



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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Short note: permissions to appeal and traps for the unwary

In *Re (A Minor) (Permission To Appeal)* [2025] EWHC 638 (Fam), a family law case, the appellant sought permission to appeal a fact-finding judgment five months out of time which provided Hayden J with an opportunity to review the case law on the procedure and timing of appeals in the modern day. His Lordship observed at paragraph 10.

It must be said that times have changed since [Sayers v Clarke Walker [2002] EWCA Civ 645] was delivered, particularly post-pandemic, where many, I suspect most, judgments are now handed down electronically. In this process, which usually involves a draft judgment being sent to the parties for corrections, amendments, anonymisation and compliance with Transparency Orders, the date that the decision is formally handed down can sometimes get lost. I suspect that compliance with the Rules may frequently be "overlooked".

To avoid any ambiguity as to when a judgment is handed down and, accordingly, clarify when a first instance judge may hear an application for permission to appeal their own decision, Hayden J gave the following guidance in relation to the Family Procedure Rules which, in this context, is equally applicable to Court of Protection cases:

An oral hand-down or ex-tempore judgment:

For the purposes of an application for permission to appeal to a first instance judge, the decision to be appealed is made either at the time of the oral hand-down or the date on which the judge adjourns the permission application to be heard. After that point, the first instance judge has no further jurisdiction and recourse must be had to the Appellate Court.

If no permission application is made at the decision hearing and, accordingly, there has been no adjournment, the lower court has no further jurisdiction and cannot consider any retrospective application for permission to appeal.

A reserved judgment, handed down either in court or electronically:

A judge who has written a reserved judgment will, ordinarily, circulate the draft of the judgment to the parties. This will be to afford the opportunity, most particularly where the parties are represented, for corrections, amendments, anonymisation and compliance with Transparency Orders, et cetera.

The judge will and ought to set a deadline for response, indicating that following consideration of any suggested amendments, the perfected judgment will be handed down. In the majority of cases, this will be an electronic hand-down and thus not require the attendance of the parties.

When the judge has perfected the draft, he or she must communicate to the

parties the date on which the judgment will be handed down. This will afford them further opportunity to consider or indicate whether they wish to appeal.

In the event that an application is to be made, the judge will either provide that the hand-down hearing should be attended, so that the application may be made, or set a separate date for the application to be heard. It is also possible that an application for permission may be made in writing, where the judge agrees. Again, this may be either at the hand-down date or the adjourned date.

In *McDonald v Rose* (supra), the Court of Appeal emphasised that adjournments should not be necessary in the generality of cases. In contemporary practice, as I have referred to above, this has even greater force. The judgment will have effectively been pre-circulated in draft and ordinarily that will provide sufficient time for the parties to decide, prior to the hand-down hearing, both whether they wish to seek permission to appeal **and** to formulate grounds and such supporting submissions as may be necessary. Adjourning the application will inevitably serve to increase delay and generate a risk of some procedural complication. But, as the Court of Appeal accepted, "it will nevertheless sometimes be justified".

To reiterate, for the purposes of FPR 30.3(3), the 'decision to be appealed'¹ date is either the date of hand-down, if no application is made, or the date on which the application for permission to appeal is determined.

Notice of hand-down of reserved judgment must be given in the daily Cause List. The following wording is likely to be helpful:

"This judgment will be handed down remotely by circulation to the parties or their representatives by email."

Where appropriate, the following should be added:

"...and released to the National Archives.

A copy of the judgment in final form as handed down should be available on the National Archives website shortly thereafter."

19. In order to achieve clarity, when the perfected judgment is sent to the parties, it seems sensible to include the following:

"I attach the judgment in this case by way of hand-down, which will be deemed to have occurred at [*time*] on [*day, date, month, year*]."

20. Compliance with the above should avoid any ambiguity as to when a judgment was handed down and, accordingly, clarify when a first instance judge may hear an application for permission to appeal their own decision.

Hayden J also identified a trap for the unwary at paragraph 21:

Whenever a party seeks an adjournment of the decision hearing to consider whether to make an application for permission to appeal or to prepare for it, they should also seek an extension of time (see *McDonald v Rose* para. 21(5)). The Court of Appeal was very clear that, even though a decision hearing may be adjourned, the 21 days (within which an appeal must be filed, in accordance with the FPR) run from the date the decision was formally announced and **not** the date that the formal order recording the

¹ In the COPR, r.20.10(3).

decision was issued. Underhill LJ regarded this as "uncontroversial" and considered that it "should be known to any practitioner, though experience shows it is often overlooked".

This is a useful judgment to have in one's back pocket for the inevitable moments where judgments come in, the question of an appeal arises and all the legal team are frantically busy. The key takeaways are: work out when hand down is as a priority; seek an extension of time at the same time as seeking permission from the lower court – particularly if issues such as funding need resolution – and, importantly, don't forget that the window doesn't close if you haven't asked permission from the court below but time keeps ticking. Be bold!

Court of Protection statistics October – December 2024

Following a hiatus during the transition to a new data system in July 2024, Court of Protection figures have been reintroduced into the MoJ [quarterly statistics](#), although there is a statistician's note that "*due to improved recording practices and several changes to the categorisations published, it is not recommended that comparisons to data prior to Q3 2024 be made.*"

The statistics show that in October to December 2024, there were 9,381 applications made under the MCA 2005. Of those, 34% related to applications for appointment of a property and affairs deputy. They also show that there were 2,044 applications relating to deprivation of liberty under the MCA 2005 in October to December 2024.² This is 22% of the applications made under the MCA 2005 in that quarter. Of these:

- 219 were identified as being for orders under s.16 (presumably in the context of wider issues and / or where it was recognised that the *Re X* streamlined procedure was not appropriate);
- 1,258 were identified as being *Re X* applications (which are for s.16 orders, but on a 'paper basis');
- 567 were s.21A applications relating to DoLS authorisations.

² We address the statistics for applications to the High Court in respect of children in the Children's Capacity Report.

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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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