



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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Statutory wills and public hearings

W v P [2025] EWCOP 11 (T3) (Rajah J)

Media – court reporting – private hearings

Summary

The person at the centre of this matter, ‘P,’ was an unnamed person who had previously been in the public eye, and significant wealth. P was now elderly, had severe dementia and was unable to communicate; he appears to have lost capacity to make decisions as to his property and affairs and execute a will. His wife, ‘W,’ made an application to the Court of Protection that a statutory will be made for estate planning purposes, with the support of P’s family.

For reasons which are not explained in the judgment, P was joined to the proceedings, and the Official Solicitor was appointed P’s litigation friend; an attended hearing was listed. Prior to that hearing, W made an application to the court not to make the standard order pursuant to Practice Direction 4C that the attended hearing should take place in public prior to hearing W’s submissions on this issue. Rajah J heard this application in a private hearing, which took place without notice to the media.

Rajah J worked through the relevant framework for private and public hearings in the Court of Protection:

- COPR 4.1 sets a general rule that all Court of Protection hearings are heard in private, but

the Court has a power under COPR 4.3 hold hearings in public. If no order is made to list a Court of Protection hearing in public, it will be heard in private. No reporting restrictions are required for private hearings, as “[p]ursuant to section 12(1)(b) Administration of Justice Act 1960 it is a contempt of court to publish information relating to Court of Protection proceedings where the court is sitting in private” (paragraph 6)

- Practice Direction 4C has effectively reversed the ‘normal’ position by creating a ‘supposition’ (paragraph 11) that hearings are to take place in public with reporting restrictions granting anonymity to P and P’s family.

Mr Justice Rajah considered that there was not a legitimate public interest in W’s application which outweigh P’s Article 8 privacy interest, and effective reporting restrictions could not be drafted which would protect P’s identity:

13. In this case, a public hearing which identified P would inevitably result in significant publicity to satisfy public curiosity. That would be a serious intrusion in the private life of P and his family. For reasons on which I will not elaborate here, this could have serious consequences for P and his family. The “supposition” that a transparency order would protect P’s privacy is, in this case, displaced. I am satisfied that it is not possible to craft reporting or other

restrictions which would protect P's identity and the privacy of P and his family. There is a very significant risk of jigsaw identification unless the reporting restrictions (and other measures such as exclusion of the public from parts of the hearing) were so stringent as to make a public hearing meaningless. This substantially outweighs any legitimate public interest in this hearing being in public, even with reporting restrictions, and amounts to a good reason for the matter to be heard in private.

14. It is for essentially the same compelling reasons that I have reached the conclusion that there will be no published judgment on the substantive application (in accordance with the Practice Guidance of 16 January 2014: Transparency in the Court of Protection - Publication of Judgments). Any judgment would have to be so heavily redacted that it would make little sense. I will authorise only the publication pursuant to COPR 4.2(2)(b) of this summary of the judgment relating to privacy, delivered *ex tempore* in private, and shorn of the details which are relevant to why jigsaw identification is such a risk, why public curiosity is inevitable and as to the unjust impact publicity would have on this particular family.

Considering older case law which pre-dated *Abbasi*, Mr Justice Rajah considered why the Court of Protection may have different rules regarding privacy than other courts:

9. The reasons for the statutory regime in COPR 4.1 to 4.3 were explained in the Court of Appeal in *Independent News Media v A* [2010] 1 WLR 2262 in relation to their predecessor provisions. Those who have mental capacity can deal with their private affairs confidentially and in private. The general rule in COPR 4.1

recognises that a person who lacks mental capacity to deal with their private affairs should similarly be entitled to the same privacy. The Court of Protection is only involved because the person's reduced capacity requires interference in their personal autonomy. Court of Protection hearings should therefore be held in private unless there is a good reason not to. The provisions of COPR 4.1 to 4.3 encapsulate the Article 8 rights of persons who are vulnerable, and whose involvement in court proceedings arises from their vulnerability and not their choice. The provisions rearticulate a longstanding common law exception to the principle that justice should be done in open court: see for example *Scott v Scott* [1913] AC 417. The jurisdiction for good reason to depart from these provisions recognises that there will be cases where the public interest in an individual case outweighs the privacy considerations...

The press was not informed of the hearing, nor given an opportunity to make submissions on W's application that it be heard in private:

15. No notice was given to the press of this hearing. Section 12 Human Rights Act 1998 provides:

"(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied:

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified."

16. *In Re EM, Mostyn J expressed the view that s. 12 was not engaged if the proceedings remained in private but the Court was asked to consider making a permissive order under COPR 4.1(3) permitting the press to attend. The press would not need to be notified of an intention to seek such an order. Practice Direction 4A takes the same approach-see paragraph 8. Such a permissive order does not restrict the right to freedom of expression, it enables it, and thus s. 12 is not engaged.*

17. *In this case, there is not an application for such a permissive order. I am not considering granting any relief at all. I am being asked not to make an order of my own motion under PD 4C. I am asked not to interfere with the general rule under COPR 4.1. In such circumstances, s. 12 HRA 1988 is not engaged. This may seem a fine distinction, and in another case a judge may balk at such niceties bearing in mind the important principles involved. But I am satisfied that this is a case in which notice to the press would itself undermine the purpose of the proceedings being in private.*

Comment

We would note that in many ways privacy is very much the norm of property and affairs applications. The great majority of the work of the Court of Protection is in property and affairs, with most of these applications being considered on the papers without an attended hearing (the trigger under Practice Direction 4C for making a hearing public). Dispute Resolution Hearings (where many property and affairs applications are resolved) are also not in public,

being expressly excluded from the Transparency Practice Direction.

Only the small number of property and affairs applications which are heard at attended hearings and are not Dispute Resolution Hearings fall under the PD4C definition of an 'attended hearing' at all. The case before Rajah J did not (on the face of the judgment) appear to be a disputed application; the far more 'normal' course for it would have been to be considered by the court entirely outside of the public eye, without any issues of private or public hearings emerging.

Whether this is 'right' or 'wrong' is a matter we suggest could usefully be addressed in the context of amendments badly needed to the MCA 2005 to put in place a framework for transparency which would enable much less 'clunky' orders to be made, with all the attendant potential for errors to creep in.

For the perspective of the media, Joshua Rozenberg has written a [blog post](#) on this case, questioning why the media could not have been given notice and an opportunity to make submissions on the decision to hold the matter in private. Joshua also discussed this case at a [webinar](#) on 27 March, along with Katie, Arianna and Vikram Sachdeva KC.

Finding, searching and viewing lasting powers of attorney

The Office of the Public Guardian ('OPG') has recently published a useful blog on its website: "[Your questions answered: Finding, searching and viewing lasting powers of attorney \(LPA\).](#)"

Family care payments

On 7 March 2025, the OPG published a guidance document for deputies, [OPG's approach to family care payments](#). The guidance considers situations other than where a family member is

providing care through formal employment. While it only governs deputies, the Guidance states that attorneys may also find the document useful.

While much family care is provided on an informal basis without payment, the guidance notes that in some cases a payment can ease the carer's own financial situation and enable them to continue in their caring role. The guidance identifies that the Public Guardian considers that payments to enable such care can be in P's best interests, provided the factors this guidance outlines are considered. When managed properly, it is often best for everyone if P gets a combination of professional care and care from a family member, thereby enhancing the quality of family life while also providing respite for the family member.

The kinds of care arrangements that might justify a family care payment include those where:

- there is no contractual relationship between P and the family member involved
- the family member is providing the care by way of their natural love and affection for P
- the care is informal in nature and not by way of a job description
- the family member(s) do not have formally agreed hours, breaks or holidays
- there is little or no demarcation of work between family members, and no one is responsible for securing contractual terms or service delivery (such as a case manager).

Considering the legal framework for such payment, the guidance advises that authority

should be sought where a deputy is taking family care payments for themselves to ensure compliance with fiduciary duties. Reviewing the authorities on gratuitous care in the Court of Protection, the guidance notes:

- The importance of the deputy's working through the best interest checklist
- That the court has previously approved a rate of 80% of the commercial rate of payments for care due to the payment's not being taxable if HMRC agrees that they are voluntary payments

The guidance states that professional deputies will not normally require specific authority from the Court of Protection to make family care payments:

[a]s long as the professional deputy can provide evidence of best interest decision making. [...] However, in cases where agreement on the amount of payment cannot be reached, or there is a possibility of challenge by other family members, the professional deputy may wish to apply to the court themselves for specific approval of payments.

The Public Guardian may apply to the court for directions if they consider that the payments do not follow this guidance and are not in P's best interests. In extreme cases, they may apply to the court for removal of the deputy.

For lay deputies, the OPG recommends that the deputy should apply for specific approval for payments to themselves or someone they are closely connected to, such as a spouse or a child "where the decision to pay may be influenced by the close relationship rather than objectively made in the best interests of P."

The guidance makes clear that deputies should take the following factors into consideration in best interests decision-making:

The care must be reasonably required to meet P's needs and be of a good standard. If in doubt, the deputy may need to seek a care assessment from social services. If there has been any litigation claim for damages, the deputy should consider the level of care recommended by experts in the course of the litigation claim.

The payments must be affordable taking into account P's resources, age, and life expectancy. If the payments cannot be met out of P's income, deputies must consider the effect on capital, having in mind P's future care needs.

Payments must properly reflect the input by the family/carer. There should be evidence of how the care payment has been calculated in relation to the degree of care being provided. If P is a very young child, deputies should consider whether care is over and above what a parent would normally give.

The care must actually be provided. Temporary interruptions in provision of care, for example if P is in hospital, do not mean the payments need to stop, but long-term changes in P's living arrangements that affect the amount of care being provided must be considered – for example, a permanent move to a care home or supported living arrangement.

Deputies should consider payments alongside the level of professional care in place, i.e., they should be necessary to supplement professional care. Payments should represent a saving on the cost of professional care.

Payments should take into account any other contributions P makes towards the running of the household or paying bills. Payments may need to be adjusted down if the carer is living in P's property rent-free or is getting other income.

Payments should take into account the overall family situation, for example, whether anyone is in gainful employment. If two parents are providing care, what is their respective contribution? If P needs two people at any time to manage their needs, payments may need to increase to reflect this.

Payments should be agreed in consultation with the carer and other family members, where possible. It is good practice to consult others with an interest in P's affairs to avoid situations of conflict.

The Guidance offers three approaches to calculating the amount of payment:

Where P's estate is sufficient, and the family provide most of the care

In this situation the deputy may consider what allowance would be needed. If the amount is affordable, sustainable, and reasonable in relation to the amount of care provided, then payment can be made.

Where P's estate is sufficient and a significant amount of professional care is provided

The deputy may wish to calculate the allowance with reference to the approach Senior Judge Lush recommended in the case of Re HC [2015] EWCOP 29. That involves calculating family care by taking the commercial cost of care and reducing it by 20%. This in turn follows the approach taken by the King's Bench

Division of the High Court in quantifying heads of damages in personal injury litigation.

The OPG will generally refer to the mean hourly salary (less 20%) for carers in the Annual Survey of Hours and Earnings (ASHE) (Table 26.5a) published by the Office for National Statistics as a benchmark for the commercial cost of care.

Where the High Court has agreed that the higher rate of the 80th percentile represents the commercial cost of providing care for P and has granted approval for a periodical payment order (PPO) at the higher rate, the 80th percentile will be an acceptable starting point as the benchmark for care payments. Family care payments and PPOs may be index linked, in which case annual assessment against the ASHE tables will not be required...

Where P's estate is limited

In this situation the payment should reflect only what P can reasonably afford.

When considering affordability, if there is an annual periodical payment P gets as part of a litigation claim, then such a payment is normally for care and case management. It can also be useful to refer to counsel's advice on settlement of a damages claim. This helps in accessing an overall budget for family care when any professional care costs and case management costs are eliminated from the equation.

In some situations, the carer may have given up a well-paid job to care for P. It is the Public Guardian's view that, in all but the most exceptional circumstances, family care payments are not intended to replace salaries.

The guidance recommends that where it is deemed necessary to increase an allowance, family care payments should index-linked to the commercial cost of care to avoid repeat applications to the Court of Protection. The guidance also notes that:

Deputies need to bear in mind that, when applying the different factors in this guidance, and particularly taking into account affordability, payments can vary widely. It is possible, for example, that two carers providing the same amount of care may get different family care payments. While on the face of it this appears unfair, it reflects the fact that carers' situations must be considered in the round rather than applying a simple formulaic approach.

In recent years, ASHE increases have been modest and, in some cases, have reduced. Carers may need to be aware therefore that they are unlikely to see large annual increases in payments for care as a result of this indexation.

The guidance emphasises the importance of good record-keeping and ongoing review of the payments to ensure they remain appropriate and affordable. The guidance notes the need to review due to a change in living arrangements, care needs, entitlement to continuing healthcare funding, the carer's circumstances changing or changes in P's financial situation.

Bond providers

The OPG has outlined two changes to surety bonds.

From 1 April 2025 the rates applied for surety bonds with Marsh have increased. This will be applicable for both any new bonds and any surety bonds due for renewal from 1 April 2025. Marsh will be contacting existing customers to explain the changes and what this means for

bonds that are in place 30 days in advance of any renewals.

In April 2023, the OPG procured a new surety bonds contract. Two of the suppliers are no longer contracting through this framework, and one provider (Marsh) remains.

The OPG has identified that:

Following review of how the contract is supporting our wider operations across Office of Public Guardian and Court of Protection, we have taken the decision as the contracting authority to commence a new procurement for this service. This decision is in no way reflective of any dissatisfaction with the service we are receiving from our current provider Marsh. In parallel, the Guardianship bonds contract is also due to come to an end this summer and so we are taking the opportunity to procure both services together.

We have listened to stakeholder feedback to help refine our requirements for the new procurement exercise. An expression of interest outlining our intention to run a new procurement process was issued on Friday 14th February and can be found here [Deputyship and Guardianship Surety Bonds \(MoJ CoP and OPG\) - Find a Tender](#).

The timeline for this is being finalised and is likely to be launched later this year. We'll update you with any relevant information as things progress.

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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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