



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

- (1) In the Health, Welfare and Deprivation of Liberty Report: a masterclass in determining a particularly complex set of capacity questions;
- (2) In the Property and Affairs Report: statutory will applications and publicity; OPG guidance on family care payments, and the bond provider saga continues;
- (3) In the Practice and Procedure Report: a helpful reminder of elephant traps for the unwary as regards when time runs for purposes of appealing decisions;
- (4) In the Mental Health Matters Report: the Mental Health Bill progresses, and the CQC reports on the MHA 1983 in 2023-24;
- (5) In the Children's Capacity Report: a new BMA toolkit to help with capacity and other issues in relation to those aged 16 and 17, and back to the vexed question of parental consent to confinement;
- (6) In the Wider Context Report: the inherent jurisdiction rebuffed in a personal injury case, recent research of relevance, and strong views from the CRPD Committee on medical assistance in dying and the 2000 Hague Convention.
- (7) In the Scotland Report: what is appealable in the AWI context, and the complexities of the position of those aged 16 and 17 in Scotland.

The progress of the Terminally Ill Adults (End of Life) Bill can be followed on Alex's resources page [here](#).

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

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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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‘Stitch,’ capacity and complexity – a masterclass in capacity determination

Calderdale Metropolitan Borough Council v LS & Anor [2025] EWCOP 10 (T3) (Cobb J)

Mental capacity – assessing capacity

Summary

Cobb J sketched the outlines of this complex case after an introduction reinforcing that “determination of an adult’s capacity represents the crucial jurisdictional gateway to the exercise of the Court of Protection’s powers to make orders, as appropriate, under the MCA 2005. It is in that important exercise of determining capacity that I find myself engaged in this application”:

4. The application before the Court concerns Stitch; she is a 31 year old woman. Stitch is not her real name, but is the name by which she has specifically chosen to be referred in this judgment (being one of her favourite Disney © characters) She currently lives in supported rented accommodation which is in the area of, and funded by, Calderdale; she receives care from an independent agency commissioned by Calderdale. I shall refer to her accommodation as ‘Oak House.’ Stitch appears in these proceedings by the Official Solicitor as her litigation friend. The Second Respondent is Stitch’s mother, MS; she too lacks litigation capacity, and appears separately by the Official Solicitor as her litigation friend.

5. Proceedings under the MCA 2005 were first brought in respect of Stitch in 2019 (the first round of

proceedings’). I was the allocated judge in those proceedings, and over a period of time made a number of substantive decisions about Stitch, both interlocutory and final. Stitch’s decision-making capacity was a live issue for the duration of those earlier proceedings, which were aptly described by Calderdale in its more recent COP1 application as “lengthy and complex”. At the conclusion of those proceedings (and for reasons more fully explained at §22 below), I concluded on the evidence, including the expert evidence from Dr O’Donovan, and with the concurrence of all parties, that Stitch had decision-making capacity in most areas of her life.

6. However, almost as soon as that order had been made, concerns re-surfaced among the staff at Oak House about Stitch’s capacity in a number of areas. Further assessments of capacity were undertaken by Calderdale social workers over several months, and in May 2024, Calderdale issued a fresh application for best interests declarations and orders under the MCA 2005.

Stitch’s lack of capacity to conduct the litigation was not in issue, but her capacity to make decisions about residence, care, contact, internet social media use and sexual relations was.

As Cobb J identified at paragraph 77, it was a difficult application for him to resolve for a number of reasons:

(a) First, Ms A's assessment in August 2023 which was to the effect that Stitch lacked capacity in many areas of her life followed within only a matter of a few weeks of a final consent order which had been made at the end of protracted proceedings, which had concluded with all of the professionals expressing themselves to be satisfied, and I too of course confirmed, that Stitch had capacity in those self-same areas of her life;

(b) Secondly, Ms A's capacity assessment in August 2023 was unorthodox, and to a degree was lacking in the rigour which is customary (and indeed necessary) in the Court of Protection; given the manner in which the assessment was undertaken (over a period of eight sessions, with no or no explicit statement to Stitch that her capacity was being assessed) it is possible that Stitch was not fully aware that her capacity was being assessed, and this may have skewed the results; furthermore, by the time of the hearing, the report was 18 months out of date;

(c) Thirdly, Dr O'Donovan's final report filed in these proceedings uncharacteristically lacked the forensic acuity which was called for in this case, particularly at this stage, and against this background; in performing her analysis and making her recommendations there was, disappointingly, little or no attempt to triangulate the wide range of available evidence about Stitch, including (specifically but not exclusively) the evidence gathered in the assessments conducted by Ms A and Ms B;

(d) Fourthly, Stitch's capacity has been assessed numerous times over the last few years, and it appears that she has now developed an ability to recall and deploy phrases and vocabulary which – when used in the right context – can

mislead the assessor into believing that she has greater understanding, or ability of reasoning, than is in fact the case.

Each of these matters was unpacked – for present purposes, (d) is one of particular interest, Cobb J noting that:

89. [...] I find that over the many years in which these Court of Protection proceedings have been ongoing, and in which a significant number of assessments have been undertaken, Stitch has become adept at holding conversations with professionals about her capacity. Ironically, it may be that Ms A's assessment has more reliable content than might otherwise have been the case had Stitch truly known that her decision-making capacity was being formally investigated. So, for instance, Ms A reported that on one occasion Stitch was:

"... not as coherent or talking in full sentences at this point – but using hand gestures and facial expressions - this made her response feel quite genuinely felt and not a learned phrase or stock response ... [indicating] the struggle that [Stitch] is having with making choices and decisions for herself".

90. In other contexts, the staff at Oak House have reported that Stitch has become adept at "saying the right things"; Ms A speaks of Stitch 'talking the talk'. Stitch has developed a range of reasonable expressive language, and has learned certain terms to use, such as 'vulnerability', 'risk', 'safety', which can lead the assessor to believe that her level of understanding is greater than it is. I was most interested to note Ms B's view that "when conversations delve deeper, [Stitch] is not able to explain what she means when she says she is

vulnerable or why certain actions are a risk to her".

91. These comments (and others of a like kind in the evidence) make it probable that Stitch has developed an ability to retain and deploy phrases and vocabulary which – when used in the right context – can (and do) mislead the listener into believing that she has greater understanding, or ability of reasoning, than is in fact the case. Her statements have to be plumbed more carefully than may otherwise be the case; hence the importance of triangulation.

In the circumstances and despite the deficits in the capacity assessments which were before the court, Cobb J made clear that:

92. [...] I do not believe that I would learn more (indeed I fear it may be counter-productive in the longer term) if I were to commission a yet further opinion on Stitch's capacity at this stage. I am ultimately constrained to reach conclusions on these complex questions of capacity based on a less than satisfactory collection of assessments.

Cobb J also had to deal with an ambitious submission on MS's behalf relating to what might best be described as a robust approach to the support principle:

93. History relates that when Calderdale's restrictive support framework was in place around Stitch up to the final hearing in June 2023 – Dr O'Donovan described it as 'containment' and 'psychological containment' – Stitch demonstrated that she could make decisions which at the time appeared to indicate capacitous thinking. When the structure or 'containment' was removed, her decision-making fairly obviously went

off the rails, and her 'capacity' (as assessed at the time) to make decisions appeared to recede or altogether disappear.

94. In view of this history, Ms Roper argues that, taking the evidence as a whole, it would be appropriate now for the court to make 'contingent orders' that Stitch has capacity to make decisions about residence and care but only "provided that" a support plan (a plan of 'containment') is "compulsorily" (Ms Roper's word⁽⁴⁾) at all times in place. In relation to the decision as to contact between Stitch and her mother, Mr Roper further argues that the court could be satisfied that Stitch has capacity "provided she has the supportive framework of a compulsory support plan and the support and presence of her carers; but that when that supportive framework is absent, [Stitch] is likely to lose such capacity" (emphasis by underlining added).

95. I recognise that underlying Ms Roper's proposal, to which Mr O'Brien aligned himself in part, could be said to be one of the core principles of the MCA 2005, namely that those who lack capacity should be supported to make decisions for themselves in order to achieve self-determination and independence. However, decision-making which could be 'capacitous' only if the decision is made in the environment in which P is 'contained' by a continuous and (materially) 'compulsory' framework of protections, supports and restrictions, in my judgment lacks the quality of autonomy or self-determination which are important characteristics of capacitous decision-making, where the decisions are made "for [oneself]" (section 2(1) MCA 2005 and §9(d) above). Ms Roper's proposal, if adopted, would be likely to lead to the conclusion that Stitch would

'lose' capacity whenever she is permitted to make her own unsupported decisions, and to have capacity only when she is compulsorily contained or supported. That does not suggest that she has capacity or even that her capacity fluctuates; rather, it suggests that she is unable to make her own decisions.

96. Looking at it another way, it would be stretching the statutory language too far to conclude that the continuous, compulsory, protective, supportive and restrictive framework created by Calderdale can be seen as an extension of section 1(3) MCA 2005 – i.e., a form of contextual practical 'help' which has been put in place to enable Stitch to make a capacitous decision. I do not accept that the compulsory imposition of a support plan which contains protective and restrictive measures can properly be regarded as comprising the practical steps which have been taken by Calderdale and which I am obliged to consider before I could conclude that Stitch should be treated as unable to make a decision (section 1(3) MCA 2005).

97. I am therefore unpersuaded that the MCA 2005 permits of the construction urged on me by Ms Roper and Mr O'Brien. That said, looking forward, I view the protective and supportive care package as crucial in offering Stitch a high degree of stability and security within which she can feel more able to express her wishes and feelings freely and fully. For this reason, it is important that her support plan emphasises that those supporting her take into account and respect her expressed wishes at times when she is calm and is able to express her preferences. I return to address this in my order.

When it came to capacity to determine residence and care, Cobb J (as with many other judges)

found that it was not sensibly possible to delink the two on the facts of Stitch's case.

100. In assessing capacity in this regard, as in others, what matters is Stitch's ability to carry out the processes involved in making the decision; history convincingly reveals, in my judgment, that she cannot do this without the infrastructure around her of the court order, and the constant support of, and boundaries set by, the staff at Oak House. In my judgment, she is not able to exercise the necessary level of executive functioning to achieve this decision-making autonomously. She derives crucial psychological containment and security from the infrastructure of the support plan; when that has gone in the past, it has exposed her inability to deploy the functions required to make a capacitous decision.

101. This leads me to consider whether Stitch's capacity in relation to residence and care is fluctuating. The question of fluctuating capacity has been advanced for discussion in this case for the first time, in part (I believe), (a) because Stitch was assessed (and found) to have had capacity in multiple areas relevant to her welfare in June 2023, but in a number of respects it is agreed that she 'lost' it reasonably soon thereafter, and (b) because at times even during the currency of these proceedings she appears to demonstrate capacitous decision making and at other times not.

102. From time to time, cases come before the Court of Protection in which it is said that P's capacity fluctuates. This is not a typical 'fluctuating' capacity case: Stitch is not someone who has 'meltdowns', or periodic psychotic episodes which impact on her capacity. Within the limitations of her intellect, she displays cognitive rigidity, and periodically she needs to be supported in her decision making when she is feeling personally/emotionally rejected,

or her needs are not met and she has difficulty in processing information about others; when using the internet, her motivation to seek a physical relationship is so strong that she is unable to consider other factors when she makes her decisions.

103. I have considered a number of authorities in this regard. The most pertinent in my judgment is *Cheshire West and Chester Council v PWK* [2019] EWCOP 57 ('PWK'). It is unnecessary to recount the facts, save to note the similarity between PWK and *Stitch* in that they can and do "function remarkably well within the constraints of [their] care package" ([25]); in PWK's case, he could easily become overcome by anxiety, and it was the unpredictability of that anxiety and the seriousness and breadth of its impact which was decisive in overturning the legal presumption of capacity. In *Stitch's* case, she easily becomes overwhelmed by the compulsion to have her needs met.

104. Sir Mark Hedley described the situation thus: (at [9]/[10])

"When PWK was relaxed and in a good place he might well be regarded as having capacity. However, when he became anxious his position could be very different. Moreover, there were many things that could trigger anxiety and quite often his carers would be confronted with irrational behaviour that could be difficult to manage. The question arose as to how the legal position on capacity should be addressed in these circumstances."

105. In PWK, Sir Mark Hedley referenced and relied on his earlier decision of *A, B & C v X, Y & Z* [2012] EWHC 2400 (COP); he distinguished isolated decision-making

with decision-making (sometimes at short notice) within the overall context of managing one's own affairs: "the management of affairs relates to a continuous state of affairs whose demands may be unpredictable and may occasionally be urgent". He added: "It is the unpredictability of that anxiety and the seriousness and breadth of its impact which is decisive in this case in overturning the legal presumption of capacity" ([25]). Sir Mark Hedley commented that:

"[19] Some have referred to this as taking a longitudinal view. In my view, this approach has the value of clarity. It establishes that the starting point is incapacity. The protection for the protected person lies in the mandatory requirements of Section 4, in particular subsections (3) and (6)

[21]... where a longitudinal perspective was adopted then PWK lacked capacity in all relevant areas."

106. The protection offered by section 4(3) MCA 2005 (to which Sir Mark Hedley refers in the passage above) requires the person making the best interests determination to consider "whether it is likely that [P] will at some time have capacity in relation to the matter in question" and if so when; by section 4(6) MCA 2005 (also referenced by Sir Mark Hedley), the person making the best interests determination must consider (so far as is ascertainable) "[P]'s past and present wishes and feelings ... (b) the beliefs and values that would be likely to influence his decision if he had capacity, and (c) the other factors that he would be likely to consider if he were able to do so". I return to these provisions later.

107. I took a different approach, plainly on different facts, in *Wakefield MDC and Wakefield CCG v DN and MN* [2019] EWHC 2306 (Fam) ('DN'), in which I made 'anticipatory declarations' in respect of P who (I found) had capacity except at times when he had periodic 'meltdowns'. Whether this proved easy to operate on the ground as a matter of practicality is outside my knowledge.

108. In *A Local Authority v PG & Ors* [2023] EWCOP 9, Lieven J, having tactfully indicated that she did not consider that my approach or Sir Mark Hedley's approach "is the correct or indeed better approach" on the facts of her case preferred the "longitudinal approach" adopted by Sir Mark Hedley adding:

"How an individual P's capacity is analysed will turn on their presentation, and how the loss of capacity arises and manifests itself".

109. In this case, Calderdale does not accept that Stitch' capacity fluctuates; Mr Patel and Ms Gardner argue that Stitch lacks capacity in all relevant decision-making, and does not 'lose' it just when she is permitted to make her own decisions. Their secondary position is that the longitudinal approach of Sir Mark Hedley in *PWK* should be adopted in this case rather than the DN approach.

110. Dr O'Donovan suggested specifically that given the chronic and unpredictable nature of Stitch's presentation, where the court concludes that Stitch's capacity fluctuates it may be appropriate to determine capacity on a longitudinal basis. By contrast, Ms Roper has argued that this case is closer to the DN scenario than the *PWK* scenario and that I should therefore consider making anticipatory

declarations as to Stitch's capacity and best interests under section 15 and 16 of the MCA 2005, to cover those occasions when she demonstrates to her carers that she is unable to make a capacitous decision as to her care.

111. I have reached the conclusion on the evidence which I discussed above (§§36-45) that, recognising all of the caveats described above, in the area of residence and care there are times when Stitch appears to articulate a level of understanding and reasoning which suggests that she does have capacity; indeed, this was a finding which I made about this and many aspects of her decision-making in 2023. However, at other times, she shows such a clear and marked lack of understanding or reasoning about her residence and care needs that she could not be viewed under any circumstances as having capacity. In this regard, and on all of the evidence laid before me, I feel driven to the view that she does not have capacity to make decisions about her residence and care, but her lack of capacity does to a degree fluctuate to a point where she has been, and from time to time, when settled, appears capacitous.

112. Looking forward, as Lord Stephens exhorts the Court of Protection to do (see §11 above), this is a case in which I should consider a future continuous state of affairs where the demands on Stitch are as 'unpredictable' (see §105 above) as they have been in the past, and where her dysfunctional attachment style causes her to function (again as it has in the past) in a way which is overpoweringly "needs led". I am satisfied that in the future she will continue to prioritise what she thinks she needs to achieve validation. In these circumstances, she is likely in my judgment to become easily overwhelmed and/or driven by her

needs. This case is, in my judgment, more like PWK than DN; that it would impose an all-too onerous burden on the staff at Oak House if I were to require them to operate under a programme of anticipatory declarations. It is thus appropriate that I should take a longitudinal perspective on her capacity in these regards, and to declare (albeit with reservations) that she is incapacitous in these areas.

The same longitudinal approach was adopted in relation to contact; Cobb J also found it more straightforward on the evidence to resolve the questions about capacity to use the internet and social media, and to make decisions about engaging in sexual relations. However, in relation to the last of these, he noted that:

121. It may be that low level sex therapy could assist Stitch to understand what options are available for her to experience sexual gratification in the absence of a partner; this may take several months. Calderdale has indicated its commitment to continue to offer support to Stitch in this area, and will take steps to review her capacity in this area, following any support of education. A report from the local Consultant Clinical Psychologist for the relevant NHS Trust confirms that the trust offers work around sex education when an individual has a significant lack of knowledge around sexual health. Whether this is the right type of service for Stitch, I am not sure. If the correct resource is identified (and Calderdale should endeavour to locate the same) – and if Stitch is willing to engage (she has shown ambivalence in the past) – I feel hopeful that some targeted work with Stitch and support around the issue of consent to sex and the making of choices in relation to sexual activity may well enable Stitch to achieve/have capacity in this area in the future. I make

provision for this in the order which I propose (see §124 below).

Finally, he was clear that Stitch was deprived of her liberty, which would require him to consider authorisation at a subsequent hearing.

Having declared that Stitch lacked capacity to make the decisions, Cobb J concluded thus:

129. Looking forward, it is important that all those who work with Stitch take full account of her own views as an integral component of the arrangements for her care and support, in strict observance with section 4(6) MCA 2005; within the parameters of the support and protection plan, Stitch's personal autonomy must be respected and her decision-making encouraged. The evidence which has been presented in this application suggests that at times Stitch is close to capacity (or even at times capacitous) in her decision-making; in those regards, thought must routinely be given to whether she may gain capacity (section 4(3) MCA 2005). Great weight must be attached to her views when they are clearly expressed; Stitch will be able to make many choices in her life, but not all.

Comment

Cobb J is shortly to take his position on the Court of Appeal. This decision shows just what an asset he will be to the Court of Appeal bench, but what a loss he will be to those requiring determination of delicate issues at first instance.

Although (necessarily) very lengthy, the judgment should be required reading for all those who are required – for whatever reason – to think about capacity in the social care context. Not only does it set out a very helpful recap of the principles to be applied (at paragraphs 9-12), and provide observations of wider relevance about such thorny issues as fluctuating capacity, it

then applies those principles to a paradigmatically complicated case (made more complicated, as so often, by the human factors involved on the side of the assessors and those advising them) in a rigorous and sensitive way, never forgetting that there is a person at the centre – and a person who has been given the choice of her own pseudonym.



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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 May. 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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