or legal gender, whether by child or adult. In other words it 'outs' them.*

## Ireland

Our Ireland correspondent, Emma Slattery, is enjoying a well-earned break this month, but will be back next month. In the meantime, many may find the Mental Health Bill 2024 published at the end of July will keep them busy reading-wise.

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

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Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2022). 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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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

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

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# Conferences

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

Alex is also doing 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.

Adrian will be speaking at the European Law Institute Annual Conference in Dublin (10 October, details here).

Peter Edwards Law have announced their autumn online courses, including, Becoming a Mental Health Act Administrator – The Basics; Introduction to the Mental Health Act, Code and Tribunals; Introduction – MCA and Deprivation of Liberty; Introduction to using Court of Protection including s. 21A Appeals; Masterclass for Mental Health Act Administrators; Mental Health Act Masterclass; and Court of Protection / MCA Masterclass. For more details and to book, see here.

### 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 October. 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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