Essex CHAMBERS

MENTAL CAPACITY REPORT: COMPENDIUM

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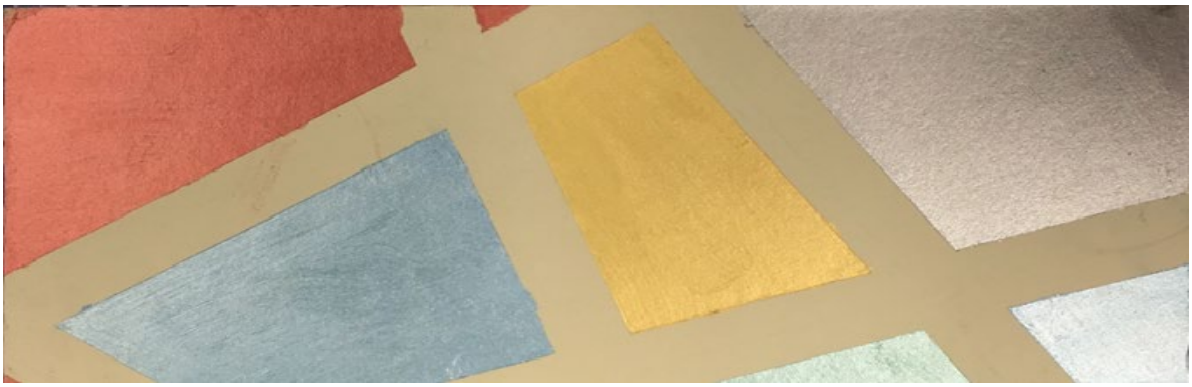

Welcome to the September 2025 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on *Cheshire West 2*, non-withdrawal of treatment in two very different contexts and SCIE sounds the alarm;

(2) In the Property and Affairs Report: the OPG annual report and increases to LPA fees;

(3) In the Practice and Procedure Report: the Court of Protection (Amendment) Rules 2025, a route map for anorexia cases relating to detained patients, and taking evidence from abroad;

(4) In the Mental Health Matters Report: the police, Article 2 and suicide risk, and an evaluation of the HOPE(S) programme;

(5) In the Children's Capacity Report: *Gillick* does not provide a universal test, and jurisdictional issues in the making of deprivation of liberty and wardship orders;

(6) In the Wider Context Report: anonymity, vulnerability and the open justice principle, and learning disability and social murder;

(7) In the Scotland Report: an apparently open and shut guardianship case and an update on Adults with Incapacity Act reform.

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.

Contents

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

Cheshire West 2?

The hearing date for the Attorney General for Northern Ireland's reference concerning deprivation of liberty has been set: 20 and 21 October. Alex, Tor and Arianna all being somewhat constrained in what they say, being instructed in the case, they point readers to this article in Community Care which provides a convenient overview of the issues at stake.

"There are more things in heaven and earth that are dreamt of in the philosophy of NHS treatment"

The Hillingdon Hospitals NHS Foundation Trust v YD & Ors (Refusal of Withdrawal of Treatment) [2025] EWCOP 31 (T3) (Theis J)

Best interests – medical treatment

Summary

The flipside of the intense focus on the wishes, feelings, beliefs and values of the person required by s.4 MCA 2005, as clarified by the Supreme Court in *Aintree v James*, is that there may be situations in which, objectively, a person's medical situation might appear hopeless, but nonetheless continued treatment is in their best interests. Such a case is that of *The Hillingdon Hospitals NHS Foundation Trust v YD & Ors (Refusal of Withdrawal of Treatment)* [2025] EWCOP 31.[1] On the face of it, YD, who had been in a prolonged disorder of consciousness since October 2024 and had no prospect of emerging from the permanent vegetative state in which he now found himself, was a clear candidate for withdrawal of clinically assisted nutrition and hydration.

But the hospital caring for him, and the ICB commissioning his care, did not assert that continuing CANH was clinically inappropriate. Had they done so, then the Court of Protection could have probed their reasoning, but could not have required it to be continued. The question, therefore, was what was in YD's best interests.

[1] In passing, we do wish more judges would do as was done here, and give a 'headline' in the title. Even if it does not need to be a spoiler, as here, it makes life so much easier when trying to keep track of the alphabet soup of case names.

One striking point about this case was that YD had not one, but two, partners, who had previously unknown to each other. Each of them, though, were:

> *73.* […] *aware, without knowing names or numbers that YD was 'a central part of a community of people with shared beliefs that there was more to life than the material, and…that there are more things in heaven and earth that are dreamt of in the philosophy of NHS treatment. They had a shared belief that each person has psychic abilities but not every person can access them.' They each had an experience of YD that was not scientifically explicable and all explained that understanding the universe outside the material and 'exploring and developing his own transcendental powers, was [YD's] life's work'. NT emphasised the serious nature of YD's scholarship in this regard. [and that] YD 'believed that one's spiritual belief system is a personal matter and one of continuous development'. YD believed in 'self-improvement, giving thanks and doing good…that we have multi-dimensional existence outside linear time and he reported that he experienced that existence when asleep and unconscious. He believed we can communicate thoughts in an extrasensory way and his beliefs were manifest in waking life personal experiences. He believed in life after death'.*

The Vice-President of the Court of Protection, Theis J, in reaching her conclusion reasoned as follows:

> *79. When considering what is in YD's best interests it should be considered in its widest sense. Consideration must be given to all relevant circumstances, to the person's past and present wishes and feelings, to the beliefs and values that would be likely to influence their decision if they had capacity, and to the other facts that they would be likely to consider if they were able to do so (s4(6) MCA 2005). Account must be taken of the views of anyone engaged in caring for the person or interested in their welfare (s4(7) MCA 2005). In considering whether treatment is in the best interests of the person concerned, the decision-maker must not be motivated by a desire to bring about the person's death (s4(5) MCA 2005).*
>
> *80. The focus must be on whether it is in YD's best interests to continue to have the treatment, rather than whether it is in his best interests to withhold or withdraw it. The purpose of the best interests test is to consider matters from the patient's point of view, however that does not mean they are determinative.*
>
> *81. The medical evidence from Dr N and Dr Hanrahan unite in their conclusion that YD is in a PDOC. They both conclude he is in a VS in accordance with the assessments that have been undertaken following the RCP Guidelines. They were each firm in their evidence about the diagnosis and the prognosis. Each were pressed by Mr Hockton about the relatively small changes that had been noted by JG and MB since June, some of which is noted in the nursing records, including by the OT. They did not dispute what JG and MB saw, or what was recorded, but attached no evidential significance to it regarding diagnosis as it lacked the consistency over a period of time and the other features as set out in the RCP Guidelines to be of significance. In his written report Dr Hanrahan stated that when considering the burdens of continuing with CANH there does not appear to be great 'burdensomeness evident'. That accords with the medical evidence of YD's relatively stability, he has not suffered from infections. Whilst Dr Hanrahan stated that in broad terms by virtue of his current condition the trajectory is he would continue to deteriorate, however he did not detract from the view set out in his report due to the high quality of care, both medical and from the family, that he is receiving. The evidence about pain is equivocal. There is evidence of YD grimacing whilst his limbs are being stretched and both JG and MB describing being aware when it appears he is in discomfort.*

82. I agree with the Official Solicitor that the court now has a rounded picture of the values and beliefs that would be likely to influence YD's decision if he had capacity. I reject any suggestion that JG, MB or NT sought to bring their values, beliefs, wishes and feelings over those of YD, or risked conflating them. They each gave compelling evidence with dignity and composure and maintained the clear blue line between what they felt and their evidence about YD's values, beliefs, wishes and feelings. This is despite their obvious deep affection for YD. They were each able to bring their own perspective of YD's beliefs and values. I reject the submission on behalf of the Trust that the evidence 'did not provide a direct answer to the question of what [YD] would have wanted to do in these specific, extreme circumstances'. In my judgment, that is considering YD's best interests through too narrow a lens. If there is no evidence of such a conversation the court needs to carefully look at the relevant evidence as a whole, evaluate it and see what, if any, conclusions can reliably be drawn.

83. What has been so striking about the evidence about YD from JG, MB and NT is that, certainly in relation to JG and MB, even though they had each known YD for 20 and 24 years respectively, they had not known each other prior to October 2024, and were unaware of each other's existence. Yet despite that separation over such an extended period of time they were each able to independently confirm many common features about YD's wishes and beliefs. In particular, regarding the depth of his interest in the spiritual world and his limitless curiosity about such matters that he held strong beliefs about. YD has long held beliefs about the healing power of the mind, body and soul and to understand and, if required, push established boundaries based on his learning and understanding. From their descriptions YD was compassionate, private person who was a fiercely independent thinker about a wide range of issues, in particular regarding the spiritual world and healing.

84. I agree with the Official Solicitor that the evidence establishes that whilst YD 'might not dispute Dr Hanrahan's opinion that recent physical changes are the manifestation of involuntary, rudimentary new connections to the brainstem, he would be likely to see that opinion as a limited and incomplete explanation of what had caused those changes'. His long standing interest in the healing power of the mind, spirit or soul would very likely be values that would inform his decision if he had capacity. The changes that have been observed he would regard as positive signs and that he had the potential to make further changes. These are likely to be relevant factors that would inform his decision if he had capacity, and would be likely to be a factor in him wishing and feeling that he wanted to continue to be provided with CANH. YD would also likely factor in, due to his long standing beliefs in such matters, that others believe they are in communication with him.

85. When looking at what evidence the court has about what decisions he has made in the past, the understanding of what VS is and the medical prognosis by Dr N and Dr Hanrahan it is unlikely to have caused YD to wish or feel that CANH should be withdrawn. When considering the evidence about the past YD is likely to value the devotion shown by JG and MB. Their evidence when asked about how YD would feel about the amount of nursing care he requires, bearing in mind the evidence about what a private person he was, was powerful, as they each responded that YD would take it as part of the process of getting better or healing. They both described YD's high threshold for experiencing pain or discomfort in the past. This is consistent with his actions in the past (for example seeking the assistance of the NHS when he chose to) and his wider views of the holistic healing process. I agree with Mr Hockton, that from the evidence the court has about YD he would have approached the decision-making in this case in a very different way from Dr N and Dr Hanrahan.

86. Having stood back and considered through a wide best interests lens whether it is in YD's best interests to continue to receive CANH I have reached the conclusion that it is.

87. In my judgment the burdens do not outweigh the benefits. I have carefully considered each of the burdens it is said continuing with that treatment would involve for YD, both in the short and the long term, but I have to balance that with the benefits of such treatment continuing. Most importantly it would preserve his life. I depart from the evidence of Dr N and Dr Hanrahan as in the particular circumstances of this case I place greater weight on YD's past and present wishes, feelings, beliefs and values than they do. I accept the picture of YD painted by the evidence of JG, MB and NT. I do not regard the continuance of CANH in this case as futile where it sustains life. Having looked at the wider evidential picture I do not accept the narrow view taken by Dr Hanrahan as it did not pay sufficient regard to the evidence of YD's beliefs and values and wishes and feelings. Whilst it is recognised that any awareness on the part of YD, if present, is extremely limited and there may be little or no further improvement and a trajectory of general deterioration it is far from clear that in the circumstances YD is in he would regard his continued existence as a burden. There is a strong presumption in favour of preserving life which, in my judgment, having carefully evaluated the evidence in this unusual case, the Trust has not discharged.

Returning to an issue which has troubled her for some time, Theis J also made some wider observations about the role of ICBs:

88. The focus of this judgment has been on YD. It is right that during the evidence the wider issue of the impact of cases such as this was raised. The Trust acknowledge there is scope for further work in relation to the timing of applications of this nature: on the one hand, there is a well-recognised need to bring cases of this kind promptly if treatment is not regarded as being in P's best interests, but on the other hand, there is the risk of unintended consequences if this leads to patients having prolonged admissions to acute neurorehabilitation beds versus a community placement. There has been no suggestion in this case that the Trust delayed in making this application.

89. The issues raised are (i) whether the ICB should be a party to proceedings of this nature, or (ii) whether the ICB's engagement in matters (without party status; as occurred in this case) satisfies their need to be actively involved in withdrawal decision, and (iii) whether patients should, where possible, be placed in community beds, pending the outcome of an application.

90. The Official Solicitor considers there is a lack of clarity in this case whether Dr N considered that YD should have been transferred to a nursing home some time ago and court proceedings initiated whilst he was there, or that he would not stand in the way of YD's CANH continuing so long as it did so at a nursing home not at the rehabilitation unit.

91. It is clear that on a case by case basis these issues should be proactively and carefully considered at each stage, full disclosure must be made of any such concerns or considerations raised so that the Official Solicitor and the Court are fully appraised of the issues. The relevant ICBs should take a proactive interest in any such issues, taking such steps as are required to avoid delay and making sure all relevant parties are represented in any court proceedings and, if required, urgent directions sought from the court in any ongoing proceedings.

92. None of these observations detract from the very clear message in cases such as NHS South East London Integrated Care Board v JP and others [2025] EWCOP 8 and NHS North Central London Integrated care Board v Royal Hospital for Neuro-Disability & XR [2024] EWCOP 66 about

the need for effective decision making structures being in place for those who are in a PDOC, the need for careful and regular review and evaluation about what is in their best interests and, where required, an application being made to the Court of Protection for a decision as to what is in the patient's best interests.

Comment

The full judgment requires reading for confirmation that real life is, as ever, stranger than fiction, and also as a case study in the navigation of complex relationships going beyond 'next of kin' to identify those who were expert in the person. It is also good to see that this was a case in which the case was brought with appropriate speed before the court for resolution of the question of whether continuing CANH was in YD's best interests.

This case is another in the number of small but increasing number of cases (including *Aintree v James* at first instance[2]) in which the Court of Protection has upheld a patient's understood wish for continued treatment in the face of medical concern as to whether it is in their best interests. This is immensely important – constructing the right decision for the person must include the potential for that decision to be to continue as well as for it to stop.

However, such an approach comes with consequences. The maintenance of patients in the position of YD is not cost-free. Just as in the case of admission and treatment in ICU, we tend to seek to avoid hard discussions about cost-benefit analysis of the sort that are now familiar in the context, say, of cancer drugs. For our part, would suggest that there is an increasing need for work to be done to establish a framework within discussions about such costs can be considered in a transparent fashion, and in a way which resolves the uncertainty justly. Otherwise, we run the risk of concerns about costs leading (no doubt inadvertently) to: (1) distortion of the clinical framing of the person's condition and of the treatment; or (2) distortion of best interests decision making (for instance, by asking whether the person would wish to be continue to be kept alive at the cost of "diverting" resources from others).

When does a Court of Protection order start to do more harm than good?

Patricia's Father & Ors v Patricia & Ors [2025] EWCOP 30 (T3) (Arbuthnot J)

Best interests – medical treatment

Summary[3]

This case is challenging at a number of levels, over and above the human tragedy at the centre of it. Procedurally, it highlights the pitfalls of identifying the point at which a decision made by the Court of Protection needs to be revisited because it is harming, rather than helping. Substantively, it highlights the challenges for the Court of Protection of seeking to respect autonomy in the context of anorexia. Clinically, it highlights deep and insufficiently understood splits amongst clinicians about how to respond to anorexia, especially in the context of resource limitations which appear (all too often) to cut

[2] Mr James had died by the time the case reached the Supreme Court so technically the decision of the Supreme Court does not count.
[3] Tor and Katie having been involved in this, they have not contributed to this note.

off first line responses. And ethically it highlights how anorexia has an almost unique ability to render relationships – both familial and clinical – all but untenable: brought home vividly by the fact that name of the case suggests that Patricia's father, mother and aunt are bringing a case against her.

As Arbuthnot J identified in the opening paragraph of her judgment:

> *1.This is an application brought by the parents and aunt of a woman who has previously been anonymised to "Patricia". Patricia is aged 25 and has lived with anorexia nervosa ("AN") since she was aged about 10. Patricia is very ill because she is not consuming sufficient calories. She is malnourished. When this case started in March 2025, her body mass index ("BMI") was thought to be around seven or eight and I was told she weighed about 19kg, which is what many five year olds weigh. She had not been able to walk unaided for two years and suffers bed sores. She has osteoporosis.*
>
> *2. Patricia also has been diagnosed in the recent past with autism and with pathological demand PDA avoidance ("PDA"). The combination of the PDA and AN means that although she has repeatedly said she wishes to live, she refuses to consume the calories that she requires to be able to walk without a Zimmer frame, let alone to have an enjoyable and productive life out of hospitals and Specialist Eating Disorder Units ("SEDUs").*

In 2023, Patricia's situation was considered by Moor J, who ordered:

> *6.* […] *in accordance with Patricia's strongly expressed views that it was in her best interests not to receive nasogastric tube feeding with restraint and not to receive any other medical treatment against her wishes and that Patricia should be given autonomy to make her own decisions about whether she put on weight or not.*

Patricia's parents and aunt were not parties in the 2023 proceedings, Arbuthnot J explained, and "they said they had not understood the import of the decisions made" (paragraph 6), nor does it appear that they had understood at any point until 2025 that they might have the ability to place her situation back before the Court of Protection. However, in March 2025, they made an urgent application to the Court of Protection, on the basis that they believed that Patricia was about to be discharged by the hospital where she was to a palliative care setting to die. An extensive series of hearings then took place.

> *4. The applicants initially relied on the evidence of Dr Ibrahim, a consultant psychiatrist, who recommended that the court make an order that Patricia be fed under restraint by nasogastric ("NG") tube. His recommendation was that she be fed until her weight was fully restored, a weight of about 50 kilos, which she had never experienced.*
>
> *5. As the case continued, no SEDU was prepared to commit to that sort of weight restoration and in the event, as of July 2025, there is only one SEDU available (I will call it SEDU 3) which may be able to treat Patricia if the orders made by Moor J in 2023 are lifted and Patricia assessed positively by the SEDU.*

As Arbuthnot J noted:

> *9. I must observe that Patricia vociferously opposes the applications made by her parents and aunt. I have met her twice and she has sent a number of emails to my clerk in which she makes*

her views clear. She has said that she wants Moor J's orders to remain undisturbed. Any change would not be in her best interests and would lead to a worsening of her AN and a reduction in the calories she consumes. She wants to live but what she does not want to do, or is unable to do, is to eat to a level which is sufficient for her to stay alive.

The issues before Arbuthnot J ultimately came down to two:

26. The first issue was whether in principle I could re-visit the 2023 order and secondly, if so, whether I should discharge the declarations made by Moor J in 2023. This would allow Patricia to receive whatever treatment the clinicians treating her consider she needs, whether that involves force feeding or not. The lifting of the order would bring her position into line with nearly every other anorexic patient in the country, as it would remove any perceived barrier to Patricia being detained and treated compulsorily under the Mental Health Act 1983 ("MHA").

27. It is not disputed by the parties that there is reason to believe that Patricia does not have capacity to conduct the litigation herself and to make decisions as to her medical treatment for AN. It is not the position that someone with AN would never have capacity, it depends on their state of health, and whether they are unable to make the decision because of the AN, which is an impairment of, or a disturbance in the functioning of, the mind or brain. In 2023, at times, Patricia had capacity to conduct the proceedings and at other times when she had lost weight and her health had deteriorated generally, she no longer had it. I heard unchallenged evidence that the brain shrinks as the AN takes hold. Patricia is at a very low weight indeed with a BMI of about nine: I heard evidence that this is likely amongst the lowest in the country. Her cognition is greatly affected by this disease. I find she lacks capacity to conduct litigation or make decisions in relation to her treatment for AN.

After a detailed review of the 2023 proceedings, the history thereafter, and the evidence before her, Arbuthnot J considered matters thus:

140. At the time of the first two decisions made in May 2023, Patricia was on an upwards trajectory and was increasing her calorific intake. During the first May hearing she had promised the judge she would increase her intake. By the second May hearing, her intake was higher than it had been. Moor J heard substantial evidence including from Professor Robinson, an independent expert and made the declarations and orders it did.

141. By October 2023 however, this improving position had stalled. Another complication was that Patricia had gone into hospital with an infection. It may have been C. difficile which Dr PI said had led to Patricia losing more weight. In any event the Court confirmed the May 2023 order and made it wider. Patricia should not be force fed with restraint nor was she to receive any medical treatment against her wishes. Moor J decided Patricia should have the autonomy to decide what she should eat and how. I accept that the Judge in 2023 recognised that Patricia was almost certainly past the point of accepting treatment.

142. Just over 18 months later, now in July 2025, despite all the efforts made to work consensually with Patricia, she is much more ill than she was in 2023. There is no doubt now that the hands-off approach, leaving it to Patricia to decide whether to increase her BMI, has not worked. At the beginning of these proceedings in March 2025, her BMI was thought to be around 7.3. This was considerably lower than in 2023. The witnesses were all agreed that if nothing changed she would die, and probably very soon.

143. With the court order of 2023, there was no other treatment that could be offered to Patricia, and this was why the hospital was going to discharge her to a care home. During the course of these proceedings, and I have no doubt that it was because of them, Patricia had improved somewhat her calorie intake and her BMI had increased to about 9 or so. She is still at risk of death.

144. Whereas in October 2023, there was still some hope that Patricia might voluntarily start gaining weight, there was no hope at all in March 2025. Despite this, I noted Patricia's will to live remains strong. She speaks about what she would like to do in her life, including travelling. She does not want to die and she has been repeatedly saying she wishes to go into SEDU 1, the SEDU that does not use feeding under restraint.

145. At the early hearings in 2025, Dr Ibrahim had produced what he said was an alternative approach which included full weight restoration. This proposal was not before the Judge in October 2023 and in March 2025 appeared to be new evidence. As it turned out, by 20th May 2025, this option was not available for this court.

146. In looking at whether there has been a change in circumstances, or other new evidence, what struck me was how wrong it was that a potential life-saving option, open to every other anorexic in the country was not available to Patricia. 18 months on, the orders were preventing Patricia from going into a SEDU. The orders in 2023 had been shown to have failed. Without a change to the orders, there was no doubt that Patricia would die.

147. The respondents' final positions in 2025 were probably best described as neutral about whether there had been a change or not or whether that should even be the test. Ms Gollop KC for the hospital was the least neutral of the respondents.

148. The hospital position, ably put forward by Ms Gollop on 20th May 2025 was that Moor J's reasoning and decisions were not wrong. He had made no error of law nor had he failed to take into account any factor relevant to best interests so that the best interests decision was wrong. Nevertheless, the Court had now heard evidence from a number of clinicians and experts or quasi experts, and should now consider the application afresh.

149. The ICB argued at the hearing of 20th May 2025, that the Court should engage with the application to discharge on its merits because the time to dismiss it would have been at the first hearing. It was far too late now to summarily dismiss the application as suggested in the decision of Poole J in An NHS Trust v AF & Anor [2020] EWCOP 55. Ms Scott for the ICB contended powerfully that it was for the Court to determine whether it was in Patricia's best interests for the orders to be discharged.

150. Ms Scott argued that the Court should not make any declaration or order which might fetter the decision-making of the clinicians, such as declare that any particular treatment should be provided to Patricia. In her most powerful argument, Ms Scott contended that Patricia should be returned to the position that all anorexic patients are in, they have the opportunity to access all available treatments including forced treatment under the MHA, without any fetters imposed by the Court.

151. CPFT argued that although Moor J's decisions did not formally bind clinicians from detaining Patricia under the MHA, the order was intended by the Judge to ensure that she was not subject

to further treatment she did not want including detention under the MHA. The only decision for the court was whether Moor J's order should be discharged.

152. Ms Roper KC for CPFT said there were two questions for the court, the first was whether it was open to the Court to re-open the previous decision of Moor J in 2023 and the second was, if so, should the previous orders be discharged. Ms Roper set out a detailed account of the evidence heard by Moor J. She considered the legal test and the case of AF. The decision made by Poole J was seven months after a decision had been made by Mostyn J. In the particular circumstances of AF, Poole J reopened the earlier decision made.

153. The second case relied on by Ms Roper was Z v University Hospitals Plymouth NHS Trust (No. 2) [2021] EWCA Civ 22 where on an application for permission to appeal, King LJ said at paragraph 31 that "the court will, if appropriate, review an earlier best interests determination. As Francis J put it in Great Ormond Street Hospital v Yates (No. 2) [2017] 4 WLR 131 at paragraph 11, such a reconsideration will be undertaken "on the grounds of compelling new evidence" but not on "partially informed or ill-informed opinion"".

154. On behalf of Patricia by her litigation friend, the Official Solicitor, Mr Patel KC supported the ICB argument that the time had passed for the Court to dismiss the application using its case-management powers on the basis there has been no material change in circumstance.

155. The Official Solicitor argued that in any event, Patricia's condition had deteriorated since 2023; Patricia continued to express a strong wish to receive treatment for her AN and the approach in 2023 that of respecting Patricia's autonomy had not worked. Where there was a presumption to preserve life, the Court should make a substantive determination. Leaving the orders in place had put an "impossible burden on her". Moor J's order required her to agree to treatment which her anorexia could not allow her to. Without a discharge of Moor J's orders, Patricia could not access SEDUs. On balance the Official Solicitor considered that it was in Patricia's best interests to discharge the orders.

156. I did not accept the argument of the ICB and the Official Solicitor that the time to revisit an earlier decision had to be at an early case management stage of proceedings. In many cases, it might be, but in the current proceedings it would have been too early. In March 2025, I had evidence only from Dr Ibrahim in his first statement. His conclusions and advice were based on a partial account given to him by the applicants and not on Patricia's medical records nor on conversations with her treating clinicians. Dr Ibrahim did not know therefore of the many attempts that had been made to treat Patricia over about 15 years in a variety of ways including by force feeding her before the orders in 2023.

157. I see no reason why I could not dismiss the application now, several hearings on, despite having heard from a number of witnesses, although I found the decisions made in May and October 2023 were clearly the right decisions for Patricia at that time.

158. In this case, at this stage, I am in a position to determine whether the application should be rejected. I should out of respect to my colleague and considering the importance of finality, give effect to the earlier decision made by Moor J unless there is either a change of circumstance, new evidence which may be persuasive, or, as is the case here and as Poole J in AF put it succinctly "if the decision or circumstances that the new court is being asked to consider are not clearly covered by the earlier judgment".

159. The most significant circumstance that is not covered by the earlier judgments in May and October 2023, is the burden on Patricia of the decisions made then. What the court could not anticipate is how Patricia would react to the decision of the court. As the many witnesses explained it, her thinking is dominated by the AN. Her anorexic cognition has prevented her from understanding the link between living or even just being able to walk and the need to take on calories to give her the strength she needs. It is a complete block in her understanding caused either by AN or by her autism and PDA. She is a highly intelligent young woman yet she fails to accept the link between eating and living.

160. Leaving the orders in place had put an impossible burden on her. Moor J's order required her to agree to treatment which her anorexia would not allow her to. Without a discharge of Moor J's orders, Patricia cannot access a SEDU that might be willing to accept her, one that might save her life.

161. I am conscious that a decision to revisit the orders made in 2023, will cause Patricia a very great deal of distress but it is right in principle and in Patricia's best interests that I look at her situation and circumstances again, when the autonomy given to her by Moor J has laid an impossible burden on her.

162. In my view there are circumstances in this case which amount to factors which were not clearly covered by the orders made by Moor J in 2023. (emphases added)

This meant, therefore, that, that Arbuthnot J had the power to revisit Moor J's decision.

163. Having determined that I have the power to revisit Moor J's decision in 2023, the next issue is whether Patricia's best interests require a continuation of the order made in 2023 or whether the evidence supports a change of approach set out in a new order.

164. The respondents invite me to take one of two approaches to the 2023 orders. The hospital and CPFT argue that the second issue needs to be decided at the same time as the first whilst the family, the Official Solicitor and the ICB argue that I should decide the principle of revisiting the orders only and adjourn the second to a time when there is a SEDU available to take Patricia. They are all concerned about the effect on Patricia of any decision I might take. There is only one SEDU, currently, SEDU 3, which might be prepared to consider Patricia for treatment if the 2023 orders were removed.

165. On balance I have decided to make both decisions at once. This is because my decision to revisit the orders made in 2023, will be very distressing to Patricia. If I adjourn the second issue, Patricia, who is extremely intelligent, will realise what is going on. She will work out the way the wind is blowing and that suspicion without any certainty will add to her distress. Added to that, Patricia has been waiting for four months now to find out the outcome of this application, the delay has caused her great upset too. I also consider that there is a chance if I deal with both issues at once, that other SEDUs may become available were I to lift the orders.

166. In 2025, it is undoubtedly the case that Patricia is much nearer to death than she was in 2023 and yet she does not want to die. It was her cognition caused by the AN in addition to her autism and PDA which have led to her refusal to take on the calories she needs to live. She said she wanted to be able to walk again and travel yet what was preventing her from doing this was her refusal to increase her BMI.

167. The professional witnesses I heard from were agreed that Patricia's opposition to compulsory treatment, was driven by her anorexia. I agreed with Mr Lewis when he said, echoing Dr Ibrahim's observation, that by "respecting [Patricia's] autonomy, the court [in 2023] had permitted her anorexia to call the shots".

168. The significant issue which I have had to grapple with is the effect on Patricia of any change in approach. I must consider Patricia's past and present wishes and feelings and the beliefs and values that would be likely to influence her decision if she had capacity. Patricia has had AN since the age of 10. She has never had values or beliefs which were not enmeshed with her AN. All she minds about is how to avoid putting on weight although she values her life and likes to imagine the life of travel she could have.

169. Patricia cannot have made it clearer that she does not want the orders to be lifted. She believes a lifting of them would lead to her being force fed. She says she is traumatised by the thought that this may occur again. She says she suffers from PTSD caused by past force feeding. She says it is torture. This is her longstanding view and she points out with some force that in the past force feeding did not work.

170. She has said that even the knowledge that there is a chance that the court may reconsider the orders made in 2023, has prevented her from sleeping, has led to her having nose bleeds, and hitting her head against a wall. She has become increasingly pressing in her emails to the parties and the court, trying to negotiate an alternative approach. She suggests that she should go to SEDU 1 where she knows she cannot be force fed. That unit, however, for good reason, has not offered her a place.

171. I am not being asked to consider what specific treatment she will receive in any SEDU and I agree that that question should be left to the clinicians treating her. My view is that Patricia should have access to the treatment or lack of treatment that any other anorexic patient does. The court should not impose an order which would prevent her from having the treatment which may save her life when she wants to live. I hope that once she gets to a SEDU she will work to increase her BMI within a collaborative treatment plan which will take into account her autism. This will allow her to achieve the aims she has spoken about.

172. All sorts of treatments have been attempted before and there is not much optimism that Patricia can be saved. Any SEDU which can care for her, needs the flexibility which will be given by the removal of the orders.

173. As part of the decision I am to take into account the views of her family, who bring this application and anyone engaged in caring for Patricia. The family want her to live and also want her to have the life of any 25 year old. Their views are reflected in this application. They want the order to be lifted.

174. The views of the clinicians who know her best is that a plan for force feeding was unlikely to succeed. Patricia would fight any restraint and this could harm her. Dr PI, whose views I respect, and who knows Patricia very well, considers that force feeding is not in Patricia's best interests. The witnesses who have worked with her point to the many years of failure when Patricia has put on a little bit of weight in a specialised hospital setting before losing it in very short order when she leaves.

175. I have reminded myself that the January 2025 treatment plan was contributed to by Patricia and it was formulated with her PDA and autism in mind. She had special carers allocated to her and support from SEDU 1which led to them having to close three beds to accommodate their work with her. This lasted for eight days.

176. Although every treatment has been tried with Patricia, rather counterintuitively, I was told by the clinicians and the expert that patients with anorexia can be restored to health even when they are very resistant to increasing their BMI and weight and even when past attempts have failed.

177. The balance of harm versus benefit is nearly equal. On the one hand, if I lift the orders, Patricia may "down tools" and she may become even more ill than she is already. I am conscious that before 2023, there had been numerous attempts to treat Patricia including by NG feeding under restraint. None of it worked and the witnesses were clear that Patricia found restraint incredibly distressing.

178. I accepted the evidence that AN is part of who she is and Patricia will find it traumatising to lose control over her treatment, if she entered a SEDU and a treatment decision was made to NG feed her under restraint. I also accepted the evidence that AN is so much part of who Patricia is that she will not want to get rid of it and could never get to a weight where she is not hospitalised from time to time. At the same time, I bear in mind too that in 2022 she agreed to NG feeding when she had no alternative to that and said it was not as bad as she had anticipated. She now denies ever saying that.

179. The best that the court could hope for is that she gains weight a little, increases her BMI, so she does not spend her life in hospital or a SEDU, although the evidence from the past was that if she were treated and increased her weight, it might well reduce again when she leaves the facility.

180. On the positive side, I bear in mind that if I lift the orders, there is a chance a SEDU will take her, whether it is SEDU 3 or another, and although the past history of such admissions is not positive, she could turn a corner and put on weight. The clinicians were clear that this does happen, when a patient later thanks the clinician for forcing them to gain weight.

181. I have had to balance the factors set out above and consider Patricia's Article 3 right not to be treated inhumanely when she believes strongly that force feeding will breach her rights. I remind myself I am not being asked to make an order that she be force fed, but to lift the orders which would then allow SEDUs to decide what is the appropriate treatment for this young woman who wishes to live.

182. Having considered the balance of the imminent risk of death versus the harm which will be caused psychologically and emotionally by the lifting of the orders, the balance is in favour of trying to save her life. The removal of the orders will allow the clinicians to work out what is best for Patricia, without the restrictions that currently prevent this.

183. I lift the 2023 orders. This is in Patricia's best interests.

Comment

The recent decision of McKendrick J in *Leeds and York Partnership NHS Foundation Trust v FF & Anor* [2025] EWCOP 26 (T3) (covered in the Practice and Procedure section of this Report) which is not referred to in the judgment of Arbuthnot J, was notable for the way in which the orders were carefully

framed so as not to be seen to bind decision-making by clinicians in the future in the event of a material change in circumstances. By contrast, the orders made in 2023 by Moor J, no doubt entirely inadvertently, became – as Arbuthnot J noted with evident concern – barriers to appropriate decision-making because they were perceived as being binding for all time. As the Court of Appeal confirmed in the *Re A* case (see paragraph 90) he Court of Protection is not a supervisory court, and exists to make decisions at a specific point in time; but the flip side of this is that those who have brought cases to court to obtain decisions must keep under review whether those decisions remain in the person's best interests.

The focus on 'autonomy' in the judgment of Moor J, and the repeated references to the concept in the evidence before Arbuthnot J is also striking. It is worth remembering that the word does not appear in the MCA 2005 itself; it is also worth remembering that it is a concept that frequently hinders more than it helps. As Swift J felt the need to point out in the *Royal Bank of Scotland* case, for instance, it is just as much a failure to respect autonomy not to interrogate evidence that the person may lack capacity to make a decision as it is to barge ahead and make decisions for them without establishing that they do, in fact, lack capacity to make the decision. It might be thought that (as with the term 'dignity') it would be sensible to strive to avoid making use of the term in decision-making in this context, at least without a very clear-eyed understanding of what exactly is being intended.

The observations of Arbuthnot J about the 'impossible burden' having been placed on Patricia by the judgment of Moor J are powerful. Hayden J has also in a number of cases (see, for instance, the *NR* case) sought to give decision-making authority back to a person who has been found to lack capacity to make the relevant decision. The drive to do so is clear, and in many ways entirely laudable: seeking to ensure that the person's wishes, feelings, beliefs and values are determinative, notwithstanding their (legal) incapacity, and also, in the anorexia context, seeking to ensure that further harm is not caused to them by imposing treatment against their will. However, it might be thought that where the person's wishes, feelings, beliefs and values are so profoundly ambivalent, it is actually an abdication of judicial responsibility to take such a course of action. It is not for nothing that those closely involved with the Convention on the Rights of Persons with Disabilities, who wish all decisions to be based upon the person's will and preferences, consider anorexia cases so difficult – or that, for all their efforts, they are not able to provide a clear way through such dilemmas. That the buck may have to stop with a judge may, ultimately, be necessary in such cases, which (1) places a responsibility on the judge which should not be underestimated; and (2) increases the responsibility on the parties and experts to provide the best possible evidence upon which the judge can reach their decision – including evidence that frankly acknowledges uncertainty.

In light of the observations in the paragraph above, some might be wondering whether cases such as Patricia's should really come to the Court of Protection, to speak the language of 'best interests,' and be guided by a requirement to make a decision framed by reference to the person's known wishes, feelings, beliefs and values. They might think that life is (metaphorically) easier under the MHA 1983, with its 'harder-edged' approach to decision-making – there is, in other words, no need to become tangled up in the essentially existential dilemma that faced Moor J. Rather, it is a simple(r) question of identifying what treatment is appropriate, and simply going ahead and providing it, irrespective of whether it is what the person says that they want. There is an element of truth to this, and this case might make some take stock of whether they want to have recourse to the Court of Protection, or

whether they want to approach patients with anorexia through the prism of the MHA 1983 which makes no (formal) pretence to putting the clinician in the shoes of the patient. However, case-law is already bending the 'appropriate treatment' test firmly towards the best interests test within the MCA 2005 – and, when the MHA Bill comes into force – statute will follow suit.[4] And, as the decision in the *Leeds and York Partnership NHS Foundation Trust v FF & Anor* [2025] EWCOP 26 (T3) shows, it is likely that clinicians who consider (for whatever reason) they have reached the 'end of the line' as regards compulsory feeding may still want to obtain the confirmation of the court (in this case the King's Bench Division) that non-treatment under the MHA 1983 is lawful even if it may lead to the patient's death. We are therefore likely to still to see cases before the court, and, for our part, we consider that this is only appropriate given the gravity of the issues at stake. Again, however, this brings with it the requirement that the court is given the best possible evidence about the options, is empowered to interrogate those options, and builds in sufficient contingency planning for the future (and a reminder that the judgment that is then given only relates to that case, rather than to the treatment of eating disorders more generally).

Three last observations:

1. These dilemmas are made much worse by the fact that services are so stretched. It is not coincidental that the frequency and severity of cases coming to the Court of Protection has increased so significantly over the past few years – or that the choices being placed before the court have become so stark;

2. As Arbuthnot J's observations about the evidence of Dr Ibrahim in her judgment make clear – and perhaps in part a side-effect of (1) above – emotions are running very high in this context, not just amongst family members, but amongst professionals. I hope that the case will allow stock to be taken: (1) as to why there are such differences in approach between clinicians; (2) what common ground there is; and (3) what both lawyers representing parties and the courts need to be told of as regards the potential differences in approaches. A starting point might be the relevant part of this webinar, in which Dr Lucy Stephenson gives a primer on anorexia and why (colloquially) it pushes so many buttons, especially when it seems to have become in some way untreatable.

3. As the webinar noted at (2) above discusses, it is hardly surprising that anorexia is featuring so heavily in the debates around the Terminally Ill Adults (End of Life) Bill, as it is a condition which cannot be neatly compartmentalised off from the conditions which are intended to be within the scope of the Bill.

Short note: cancer investigations and mental ill health

Those living with serious mental health conditions also regularly fail to be supported to access the physical health care that they need. In *St George's University Hospitals NHS Foundation Trust v MN* [2025] EWCOP 28 (T3), the Trust brought an application – albeit some 10 months after the first suspicion arose – to ensure that a person with a serious mental health condition underwent the necessary investigations of potential anal cancer. He lacked the relevant decision-making capacity,

[4] Albeit without using the language of best interests, because the MHA 1983 will still be applicable to those who have capacity to make decisions about medical treatment for mental disorder.

and was (inconsistently) expressing reluctance to undergo the investigations. Peel J considered that the delay in making the application could not "remotely be justified," and suggested that the Trust needed to review why it took so long to embark on legal proceedings (paragraph 10).

Peel J was clear that the application should be granted, for the following reasons (at paragraph 21):

> *i) MN's objections to the exploratory investigations are not based on an informed, rational understanding of what is proposed, the benefits and the burdens. His resistance is, instead, infected by delusional beliefs outlined above. This is not a case where there is evidence of his views before loss of capacity. In this case, his personal beliefs and appraisal of what the clinicians are proposing are rooted in long standing paranoia.*
>
> *ii) There is nothing to suggest that he actively wants his life to end, or, putting it another way, that he would not want the opportunity for the quality of his life to be enhanced, and for the duration of his life to be prolonged. Indeed, he expressed the clear view to the OS's agent that he does not want to die. Further, his views about undertaking further medical investigation seem to have fluctuated, in that he did not vigorously oppose it when talking to his IMCA or the OS's agent whereas he is aggressively dismissive to the clinicians.*
>
> *iii) The evidence is that at mention of the word "cancer" he becomes agitated, so it would clearly be sensible not to use that word to or in front of him when informing him about the intended hospital admission.*
>
> *iv) The investigations are required to confirm the diagnosis, the stage of the tumour, and whether it has spread. Further, they are necessary to enable an assessment of treatment options to take place and, if treatment is not viable, how palliative care can be implemented.*
>
> *v) If the investigations are not carried out, potentially life saving treatment options cannot be considered. If cancer is present, MN would likely experience an increase in pain and discomfort, including itching, pain, bleeding and blockage in the anal canal. It would spread to other areas leading to death.*
>
> *vi) The testing should provide a definitive diagnosis of whether he has cancer, and enable the team to prepare a treatment plan, which would include pain mitigation. He is currently experiencing physical discomfort and it is desirable to reduce or eliminate the pain if possible.*
>
> *vii) I regard MN's situation as urgent given the lengthy delay since anal cancer was first suspected. In my view, the investigative work should be done as soon as possible, although the evidence is that it will require 2 weeks to make all the necessary arrangements which are challenging and multi faceted to coordinate.*
>
> *viii) General anaesthetic would minimise movement and distress and enable all the tests to be completed in one day. I am satisfied that carrying out the investigations without a general anaesthetic is not a clinically recommended option in this case, and although there are risks involved, they are no greater for MN than any other patient. I was told that the general anaesthetic would last 1 ½ - 3 hours and it is advantageous to carry out all the investigations under the one anaesthetic.*
>
> *ix) If the diagnosis is confirmed, likely future treatment options are chemotherapy and radiotherapy, potentially followed by surgery which would be major and accompanied by a*

permanent colostomy bag. Authorisation to take these steps is, properly, not sought by the Trust at this stage which must await the outcome of the testing procedures, and then reconsider capacity and best interests. At this stage, what is sought is investigative only and, in my judgment, a proportionate and appropriate step to take.

x) I approve the Deprivation of Liberty sought, if and insofar as it is required to enable transportation and the planned investigative medical procedures. It is likely that restraint (physical and/or chemical) will be required. It is, in my judgment, a proportionate and necessary interference with MN's rights to facilitate the testing to be carried out.

The application was adjourned to a further hearing to consider any potential treatment options required in consequence of the investigations.

SCIE sounds the alarm on MCA reform

The Social Care Institute for Excellence is not normally an alarmist body, which makes its recent (26 August 2025) statement on MCA reform all the more striking. We reproduce the material sections below:

*Failure to act on long-delayed reforms to the Mental Capacity Act is contributing to **preventable deaths**, **unlawful detentions** and **growing human rights concerns**.*
The Mental Capacity Act (MCA) is the legal foundation for decisions made on behalf of people who cannot decide for themselves, because of dementia, learning disability, brain injury or serious illness. It governs some of the most sensitive decisions in life: medical treatment, financial control or the need for care.

Crucially, the MCA also governs when and how someone can be lawfully deprived of their liberty, such as when they are confined to a hospital or care home for their own safety. These safeguards, known as Deprivation of Liberty Safeguards (DoLS), are embedded in the MCA. If DoLS aren't working, the MCA isn't working.

The Government's attempt to fix this, through the Mental Capacity (Amendment) Act 2019 and the introduction of Liberty Protection Safeguards (LPS), has stalled. Implementation was paused in 2020. Five years on, reform is frozen, yet demand is rising and consequences are escalating.
*The Social Care Institute for Excellence's (SCIE) **new analysis of Care Quality Commission** (CQC) assessments of local authorities, as of August 2025, reveals that:*

- ***67% of local authorities** inspected were found to require improvements to their DoLS arrangements.*
- *The most frequent issue raised in CQC inspections was **failure to process deprivation of liberty requests lawfully or on time**.*
- *Local authorities themselves cited **staffing shortages and rising demand** as key drivers of the backlog.*

This is occurring against a backdrop of soaring requests, with over 332,000 DoLS applications made in 2023/24, a stark contrast to the original Government estimate of just 21,000 per year. In

practice, only 19% of these are completed within the 21-day legal requirement, with significant numbers waiting between 12 and 18 months for completion.

The Mental Health Bill 2025 aims to stop adults with autism or a learning disability from being inappropriately detained under mental health law unless they also have a co-occurring mental illness. But many of these individuals will instead be placed under the DoLS system, a system already at breaking point. Without functioning MCA safeguards, these adults risk being transferred from one form of detention to another, without any legal protection or meaningful right of appeal. Similarly, the proposed Terminally Ill Adults (End of Life) Bill relies on an individual being able to demonstrate clear and settled capacity in deciding to end their life. However, the MCA provides no adequate framework for assessing capacity in such decisions.

As the Chief Executive, Kathryn Marsden OBE, notes:

The concern is that while other parts of the legal and policy framework are being modernised, such as the Mental Health Bill and potential assisted dying legislation, they are being built on a foundation that is crumbling.

The Mental Capacity Act is the bedrock of these reforms. If that foundation is not functioning, then nothing built on it will be stable.

Reform cannot wait for the long legislative cycles of Government. While the full implementation of LPS may still be some way off, urgent action is needed to stabilise and improve the current system.

With rising demand, mounting delays and legal ambiguity, continuing inaction will only deepen injustice and increase costs, both human and financial.

SCIE is therefore calling for:

- *renewed Government commitment to the Mental Capacity (Amendment) Act, with a roadmap for review and implementation*
- *publication of updated Codes of Practice, which have not been revised since 2007, despite major legal developments*
- *investment in workforce training, supervision and post-qualification development so professionals can confidently and lawfully apply the MCA*
- *revisiting the core principles of the LPS model, enabling a more flexible, portable and person-centred approach to deprivation of liberty*
- *strengthening of CQC inspections, so that failures in applying the MCA itself (not just DoLS backlog) are monitored and addressed.*

We are particularly glad to see that SCIE is asking for things to be thought across across the piece – and we would add to the piece also the changes that the Law Commission are proposing in relation to Wills which include (buried in the report) proposals for reforms to enable better support for decision-making, and a recasting of the MCA to place greater weight on the person's wishes and feelings. Whilst

the DoLS saga shows that simply having law in place is not a guarantee that rights protected by that law will actually be protected, having the right law in place is a crucial foundation.

PROPERTY AND AFFAIRS

The OPG annual report

The OPG has published its annual report and accounts for 2024-2025. It has cleared its backlog for registering LPA applications but, as the report acknowledges at the outset:

> *We do, however, face significant challenges in investigations. The number of cases continues to grow, and this year we were unable to meet the 70 working days target for completing investigations. While this is not a position we want to be in, the team have worked hard to ensure we are still meeting our targets on safeguarding – consistently responding to 99% of calls within the 3-minute window and triaging 98% of acute cases within two days to protect those who need it most. To work to reduce the backlog in investigations the team have implemented several creative solutions to intercept cases earlier and pre-empt investigations. This is an organisation wide priority for 2025 to 2026 as we remain committed to taking consistent and timely action to ensure we enact our responsibility to intervene when our clients' best interests are not being upheld.*

In more detail (at page 17):

> *The continued growth in LPA demand has been the primary contributing factor to the proportional increase in the number of investigations. This year, concerns raised with OPG increased to 11,266 from 10,577 last year, representing a 6.5% increase. This increase corresponds with the increase in the number of LPAs registered, which has risen by 1,301,364. In response to the increasing number of investigations and to support our long-term approach to managing investigations we are proactively exploring the main causes, identifying process improvements, and using data to predict future trends.*
>
> […]
>
> *Of the 11,266 concerns raised, 3,823 were accepted as investigations (34%) with 7,443 (66%) being signposted appropriately.[5] Each investigation leads to a report that summarises the investigation and provides any recommended actions. The reports are agreed and approved by the Public Guardian, or by those within OPG who have the responsibility to sign on the Public Guardian's behalf. OPG's target for finalising and achieving either Public Guardian approval for investigation reports or a legal case review is within 70 working days of the concern being raised.*
>
> […]
>
> *During 2024 to 2025, in 73% of investigations undertaken, no further action was required, compared to 77% last year. Additionally, 24% of investigations resulted in Court of Protection action, compared to 15% last year. For 3% of investigations, we used alternative methods to making applications to court. These included asking attorneys to provide a revised account in a few months to demonstrate how they are adhering to the code of practice.*

[5] It would be interesting to have more detail about this, as 34% does appear to be quite low as a proportion.

LPA fee increase

The MoJ has announced an intention to increase the LPA application fee from £82 per LPA application to £92. The new fee will be payable for LPA applications received by the Office of the Public Guardian (OPG) from 17 November 2025.

P&A Court User Group Minutes

The Minutes of the July meeting have now been published. Amongst the issues of wider relevance include the following exchanges relating to capacity assessments.

> *The issue we are having is that COP3 assessments are being rejected on the basis that no formal diagnosis of an impairment of the mind or brain is given. In each instance we have sent a COP9 referring to observations of MacDonald J and the information from the COP3 form, that a formal diagnosis is not required. Each time the new order requiring a new capability assessment "by a suitably qualified medical practitioner" has been set aside. Please can there be clarification on this.*
>
> ***HHJH** referred the group to **paragraphs 44, 47 & 48 of** MacDonald J's judgment in North Bristol NHS Trust v. R [2023] EWCOP 5*
> ***https://www.bailii.org/ew/cases/EWCOP/2023/5.html***
>
> ***HHJH** explained that internally she has regular 'supervision' meetings with the Authorised Court Officers (ACO's), and this judgment has been discussed so she is confident that there is full and proper awareness of it. The issue is whether the COP3 submitted satisfies the decision-maker that there is a causative link between functional incapacity and mental impairment/disturbance. Without commenting on any individual case, there are circumstances where evidence submitted makes it entirely appropriate for a decision maker to query this. **HHJH** noted that BS is clearly aware of the correct procedural route to raise any concern about an order made on the papers (COP9 application for reconsideration), so the system seems to be working.*
>
> ***HHJH** advised of an additional question raised directly to an ACO outside the meeting : 'we understand that virtual capacity assessments were acceptable during covid, is this still ok now, as we are finding that more GP's, social workers and psychiatrists are refusing to carry these out?'*
>
> ***HHJH** responded that accommodations for this were made during the pandemic and although these are still possible where circumstances require it, remote assessment is not the optimal way for P to be seen. If a virtual assessment is undertaken, an explanation must be provided as to why and as to what support measures were provided to P. An explanation based simply on 'stretched resources' is unlikely to be persuasive.*

Senior Judge Hilder also gave some useful clarifications around tenancies:

> ***HHJH** highlighted the difference in tenancies in respect of where P's lives and tenancies as investment property. The templates for appointment of a professional/solicitor deputy do not standardly include express provision in respect of tenancies that P live in; templates for LA deputies do. This is because of the different types of estates commonly handled by the different types of deputies. In respect of powers of management and investment, see Re ACC para 53.3. It is common practice for professional deputies to be given explicit authority to let or manage investment properties. Evidence in support of an application for such authorities should be filed on*

form COP24. If the issue relates to P's home, evidence of where P will live if a tenancy is terminated, and any deprivation of liberty authorisation should be provided.

Sheree Green (SG) Greenchurch Legal Services Ltd via the chat *often for panel appointments, we have folk in supported living with a tenancy. Is it possible to extend the clause included in the local authority deputyship orders to panel orders?*

HHJH *confirmed that yes that is possible. The request should be made clear in the application.*

PRACTICE AND PROCEDURE

The Court of Protection (Amendment) Rules 2025

These Rules were laid before Parliament on 15 July, and come into force on 1 October 2025. They make a number of changes in relation to committal proceedings, especially to pick up the problems identified by Poole J in *Esper v NHS North West London ICB* [2023] EWCOP 29.

Rule 3 amends rule 4.1(4) of the 2017 Rules to remove a defunct cross-reference.

Rule 4 amends rule 21.4(2) of the 2017 Rules, which requires a committal application to give information to a defendant about their rights including their right to silence, to incorporate a requirement to warn the defendant of the risk of a court drawing adverse inferences from that silence if that right is exercised. This follows the decision in Inplayer Ltd. and another v. Thoroughgood [2014] EWCA Civ 1511 and aligns with the position in criminal proceedings.

Rules 5 and 6 amend, respectively, rules 21.7 and 21.8 of the 2017 Rules, concerning hearings in contempt proceedings, in response to the decision in *Esper*:

1. Rule 21.7 of the 2017 Rules is amended to require the court to consider, before the first hearing of any contempt proceedings, whether to make an order under rule 21.8(5) for the non-disclosure of the identity of the defendant in the court list. This is to prevent the utility of any subsequent non-disclosure order being undermined by the prior public notice of the identity of the defendant.

2. Rule 21.8 is amended to provide that the court has a discretion to order the non-disclosure of the identity of any person during contempt proceedings, where certain criteria are satisfied. Currently, the rule mandates non-disclosure where those same criteria are satisfied, but only in respect of a party or witness to the contempt proceedings. Rule 21.8(11A) is inserted to clarify that the court's discretion does not extend to restricting the disclosure of the identity of a defendant who has been convicted and sentenced to a committal order. An amendment to rule 21.8(13) clarifies that the judgment is transcribed and published solely where the court has made an order for committal.

Anorexia, the Mental Health Act and the Court of Protection – a clear route map for cases

Leeds and York Partnership NHS Foundation Trust v FF & Anor [2025] EWCOP 26 (T3) (McKendrick J)

Mental Health Act 1983 – interface with Mental Capacity Act

Summary[6]

In this case, McKendrick J made some very helpful observations about how the courts should proceed in a case where clinicians are seeking clarification that treatment steps that they are proposing to take (or, more often not take) in relation to a patient detained under the MHA 1983. This is an issue which is coming up particularly often in relation to patients with anorexia.

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

As McKendrick J noted at the outset of the judgment:

> *4. At the heart of this application is the nature of the medical treatment and ancillary treatment by way of restraint or force or sedation which should be provided by the Trust to FF to treat her anorexia. Her anorexia is long-term and pervasive and has had the most profoundly negative consequences on her health, her well-being and the quality of her life for very many years. Whilst I will survey briefly the evidence in respect of her capacity, I record at the outset that there is no dispute that FF lacks capacity to consent to receive the medical treatment to treat her anorexia and she lacks capacity specifically in relation to whether or not to consent to receive clinical artificial hydration and nutrition by force (whether that is by restraint or chemical sedation) or the threat of such force. That lack of capacity is agreed between the Trust, who filed detailed evidence in support, by her father, GG, and by the Official Solicitor as her litigation friend.*
>
> *5. That therefore gives way to this court exercising a best interests jurisdiction pursuant to the Mental Capacity Act 2005. I will need to deal with an ancillary question, that being, whether under a full merits review, this court agrees with FF's responsible clinician's decision not to impose treatment pursuant to the terms of section 63 of the Mental Health Act 1983 upon her. Those are the only two questions that this judgment is particularly concerned with. Issues of whether FF remains under section 3 of the Mental Health Act 1983 are not issues for me sitting as a Tier 3 Judge in the Court of Protection. I am not sitting as any form of First-Time Tribunal reviewing the conditions or nature of her detention under the 1983 Act. I am only concerned with those two in-effect interrelated issues of her medical treatment. It will be necessary later in this judgment to consider what is the correct legal and procedural route to deal with the second question, namely how a declaration should be made in respect of the question of section 63 of the 1983 Act.*

The Trust's position as that it was:

> *6.* […] *no longer in FF's best interests to receive clinical artificial hydration and nutrition by force or restraint, or by the threat of the use of force. Their position is that they will continue to provide a full suite of treatment, care, assistance and a high level of professionalism, which they have provided throughout, but they have come to the conclusion that hydration and nutrition under section and in the light of the terms of section 63 of the Mental Health Act 1983 by the use of force or restraint is no longer clinically indicated, it being futile, burdensome and damaging to FF. Therefore they also submit that I should make the declaration that the responsible clinician's decision not to impose treatment pursuant to section 63 of the 1983 Act is lawful.*

FF's father, GG, agreed, as did with the Official Solicitor, such that:

> *7.* […] *Therefore this matter proceeds with the agreement of all parties but nonetheless, given the gravity of the relief sought, it is incumbent on the court to carefully scrutinise the evidence and provide some detailed reasons for granting the relief. It would not in my judgement be appropriate in a case like this simply to approve a consent order. It is the very role of the court to ensure that what the parties agree to is appropriate and in the best interests of the patient under the Mental Capacity Act 2005 and that the full merits review and scrutiny of the declaration sought pursuant to section 63 is also the appropriate relief.*

Having conducted a detailed review of the evidence before him, McKendrick J concluded that:

37. I approach this case with the utmost gravity in those circumstances. But having said all of that, it is clear from what I have recounted of the evidence that FF's quality of life is sadly at an extremely low level. She considers the nutrition that she receives torturous; she describes it as poison. It is difficult to read how she likens it to sexual abuse and rape. Her profound opposition to that is laid bare by the requirement for seven or eight people to use force and restraint at times. The physical and psychological impact on her is profound. I have no doubt in concluding that the treatment regime is extremely burdensome. I have discussed with counsel the extent to which the treatment regime is futile. The provision of hydration and nutrition is not futile in as much as it sustains life, but the combination of artificial hydration and nutrition and the threat of force is futile in treating the anorexia nervosa. It is also highly burdensome.

[….]

41. FF's wishes and feelings, which I must have regard to, and it would be entirely wrong not to, notwithstanding the profound disordered thinking brought about by her anorexia, are difficult to ascertain. But I am clear that it is her wish to remain alive and it is her wish to stop the poison and stop the torture. The pathway that has been set out by the Trust is, in their judgment, with the agreement of those involved in FF's care, the best possible way forward to sustain her life and unburden her from the physical and psychological demands of the regime that she has been subject to. I have considered carefully the fact that physical restraint has not been used for a significant period of time, but it seems to me there is no easy answer to that because FF is fully aware that if she does not have calories for 48 hours, that the threat of force can become a reality, and that is what has encouraged her to return to accept nutrition. Therefore it would be false for me to take any comfort in the lack of force being used for some time.

42. I have considered carefully, as I must as a public authority, her Article 2 right to life, her Article 3 right not to be subject to any inhumane or degrading treatment and her right to psychological and physical integrity and her Article 8 rights. As is clear from the case law, the best interests analysis includes consideration of all these fundamental human rights. When I consider the terms of section 4 of the Mental Capacity Act 2005 and the evidence I have read, taking into account those fundamental human rights, as the parties all agree, the best interests declaration that the Trust seek is the appropriate one. The continuation of futile and burdensome treatment which causes significant psychological damage with no proper way out has gone as far as it can, and the treating team are right to craft an alternative treating plan which is not reliant on force. To continue to do so, in the harrowing circumstances which I have read and sought to describe in this judgment, would be wrong. Therefore I conclude that the section 16 order the Trust seek should be made.

That was not the end of the story, however, because the Trust also sought an order declaring that their decision not to rely upon s.63 MHA 1983 to impose nutrition by force was lawful. Having conducted a review of the case-law, McKendrick J noted that:

53. There is not any dispute between counsel as to the fact that in a case like this, a full merits review is required. There is no dispute between the three parties that I should make a declaration that the responsible clinician is correct to conclude that treatment should not be forced upon FF under the auspices provided to the responsible clinician of section 63 of the Mental Health Act 1983. I agree with that view, and my reasons for agreeing with that view are essentially the same as those which have led me to make the section 16 order pursuant to the Mental Capacity Act 2005, namely that the continuation of restraint and force or the threat of such to provide artificial hydration and nutrition to FF is not in her best interests. Having concluded it is not in her best

> *interests, I cannot see a proper case for this court to refuse the declaration sought in respect to section 63 of the Mental Health Act 1983, in circumstances where there are no wider public issues.*

However, that gave rise to a procedural issue as to how that declaration could be made:

> *54.* [….] *Should that declaration be made under the powers available to this court, as set out in the Mental Capacity Act, in particular section 15? Should the declaration be made under the court's inherent jurisdiction? I am providing this judgment ex tempore and therefore there is a limit to the analysis I can provide, but counsel have raised the issue, and they are right to do so. Different judges have taken different positions in respect of this, and so counsel have suggested it would be helpful to have some guidance. I am not in a position to provide guidance, but my own view in these cases, where there are issues of capacity and best interests but there are also issues between the detained patient and the Mental Health Trust, is that it is helpful for these latter proceedings to be issued pursuant to Part 8 of the Civil Procedure Rules seeking the application of the Civil Procedure Rules, and in particular CPR Rule 40.20, granting a declaration but doing so in reliance on the statutory powers available to a judge of the High Court pursuant to section 19(2)(a) of the Senior Courts Act 1981.*
>
> *55. Tempting as it is to make the declaration under the Mental Capacity Act 2005, it does not seem to me that that is the correct approach, and whilst section 15 is drafted in broad terms, it must be read and understood in the context of the Mental Capacity Act 2005. There are many patients who receive treatment compulsorily pursuant to section 63 of the 1983 Act who have capacity. Part of the reason for that are issues of public safety and wider public policy. These issues may well involve other somewhat different interests, and it is easy to imagine there might be parties who wish to intervene in such cases. It seems to me it is always helpful for there to be a procedural code which leads to the declaration being granted. It is clear from this case it is not the Family Procedure Rules, and it does not seem to me appropriate to apply the Court of Protection Rules for the reasons I have just stated. Therefore it seems to me that the Civil Procedure Rules should apply.*

McKendrick J also considered the relevance of the inherent jurisdiction, and considered that there was no gap in the statutory scheme which fell to be filled by the inherent jurisdiction, but reached the conclusion that:

> *58. There is no need, as we are told by the Court of Appeal in the case of DL v A Local Authority [2012] EWCA Civ 253, to resort to the inherent jurisdiction when Parliament has codified in statute the court's jurisdiction to make declarations. There is an issue between the Trust and FF regarding the treatment, and it is right that a declaration be made as between FF and the Trust which is binding, and that sits ancillary to the section 16 order that I have made under the Mental Capacity Act 2005. It also seems to me that in these cases it is going to be of benefit that whilst the Court of Protection application is issued to deal with capacity or best interest issues, a Part 8 claim form is also issued to deal with the declaration separately in respect of section 63 of the Mental Health Act 1983. There is no need for anything further to be done other than that claim form to be served, and for that Part 8 claim form to note the evidence and background set out in the Court of Protection. But given these applications for declarations in respect of section 63 may deal with wider issues of the safety of the public and other issues, the role of the CPR in providing for experts, open justice, and of course costs, is of benefit to any judge hearing these dual applications. That is not intended in any way to drive*

> *up costs or make matters more cumbersome, but adherence to the procedural rules is of course important.*
>
> *59. For those reasons, therefore, I grant a declaration in respect of questions of capacity pursuant to section 15 of the Mental Capacity Act 2005; I make the order sought by the Trust in respect of best interests under section 16 of the Mental Capacity Act 2005; and I will make a declaration in respect of section 63 of the Mental Health Act 1983 pursuant to section 19 of the Senior Courts Act 1981. Those are my reasons for granting the substantive relief in these difficult proceedings.*

Helpfully, McKendrick J set out in an annexe to the judgment the terms of the final order. One important point to note is that the declaration was expressly framed, so as to apply as to "all future hospital admissions unless professionals undertaking assessments (for the purposes of MHA detention) form the reasonable and bona fide opinion that they have information not known to this court, and which puts a significantly different complexion on the case" (i.e. *von Brandenburg*). McKendrick J also made clear in relation to the s.16 order made that his decision on his behalf was not fixed for all time: "[i]f at any time FF expressly accepts or requests an escalation of treatment to provide nutrition and hydration or consequential treatment of the medical complications which may arise from her diagnosis of anorexia nervosa, such treatment will be provided if her treating clinicians consider it clinically indicated and in her best interests at the relevant time."

Comment

One immediate point to make in light of the sometimes radical misunderstandings of Court of Protection cases relating to eating disorders is that McKendrick J was not making generalised pronouncements as to the use of force or otherwise in the treatment of anorexia, or about whether and under what circumstances the Court of Protection must be approached.

However, what McKendrick J was doing was (despite his cautious approach to doing so) making a generalised pronouncement about how procedurally to approach the situation of a patient detained under the MHA 1983 where the clinicians have – for whatever reason – decided that they do not feel that the tools of the MHA 1983 provide the answer to the ethical dilemmas that have arisen and have, instead, sought to answer that dilemma by reference to capacity and best interests. Despite being a ex tempore judgment (i.e. one delivered 'live'), I would suggest that his conclusions are entirely correct and provide a very clear route map going forward.

Tracking down the abducted 'P' – a menu of options for Court of Protection practitioners

Re AB & Ors [2025] EWCOP 27 (T3) (McKendrick J)

Practice and procedure – other

The Court of Protection on occasion has to deal with those who are determined to stymie its jurisdiction. In *Kirk v Devon County Council* [2017] EWCA Civ 34, Sir James Munby, through gritted teeth, accepted that the end of the line had been reached in relation to a P who had been abducted to Portugal. In *Re AB & Ors* [2025] EWCOP 27 (T3), McKendrick J refused to accept that the end of the line had yet been reached in relation to a P abducted to Jamaica. His reasons for giving a detailed judgment setting out the background and the concerns relating to P were two-fold.

The first was that he remained:

> *33.* […] *concerned about AB's welfare in Jamaica notwithstanding the fact the orders made by this court have led to her being located and seen by the Jamaican authorities. This judgment will therefore be sent to the A Police Force in the UK, the Jamaican Police and the consular team at the British High Commission in Kingston Jamaica. A County Council will impress upon those authorities that AB is very vulnerable and that there is an alarming history of safeguarding concerns in respect of AB. Furthermore, the authorities will be reminded that Mrs O had not authority to remove her from England and Wales and did so contrary to orders of this court. Mrs O has been served with orders of this court and she has continued to act in defiance of those orders.*

The second was that:

> *34.* […] *there were steps that could have been taken to locate AB earlier, when it became clear Mrs O would not comply with the return orders. It may be helpful for practitioners in the Court of Protection to understand the steps that can be taken to locate missing persons. Such orders in the High Court are often used to locate missing children. This was made clear in HM and PM and KH[2010] EWHC 870 Fam– a decision of Munby LJ (as he then was). He said this at paragraphs 34 to 36:*
>
> > *34. None of these various orders would be thought surprising or unusual by those familiar with the practice of the Family Division when trying to locate and retrieve missing or abducted children. But before turning to consider the appropriateness of such orders being made in a case, such as this, where the abducted person is not a child but a vulnerable adult, there are two aspects of the jurisdiction which, however familiar to expert practitioners specialising in this field, merit some further elaboration.*
> >
> > *35. The first relates to the power of the court to order third parties to provide information.*
> >
> > *36. It has long been recognised that, quite apart from any statutory jurisdiction (for example under section 33 of the Family Law Act 1986 or section 50 of the Children Act 1989), the Family Division has an inherent jurisdiction to make orders directed to third parties who there is reason to believe may be able to provide information which may lead to the location of a missing child. Thus orders can be made against public authorities (for example, Her Majesty's Revenue and Customs, the Benefits Agency, the DVLA, local authorities or local education authorities, etc, etc) requiring them to search their records with a view to informing the court whether they have any record of the child or the child's parent or other carer. Similar orders can be directed to telephone and other IT service providers, to banks and other financial institutions, to airline and other travel service providers – the latter with a view to finding out whether the missing child has in fact left the jurisdiction and, if so, for what destination – and to relatives, friends and associates of the abducting parent. In appropriate cases, though this is usually confined to relatives, friends and associates, the court can require the attendance at court to give oral evidence of anyone who there is reason to believe may be able to provide relevant information. Compliance with such orders can, where appropriate, be enforced by endorsing the order with a penal notice and then, in the event of non-compliance, issuing a bench warrant for the arrest and compulsory production in court of the defaulter.*
>
> *35. It may also be helpful to refer to Re S (Ex Parte Orders)[2001] 1 FLR 308 at page 320 and also London Borough of Hackney v A, B and C [2024] EWCOP 33(T3). I am satisfied that the Court of Protection can make such third party disclosure orders.*

> *36. In addition to these powers, the power to compel persons to file evidence and attend court to provide sworn evidence is a useful tool, used sparingly, to assist to locate missing persons. It is frequently used in the Family Division to locate children. It took two directions to file witness statements and attend court to give sworn evidence (orders directed to Mr O and his daughter, YM) for the landline number to be produced to enable the Jamaican police to locate AB.*

In relation to AB's case, McKendrick J considered that this meant:

> *37. It follows therefore that the agreed position of the parties at the hearing before me in March 2025, that permission for these proceedings to be withdrawn should be given was, in my judgement, misconceived. Counsel for A County Council told me his instructions were to seek to permission to withdraw the proceedings albeit his client's position was that it was in AB's best interests to return to reside in England and Wales.*

McKendrick J made clear that he had not overlooked the question of his jurisdiction sitting as a Court of Protection judge between March and July 2025. As he noted at paragraph 38 "[a]s with children, so it is with vulnerable adults: habitual residence is key to jurisdiction." Counsel for Mrs O had never (and McKendrick J considered rightly) submitted that the Court of Protection had no jurisdiction, although she had come close to submitting that AB was now habitually resident in Jamaica. McKendrick J accepted that there was a "clear and arguable case that AB may have lost her habitual residence in England and Wales and at some stage since February 2023 she may have become habitually resident in Jamaica." He referred himself to the extensive review of the case-law relating to this issue in *Re QD (Jurisdiction: Habitual Residence)* [2019] EWCOP 56, before continuing:

> *40. I have not had to determine AB's habitual residence. No party had submitted I have no jurisdiction. Mrs O has filed no evidence as to AB's circumstances nor has she sought to explain or justify her decision to remove AB in February 2023. Mr O has not sought to file evidence in respect of AB's situation in Jamaica for the purposes of submitting the factual evidence before the court now demonstrates AB is habitually resident in Jamaica. In any event, I would have been satisfied my limited orders made to locate AB fell very much within the jurisdiction set out by Holman J in Amina Al Jeffrey v Mohammed Al-Jeffrey (Vulnerable Adult: British Citizen) [2016] EWHC 2151 (Fam). Furthermore, even if she were habitually resident in Jamaica, I consider this court retained a residual jurisdiction in respect of the orders previously made when it was obvious this court had jurisdiction based on AB' habitual residence, because the orders I made were related to, and ancillary to, the previous return orders. For these reasons, albeit there was no dispute, I have satisfied myself that there has been jurisdiction for me to make the orders between March and July 2025 to locate AB. If a form COP 9 is filed asking me to make a return order, I may need to pause to consider jurisdiction more fully.*

In relation to further steps that could be taken to secure AB's return to England & Wales, McKendrick noted:

> *41. I should also add that whether or not there is to be an application for contempt is one for the applicant and Official Solicitor. There appeared to be a reluctance to consider any form of contempt against Mrs O because it was felt to be lacking in utility because she is in Jamaica. However, directions and orders made in March 2025, clarified that Mrs O likely owns fifty percent of the family home. The possibility of confiscation of Mrs O's interest in the family home pursuant to COP*

> *Rule 21.9 (1) if she were found to be in contempt of court, certainly appeared to encourage Mr O to cooperate.*
>
> *42. It may well be that the combination of: (i) the DWP's likely consideration of terminating AB and Mrs O's benefits; (ii) and the potential for the parties to make clear to Mrs O that if she return to England and Wales with AB, they would not pursue contempt proceedings against her; and (iii) nor would they seek a costs orders pursuant to COP Rule 19.5 (1), will encourage Mrs O and AB to return. That is a matter for them.*

McKendrick J therefore ordered a stay, with permission to the parties for file an application for a lift of the stay within the next 6 months, failing which the proceedings would stand dismissed with no order as to costs:

> *43. Notwithstanding the fact AB has not returned to this jurisdiction, I consider the order for a stay is appropriate. The applicant local authority have themselves met with Jamaican lawyers to consider an application there for a return order in that jurisdiction. They tell me they will continue to liaise with the UK police. For these reasons, having located AB and ever mindful of the need for this court to take a proportionate approach, I see only the very limited role, which I have described above, for this court going forward.*

Comment

Paragraphs 34 to 36 of the judgment are particularly helpful in terms of outlining clearly the menu of options for seeking to identify and compel the return of missing persons. One observation, however, is that it is necessary to proceed with a little care in terms of enforcing orders. It is undoubtedly possible to attach a penal notice to an injunction; breach of such a notice will be contempt, and can be "punished by a fine, imprisonment, confiscation of assets or other punishment under the law" (see the definition of 'penal notice' in CPR r.21.2(2)). It is, however, not possible to attach a power of arrest directly to an order of the Court of Protection. As HHJ Bellamy (sitting as a Deputy High Court Judge) noted in *FD (Inherent Jurisdiction: Power of Arrest)* [2016] EWHC 2358 (Fam), the High Court does not have the power under its inherent jurisdiction to attach a power of an arrest to an injunction; as the Court of Protection's enforcement powers derive (via s.47) from the High Court's powers, the Court of Protection equally does not have the power to attach a power of arrest directly (see also, albeit only in passing, paragraph 45 of this judgment of HHJ Mitchell from January 2025).

Short note: smoke, fire and fact-finding

In *H (Children) (Findings of Fact)* [2025] EWCA Civ 993, the Court of Appeal reminded practitioners in family cases – in observations equally applicable to those in Court of Protection cases that:

> *65. In a case in which there are multiple allegations, a Judge must always guard against the temptation to approach the evidence on the basis that something must have happened;* […]. *In this case, the Judge had rightly been invited by counsel to consider the comments of Lord Hewart CJ in Bailey [1924] 2 KB 300 at 305, regarding the judicial approach required in cases in which the court is faced with determining a very large number of allegations:*
>
> > *"The risk, the danger, the logical fallacy is indeed quite manifest to those who are in the habit of thinking about such matters. It is so easy to derive from a series of unsatisfactory*

> *accusations, if there are enough of them, an accusation which at least appears satisfactory. It is so easy to collect from a mass of ingredients, not one of which is sufficient, a totality which will appear to contain what is missing. That of course is only another way of saying that when a person is dealing with a considerable mass of facts, in particular if those facts are of such a nature as to invite reprobation, nothing is easier than confusion of mind; and, therefore, if such charges are to be brought in a mass, it becomes essential that the method upon which guilt is to be ascertained should be stated with punctilious exactness" (Emphasis by underlining added).*

The Judge was further taken to Macdonald J's comments in Re P [2019] EWFC 27 at [272] where he said (having quoted the extract from Bailey above):

> *"The totalising approach must be avoided if the court is to steer safely clear of capitulating to suspicion and the beguiling adage that there is 'no smoke without fire'" (Emphasis by underlining added).*

The judicial advice from Bailey and Re P set out above was particularly apt to this case.

Taking video evidence from abroad

Newcastle CC v JK [2025] EWHC 1767 (Fam) (Family Division (Poole J))

Other proceedings – Family (public law)

Summary

Poole J, who appears to have had a very busy summer term, has given judgment on the thorny question of how to give evidence from a foreign jurisdiction.

The case is a troubling one of parental neglect and cross-border travel. It begins with a family and three young sons fleeing their country of origin and successfully claiming asylum, initially in Austria. From 2015 to 2022 the family lived in Austria. In the summer of 2022, the boys (now four) were removed from their parent's care on grounds of neglect and a failure of supervision coupled with mutual assaults by the parents.

The boys were then abducted by their mother and brought to England via the channel on an inflatable dinghy – or "small boat" – whereupon it appears they claimed asylum once again. At this point the boys' mother married a co-national from her country of origin and within 3 months, all four boys were removed from her care on grounds of abuse and neglect and placed, separately, in long term foster care.

Based on the evidence of the mother, which he found to be *"riddled with significant inconsistencies, concealment, and dishonesty"* (paragraph 70), Poole J found that she had failed to impose boundaries for her children (paragraph 78), failed to accept help from professionals (paragraph 78), and that as a result all four children had suffered (paragraph 79) *"emotional and psychological harm, with actual physical harm and a continuing risk of physical harm for several years,"* In light of the same, the court refused the mother's proposals for her children's return to her care; it also rejected the father's proposals for their return to their mother or, alternatively, a move to live with their paternal uncles in

Austria (paragraph 80). Instead, care or supervision orders were made for 3 of the 4 sons, with the youngest being granted permission to remain in in his current foster placement (paragraph 97).

The case is notable – particularly for COP purposes – for the coda that Poole J provides at paragraph 110 onwards regarding the issue of taking live video evidence from abroad.

As Poole J recorded in the judgment (paragraph 111), FPR r22.3 provides that the Court may receive evidence remotely. FPR PD 22A annexe 3 paragraph 5 provides:

> *It should not be presumed that all foreign governments are willing to allow their nationals or others within their jurisdiction to be examined before a court in England or Wales by means of VCF. If there is any doubt about this, enquiries should be directed to the Foreign and Commonwealth Office (International Legal Matters Unit, Consular Division) with a view to ensuring that the country from which the evidence is to be taken raises no objection to it at diplomatic level. The party who is directed to be responsible for arranging the VCF (see paragraph 8) will be required to make all necessary inquiries about this well in advance of the VCF and must be able to inform the court what those inquiries were and of their outcome.*

In the JK case, a request for evidence to be taken remotely from the father in Vienna was made via the FCDO very shortly before the hearing. The response from the FCDO, however, was that any such request would need *"at least 20 workings days' notice"* before it could be resolved.

As Poole J recorded:

> *115. Waiting twenty days for a request to be made to, and response to be received from, the Austrian Government would have been inconsistent with the no delay principle (Children Act 1989 s1(2)) and the statutory obligation to resolve proceedings within 26 weeks. The Court would not have been able to resume in twenty days in any event and the delay would have been much longer, probably to October 2025. Apart from the overall delay in resolving proceedings, it would have been unsatisfactory to go part heard for several weeks.*

Poole J then went on to quote from the Upper Tribunal decision in *Agbabiaka (Evidence from Abroad: Nare Guidance)* [2021] UKUT 00286 (IAC):

> *1) There is an understanding among Nation States that one State should not seek to exercise the powers of its courts within the territory of another, without having the permission of that other State to do so. Any breach of that understanding by a court or tribunal in the United Kingdom risks damaging this country's relationship with other States with which it has diplomatic relations and is, thus, contrary to the public interest. The potential damage includes harm to the interests of justice.*
>
> *(2) The position of the Secretary of State for Foreign, Commonwealth and Development Affairs is that it is accordingly necessary for there to be permission from such a foreign State (whether on an individual or general basis) before oral evidence can be taken from that State by a court or tribunal in the United Kingdom. Such permission is not considered necessary in the case of written evidence or oral submissions.*

(3) Henceforth, it will be for the party to proceedings before the First-tier Tribunal who is seeking to have oral evidence given from abroad to make the necessary enquiries with the Taking of Evidence Unit of the Foreign, Commonwealth and Development Office (FCDO), in order to ascertain whether the government of the foreign State has any objection to the giving of evidence to the Tribunal from its territory.

Poole J noted, however, that this judgment, being from an administrative tribunal, was not binding upon him (paragraph 117); he then went on to set out a helpful list of matters that the court would consider when trying to determine whether or not to grant an application for a party to give evidence to a foreign court while outside its physical protection. He listed the following factors that a court should consider while determining such an application:

a. The Children Act 1989 (CA 1989) s1(1) provides that when a court determines any question with respect to the upbringing of a child, the child's welfare shall be the court's paramount consideration.
b. CA 1989 s1(2) requires the Court to have regard to the general principle that delay is likely to prejudice the welfare of the child.

c. In public law proceedings the Court is subject to a statutory obligation to complete care proceedings in 26 weeks – Children Act 1989 s32(1)(a)(ii) introduced by the Children and Families Act 2014 s14.

d. The Family Procedure Rules enjoin the Court to manage cases so as to give effect to the overriding objective including to ensure that cases are dealt with expeditiously and fairly and saving expense.

e. Taking evidence from abroad without the other country's permission is not unlawful. In Raza v Secretary of State for the Home Department [2023] EWCA Civ 29, the Court of Appeal held:

> *"Neither Nare nor Agbabiaka suggests that the taking of video evidence from abroad without the permission of the state concerned is unlawful, or that it makes the hearing a nullity. Agbabiaka suggests that such a hearing might be contrary to the public interest because of its potential to damage international relations, and, thus contrary to the interests of justice, but that is a different point."*

f. There is now a firmly established practice of evidence being taken from abroad by video link in family proceedings. In Hague Convention 1980 cases it is routine practice. Similarly, in wardship cases where the child is abroad with a parent who is refusing to return the child. To my knowledge this practice has not given rise to any diplomatic difficulties for the FCDO.

g. In many cases parents or witnesses abroad cannot realistically travel to England for the purpose of giving evidence. Legal, financial, or other restrictions may be imposed on them

h. By taking such evidence the Court is not seeking to exercise its powers abroad by imposing restrictions on the witness or by regulating their conduct. Indeed, one of the disadvantages of taking evidence remotely from abroad is the difficulty in enforcing appropriate conduct by the person giving evidence.

i. The Court in family proceedings may sometimes seek to exercise powers over a person who is abroad, for example by making a return order under the inherent jurisdiction, but the talking of evidence is not in itself an exercise of such powers. The Court may require a person to attend a hearing remotely even though they are abroad, but the enforcement of such an order is problematic to say the least. In the great majority of cases the witness or party voluntarily attends to give evidence and no power is exercised over them by taking their evidence.

j. The Court in this jurisdiction is not seeking to exercise any powers over the authorities in another country in family proceedings.

k. Accordingly, it is very difficult to see how diplomatic relations could possibly be damaged by taking evidence in family proceedings by video link from a voluntary witness in a private room abroad.
l. In a particular case a specific concern might arise about the risk to diplomatic relations from taking evidence from a witness abroad. In such a case the matter should be raised with the Judge before communication with the FCDO. Absent such circumstances there will be no "doubt" as addressed by FPR r 22A Annex 3 paragraph 5.

Ultimately Poole J determined :

121. I would have allowed the Father and paternal uncles to give evidence by video link from Austria in any event but I also came upon a decision on point by Joanna Smith J in Dana UK Axle Ltd v Freudenberk FST GMBH [2021] EWHC 1751 (TCC) upon which I can also rely, albeit somewhat tentatively since I have not seen the legal advice to which she refers:

> *"[27] On the evening of the first day of the trial, I was provided with a legal opinion on the taking of evidence in Austria by a foreign court (via video conference) by Daniela Karollus-Bruner of CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH dated 5 May 2021, which expressed the view that, post Brexit, the bilateral treaty of 31 March 1931 between Austria and the United Kingdom (the Austro-British Convention on Mutual Legal Assistance BGBl 1932/45 (the "**Convention**")) governs the taking of evidence abroad by the courts of the respective other state. Article 8 of the Convention allows for evidence to be taken on Austrian territory without the intervention of state authorities, provided that a "Commissioner" in charge of the taking of evidence is appointed as a person authorised by the Court. Doctrine confirms that the Court can "commission" the presiding Judge herself. Accordingly, on 6 May 2021, I made an order pursuant to which I was commissioned to take evidence to be given in these proceedings from within the territory of the Republic of Austria."*

122. I have examined that Convention which applies to commercial and civil cases. Family proceedings fall under the broad umbrella of civil proceedings. Article 8a of the Convention provides that evidence may be taken:

> *"without any request to or intervention of the authorities of the country in which it is to be taken, by a person in that country directly appointed for the purpose by the court by whom the evidence is required. A diplomatic or Consular Officer of the High Contracting Party whose court requires the evidence or any other suitable person may be so appointed."*

> *As Joanna Smith J noted, the trial judge in England or Wales can be the "other suitable person". Accordingly, it seems to me that in the present case, the Convention allows me to take the Father's and paternal uncles' evidence remotely from that country as a suitable person so appointed.*

Comment

This judgment reflects a practice which many practitioners will have seen put into effect on numerous occasions post Covid – and post Brexit – where witnesses have been involved in proceedings while outside the country. Readers should be grateful to Poole J for having done the heavy lifting in determining the statutory underpinning to what is otherwise an increasingly common phenomenon in the world of global travel and remote communications.

MENTAL HEALTH MATTERS

Short note: the police, suicide risk and Article 2 ECHR

Hill J in *R (Ferguson) v HM Assistant Coroner for Sefton, Knowsley and St Helens* [2025] EWHC 1901 (Admin) pulled few punches when it came to the approach taken by a coroner to Article 2 in the context of an inquest following a suicide after police contact.

Finding that the coroner had erred in concluding that Article 2 was not engaged, her judgment provides a helpful tour d'horizon of the Strasbourg and domestic case law as regards the circumstances under which the positive obligations of the police to secure life in the face of suicide risk are engaged. As Hill J found that the coroner had erred both in his analysis that there was no "real and immediate risk" to life, and that his analysis that the deceased was not within the control of the police, the judgment is helpful for its analysis of both of these issues.

Of note amongst much else is that her robust rejection of the reliance by the Chief Constable on the proposition that the deceased did not lack capacity (to do what was not explained) (see paragraph 187).

Long-term segregation – an evaluation of the HOPE(S) programme

Researchers at Manchester Metropolitan University have published the evaluation of the National HOPE(S) Programme to end long-term segregation (LTS) for children and young people, autistic adults and/or adults with a learning disability in inpatient hospital settings. The roll-out concluded at the end of March 2025, and as the abstract explains

> *Long-term segregation (LTS) is a restrictive practice used in mental health services that disproportionally affects autistic people, individuals with a learning disability, and children and young people. LTS is often experienced as traumatic, isolating and dehumanising. Despite strong policy commitments to reduce the use of coercion in care, LTS continues to be widely used across the system in England. This report presents the findings of the first national evaluation of HOPE(S): a rights-based, trauma-informed intervention designed to reduce the use of LTS and improve outcomes for individuals, families, and staff. Conducted by Manchester Metropolitan University, the study used a mixed-methods approach across 40 NHS-commissioned organisations and 68 hospital settings in England. Results are based on a large sample (n=73) of in depth semi-structured interviews and focus groups and secondary analysis of routine clinical data and key outcome measures for 122 individuals in LTS, 11 family members and 388 staff. Quantitative results show that the HOPE(S) intervention was associated with: (i) Significant reductions in the use of physical and chemical restraint and seclusion; (ii) Improvements in quality of life for individuals; (iii) Increases in access to fresh air and meaningful activity; and (iv) Improved staff wellbeing, including reduced burnout and secondary trauma. Qualitative findings, co-produced with stakeholders, highlight HOPE(S) as a catalyst for cultural change. It helped shift practice away from containment toward connection, dignity, and relational safety. However, significant systemic barriers remain, including inconsistent definitions of LTS, service resistance, and the need for long-term relational continuity. This study provides robust, rights-based evidence to support national reform of restrictive practices in mental health and related services. The HOPE(S) model is scalable, impactful, and aligned with international human rights frameworks, including the UN Convention on the Rights of Persons with Disabilities (CRPD) and WHO guidance.*

The overall recommendation is that:

> *There is a strong consensus across stakeholders that HOPE(S) should be sustained, expanded, and embedded across health and social care systems. Without HOPE(S), or a comparable, values and rights- driven alternative, there is a serious risk that services will continue to fall short in meeting the needs of autistic people and people with a learning disability, resulting in ongoing harm, institutional trauma, and irreparable damage to people in LTS and their families. Commissioning HOPE(S) or an equivalent rights-based model of care is not optional. It is a matter of justice, ethics, and human rights. It is urgent for the children and young people who will otherwise enter a revolving door of mental health detention, poor physical and mental health, and a system which will strip them of any skills/independence to enjoy a meaningful life close to their loved ones. It is crucial for their families whose life is on hold and suffer in silence while their loved ones are in LTS. It is also a matter of evidence: this programme is not only effective, but transformative. What we do next will determine whether we repeat the failures of the past, or finally create a system capable of supporting, not segregating, the people it serves.*

At least one trust has adopted the model on an ongoing basis, but at the time of writing, we have not seen anything to suggest that it will be maintained on a national basis. The NHSE website simply says:

> *The HOPE(S) model is a human rights-based approach which was developed by Mersey Care NHS Foundation Trust to reduce the use of long-term segregation that is sometimes experienced by autistic adults, adults with learning disability and children and young people when in mental health hospital.* HOPE(S) Model: Mersey Care NHS Foundation Trust.
>
> *The National pilot has now concluded, and commissioners can discuss the HOPE(S) model in more detail and explore costings for local areas by contacting:* hopes@merseycare.nhs.uk

The CRPD and the MHA

As part of the (slow-moving) process of the Committee on the Rights of Persons with Disabilities' second examination of the UK's compliance with the CRPD, the UK Government has published its response to questions raised by the CRPD Committee concerning the Mental Health Bill. It makes the – slightly surprising – suggestion that the MHA 1983 already complies with the CRPD. As former legal adviser to the MHA review, Alex has more than a few reservations about that proposition. He is also confident that the answers given by the Government as to the Mental Health Bill's compliance with the CRPD will not find favour with the Committee, albeit (as discussed in Annex B to the MHA Review report), that is not determinative of the answer as to whether, in fact, they comply with the UK's obligations under the Convention.

CHILDREN'S CAPACITY

Gillick is not a universal test – an important clarification from the Court of Appeal

Re S (Wardship: Removal to Ghana) [2025] EWCA Civ 1011 (Court of Appeal (Sir Andrew McFarlane P, Baker and Arnold LJJ)

Other proceedings – Family (public law)

Summary

For years, lawyers and clinicians have thrown around the term '*Gillick* competence' as if it were a universal test to apply to analyse the decision-making abilities of children. More recently, they have largely limited themselves to throwing the term around in relation to the decision-making abilities of children under 16, looking instead (in England & Wales) to the Mental Capacity Act 2005 for those aged 16 and over.

Both of these are incorrect.

The MCA 2005 only applies to those aged 16 and over where statute provides that it does (hence why the Law Commission in its disabled children's social care consultation paper proposed expressly making it apply to decision-making by children in the context of the assessment and support planning of social care needs).

In *Re S (Wardship: Removal to Ghana)* [2025] EWCA Civ 1011, the Court of Appeal has reminded us that the *Gillick* test in fact strictly only applies to the determination of whether a child (under 16[7]) has the capacity to give or withhold valid consent to medical treatment. The case arose in another context altogether, namely whether the High Court had been wrong to refuse a wardship application – brought by the child themselves – seeking to bring about their return from Ghana. In the course of reasons for explaining why Hayden J had gone about matters in the wrong way, Sir Andrew McFarlane made some important observations about the *Gillick* test:

> *40. Although the impact of the decision in Gillick v West Norfolk and Wisbech AHA [1986] AC 115 (HL) featured prominently in the submissions of the two interveners* [The International Centre for Family Law, Policy and Practice and the Association of Lawyers for Children]*, the points made there were not developed by the parties to the appeal during the oral hearing. There was, however, some discussion on the direct relevance of a child being said to be 'Gillick competent' in proceedings which do not relate to medical treatment. It may therefore be helpful to offer some short observations in that regard.*
>
> *41. In the present case, Hayden J recorded that*

[7] As Sir James Munby made clear in *NHS Trust v X (In the matter of X (A Child) (No 2))* [2021] EWHC 65 (Fam), at paragraph 77, *Gillick* competence ceases to be relevant in the context of medical treatment decisions governed by s.8 Family Law Reform Act 1969 when a child turns 16.

'nobody has disputed that S is a 'Gillick competent' young person and that, accordingly, resolution of his application requires his own views to be factored into a best interests decision relating to his welfare.'

42. In their skeleton argument for S, counsel had put forward five 'key propositions', the fifth of which was:

'To override the wishes and feelings of a Gillick competent young person, there must be clear and compelling reasons for so doing. Parental responsibility does not trump that obligation on the Court, once the Court is seised of a welfare decision in respect of the young person.'

43. In their skeleton argument on behalf of the father, Ms Foulkes and Ms Charlotte Baker submitted:

'It is wrong in law to assert that achieving Gillick-competence serves to narrow parental responsibility in relation to all and/or significant areas relating to a young person's welfare, and in addition, that there must be clear and compelling reasons to override the wishes and feelings of a Gillick-competent young person (see the "fifth proposition" in S's skeleton argument). As is explored further below, the ratio in Gillick v West Norfolk and Wisbech Area Health Authority & Anr is limited to medical treatment and, although it is often referred to in family proceedings as a shorthand to describe (a) the rationality and strength of a young person's feelings; and/or (b) their capacity to participate in litigation and competence to instruct their own solicitors, it is not of wider application as a principle of law.'

44. In her oral submissions, Ms Fottrell asserted that Gillick was of fundamental importance in this case. She challenged Ms Foulkes' submission that it was not relevant, as CA 1989, s 1, the welfare checklist and case law were all informed by Gillick and stressed the need to give due weight to 'wishes and feelings'. Ms Foulkes maintained the position that Gillick applied directly to medical cases and that it was difficult to see how it might apply to non-medical decisions. Following further research over the short adjournment, Ms Fottrell drew attention to a Re S (Parent as Child: Adoption: Consent) [2017] EWHC 2729 (Fam), in which Cobb J (as he then was) considered the ability of a parent, who was still herself a child, to give valid consent to the adoption of her own child. Cobb J clearly considered that Gillick competence was a relevant factor in that situation, albeit that the decision in focus did not relate to medical treatment. He summarised the approach to be taken as follows:

'… it is agreed by all parties that in order to be satisfied that a child is able to make a Gillick-competent decision (ie has 'sufficient understanding and intelligence to enable him or her to understand fully what is proposed': see Lord Scarman in Gillick, above), the child should be of sufficient intelligence and maturity to:

(i) Understand the nature and implications of the decision and the process of implementing that decision.

(ii)Understand the implications of not pursuing the decision.

(iii) Retain the information long enough for the decision making process to take place.

(iv) Weigh up the information and arrive at a decision.

(v) Communicate that decision.'

45. Having considered the issue during the hearing and since, I am clear that Ms Foulkes is correct that, in terms of its legal impact, the decision in Gillick is limited to the ability of a young person to give autonomous valid consent to medical treatment. The purpose of the decision is to offer clarity for the benefit of medical practitioners who require valid consent for a proposed procedure. Lord Scarman was plain in limiting the context of the principle:

> *'I would hold that as a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed. It will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give a consent valid in law.'*

46. It is also right that, over time, the phrase 'Gillick competent' has been used more loosely to describe the age and maturity of young people who are seen as being capable of making informed decisions as to their future in a range of situations wholly unconnected with medical treatment. An example of this is the use of the phrase by Cobb J in Re S, but, it must be stressed, that Re S, whilst not concerning consent to medical treatment, was specifically focused upon the capacity of a the 'child' in that case to give valid consent to adoption. Cobb J was not referring to, or deploying, the concept of Gillick competence in the course of making a CA 1989, s 1 determination as to the child's welfare – which is the situation in the present case.

47. By the close of submissions, Ms Fottrell did not seek to go beyond the position described in the previous paragraph. In the circumstances, it is right to proceed in the present case on the basis that the characterisation of S as being Gillick competent has no direct legal impact in a case which does not concern the evaluation of his ability to give or to withhold valid consent to medical treatment. In the context of this case, 'Gillick competent' is no more, nor no less, than a convenient label to indicate that S has sufficient maturity and understanding to form his own view as to where he may live. His 'wishes and feelings' are matters that the court is specifically required to take into account by CA 1989, s 1(3)(a). They are to be considered 'in the light of his age and understanding'. The fact that all parties before the judge accepted that S was Gillick competent was a factor that should have been given appropriate weight by the court in its overall welfare evaluation. The wishes and feelings of a young person who is so regarded are likely to attract more weight, and, depending on the issue in question and the circumstances of the case, in some cases significantly more weight, than that attaching to the wishes and feelings of a younger or less mature child. But, as a matter of law, it is wrong to assert, as the appellant's 'fifth proposition' asserted, that the wishes and feelings of a Gillick competent young person can only be overridden if the court finds clear and compelling reasons for doing so. As with each of the other elements in any holistic welfare balance, all will turn on the weight that is attributed to each of the relevant factors.

Comment

Sir Andrew McFarlane is undoubtedly correct that the term '*Gillick* competence' has crept in very many places over the years. It has featured significantly in the context of the Mental Health Bill debates, for instance, with the Government resisting amendments to put the test for decision-making in relation to matters under the MHA 1983 (which extend beyond decisions about treatment to, for instance,

appointment of a nominated person) on a statutory footing. The Government expressed concern that to introduce a test specifically for use in the mental health setting would create confusion and uncertainty elsewhere given the broader applicability of the *Gillick* test. Proceeding on the basis that *Gillick* does not, in fact, have 'direct legal impact' in relation to many of the decisions being taken in the mental health setting might be thought to shed rather a different light on matters.

Sir Andrew's observations about the decision in *Re S* are also interesting. It is clear that he endorsed the approach of Cobb J (as he then was), in circumstances where Cobb J reframed *Gillick* to look very much like the functional limb of the MCA 2005 test. Again in the context of the Mental Health Bill debates, there have been arguments as to whether and how *Gillick* differs from the MCA 2005. Sir Andrew, for one,[8] would appear to take the view that applying the test is applying the functional aspect of the test in the MCA 2005 (and, as in *Re S*, it does not then require any analysis of whether any inability to make the decision is down to an impairment / disturbance of the mind / brain).

More broadly, the decision is also helpful for reminding us that not only will the courts override the decision of a *Gillick* competent child in the medical treatment context where there is appropriate cause to do so, there will also be statutory contexts (most obviously under the Children Act, but also in relation to 1980 Hague Convention cases) where the child's view can never, itself, be determinative as a matter of law. That does not mean that their views should not be taken seriously, but it means that Parliament (and the courts) have determined that, as children, they are different legal creatures to adults.

Anonymisation post-*Abbasi*

In *Birmingham Women's and Children's Hospital NHS Foundation Trust v KB & Ors* [2025] EWHC 2032 (Fam), Morgan J gave detailed consideration to the implications of the Supreme Court's judgment in *Abbasi*.[9] In the aftermath of a case concerning life-sustaining treatment of a child (in which, unusually, the application had been refused), questions arose as to (1) the scope of injunctive relief to prevent the naming of clinicians; and (2) the extent to which the child's parents could disclose certain types of information to relevant categories of people.

As she identified:

> *12. The differing positions as to the scope of any injunctive relief have been the main focus of the argument at this hearing. The trust invites an order which prohibits identification of those clinical staff who were witnesses directly involved in the proceedings, the second opinion doctors and (at the outset of this hearing) 'any individual – medical nursing or other healthcare professional – with responsibility for the provision of care and treatment to Fatima' . The parents acknowledged that there may be a legitimate basis for anonymising clinical staff who were directly involved in the proceedings and whose names are to be set out in Schedule 1 of the order, but argued that the justification for injunctive relief preventing the identification of any healthcare staff involved with Fatima (but not connected with the proceedings) was going too far. In particular Ms Cheetham submitted there was no evidence that there had yet been any disruption or abuse of the sort which would justify it. As the hearing developed, and secondary to that primary position, the parents*

[8] It is also interesting to note that the (statutory) MHA Code of Practice uses essentially the same approach as that of Cobb J to interrogate a child's ability to make relevant decisions – see paragraph 19.36.
[9] Katie having been involved in the case, she has not contributed to this note.

submitted that if there were to be a prohibition on naming those caring for Fatima, it should be expressed as 'the individual – medical, nursing or other healthcare professionals named in schedule 1'.This, Ms Cheetham KC argued would not only provide the parents with certainty as to who they could not name, since there would be a clear list of names set out in the accompanying schedule, but also had the attraction of being consistent with the summary of conclusions at [182: (11)] of Abbasi which reads: "(11) The individuals whose identities are protected by such injunctions should be identifiable by reference to the court's order.".

13. Both the Trust and the Guardian contend that it is impracticable and unrealistic to name all those looking after Fatima now and for the remainder of her stay in hospital. It would necessitate for a child of such complex needs, the naming of very large numbers of health professionals from a wide range of different teams. Added to which each time a new member of staff joined (or left) the trust's employment, whether permanently or for example as locum cover, that would require amendment. Ms Scott with whose position Mr Davey KC agreed, contended that the specificity on which the Supreme Court placed emphasis was, for good reason, expressed in terms of individuals whose identities are protected being 'identifiable by reference to the court's order' as distinct from identified by name. On that basis, the Trust modified its position such that it agreed the formulation offered by the parents subject to substitution of the word 'identified' for 'named'. Thus 'the individual – medical, nursing or other healthcare professionals identified in schedule 1' and setting out the relevant health care teams and hospital within which categories of medical nursing and healthcare professionals caring for Fatima fall. That, it is suggested, enables anyone to identify whether a health professional caring for Fatima falls within a team, and is consistent with the requirement that those protected should be identifiable by reference to the order. In the circumstances of this case, if the injunction is to extend to those looking after Fatima, I agree with that formulation. Furthermore, it meets in my judgment the specificity needed. All cases which lead to applications of the sort brought by the Trust here are unusual, but each comes with its own fact specific circumstances. It may be that in other cases the better course to satisfying the requirement of identifiability will be by naming those caring for a child. Here I am satisfied that it is not.

On the facts of the particular case, Morgan J further considered that it was:

16. […] *necessary and proportionate to make an injunction which includes not only those involved in the earlier proceedings and the second opinion doctors but also those continuing to care for her whilst she remains in hospital. I accept and agree with the position of the Trust and the Guardian and the submissions made on their behalf. For reasons I have already considered above, those caring for Fatima should be identified by reference to particularised teams set out in schedule 1. At the outset of the hearing there had been a measure of agreement between the parties that, were I (in making any injunction in respect of treating clinicians) to adopt the formulation reflected in the version of schedule 1 attached to the draft order then circulated, that might offer clarity. That version in relation to treating clinicians set out six teams and the job titles of those falling within them, but also a named list of those caring for Fatima as at the date of the hearing. There indeed appeared at first to be some attraction to this course, as submissions developed over the course of the hearing however, I became less persuaded that it was likely to be helpful and, to the contrary, increasingly concerned that it had the potential to be unhelpful. For the following three reasons I have concluded the better course is not to include a list of names of those currently treating Fatima alongside the identification by role and team:*

i) Even as drafted at the date of the hearing, it emerged in the course of argument that the list did not meet the purpose for which it was intended – for example the Doctors named, I was told, were only those at consultant level and not their more junior colleagues.

ii) The list did not (and could not) take account of changes of personnel coming into and out of the Trust's employment looking after Fatima. In order to provide the certainty that the list had been intended to give, there was the prospect of repeated applications for variation and the attendant cost and court time. This aspect is in reality another facet of the issues considered at [13] above arising from the Supreme Court's emphasis on the requirement of identifiability.

iii) The purpose of the schedule is that those bound by the injunction may identify those protected. During the hearing the discussion and consideration of the utility of the inclusion of the names of those currently treating was focussed primarily on the merit from the parents' perspective that they would have a clear list of names of those who they would not be permitted to identify (during the lifetime of the order) in the course of, for example any interview they might give to the media organisations who have made contact with them. With the benefit of time for reflection that focus may have been misplaced. The parents, of all people, are well placed to know whether someone is or is not a person looking after their daughter. For others, the inclusion of the list of names risks introducing confusion and one can readily foresee a misunderstanding arising that, if a name is not on the list, an individual is not one of those protected.

Earlier in the judgment, Morgan J had noted that

Fatima's parents would like to accept invitations to give interviews and to, as they put it 'tell their story'. They are anxious in so doing to know what identities or details they may give and not to find themselves inadvertently either in breach of any continued injunction or outside any restrictions of s 12 of the AJA. As to the latter point they invite either this court's interpretation/critique of the decision of the Supreme Court's judgment in Abbasi, as to which they submit para [120][10] has introduced confusion, or - should this court not be attracted to that course - as an alternative, discharge in whole or variation in part of that which would be prohibited by s12 AJA with explicit detail by way of schedule to any order of what may or may not be reported. Finally, they invite permission (insofar as it is not material falling within PD12G) to disclose some of the documents from the proceedings to certain organisations and entities and there is a difference of view between the parents and the Trust as to whether if documents are to be disclosed that should be in redacted form or otherwise.

[10] Which reads "[w]*e also note that section 12(1) of the Administration of Justice Act 1960 provides that the publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in certain specified circumstances, including '(a) where the proceedings – (i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors'. As Munby J said in Kelly v British Broadcasting Corpn [2001] Fam 59, 72, summarising a number of earlier authorities, 'in essence, what section 12 protects is the privacy and confidentiality: (i) of the documents on the court file and (ii) of what has gone on in front of the judge in his courtroom'. Accordingly, it covers the names of the witnesses who gave evidence or provided statements, the identities of the experts who provided reports, and the contents of their evidence, statements and reports. It follows that, by virtue of section 12, the publication of the witnesses' and experts' names, either by the media or by the parents, would have rendered them liable to proceedings for contempt of court. That reflects the common law: In re Martindale [1894] 3 Ch 193; In re De Beaujeu's Application for Writ of Attachment against Cudlipp [1949] Ch 230. For that reason also, the injunction could not be regarded as impinging upon open justice.*

Morgan J took the view, however, that "the *more straightforward and appropriate course in this case is to vary section 12(1) (a) (i) of the Administration of Justice to the extent of granting permission to communicate or publish identified information* (paragraph 18). Fatima's parents:

> *21.* […] *sought permission (subject to certain conditions) to provide 'copies of any chronologies, indices, position statements, skeleton arguments and written submissions filed in proceedings' to the following:*
>
> *i) An elected representative [clarified in submissions to mean an elected Member of Parliament]*
>
> *ii) The General Medical Council;*
>
> *iii) The Parliamentary and Health Service Ombudsman;*
>
> *iv) NHS England;*
>
> *v) Legal advisors considering any ancillary claim that may be brought on behalf of Fatima or themselves, due to issues connected with the proceedings.*
> *vi) Accredited Reporters*

As Morgan J noted:

> *22. The parents strongly contended the documents should be disclosed unredacted in the case of all those at i)-v). In respect of reporters, the point was strongly made that an accredited reporter would, but for the timing of the final hearing, have been entitled to them in that form. So far as the others are concerned in part the significance of the unredacted format submitted Ms Cheetham was that, absent the names of those concerned the documents would not make sense and in part because, to take one example, the GMC were it on receipt to set about any kind of disciplinary action would need to know who were the clinicians concerned. It would in any event, be onerous and unreasonable to expect the parents to ensure that there were appropriate redactions in place.*

However, ultimately, Morgan J concluded that the documents in categories (i) – (v) should be in a form redacted to be consistent with the injunctions she had made (paragraph 25). The position of accredited reporters was, however, different:

> *27. I take a different view in relation to those documents which may be released to accredited reporters. On this aspect in addition to submissions from Counsel for each party I had the benefit of brief observations from Mr Parke from the Press Association who was present in court. It seems to me that there is force in the submission that were the proceedings to have been heard after 1st May 2025 they would fall under the Family Transparency Provisions contained within 1.2(b) and 1.3(b)(ii) of PD12G. By para 6.2 on request a reporter would be entitled to copies (subject to receipt of a transparency order) of those documents under consideration here.*
>
> *28. Additionally, as Ms Scott submitted, amplified by Mr Parke's observations, accredited reporters are well used to receiving and handling material which is subject to reporting restrictions or injunctions as the case made be and service is accompanied by a schedule particularising in very great detail those who are protected. In my judgment so far as vi) above, Reporters, is concerned the documents disclosed should be in unredacted form.*

Short note: when to ward the older child

London Borough of X v Z & Ors [2025] EWHC 2040 (Fam) concerned 'ZE,' who was 17 years old and considered to have capacity to make the relevant decisions in this matter and to conduct proceedings. ZE had lived with his mother through most of his life, with limited contact with his father despite private law orders directing contact. The local authority had concerns of long-term and chronic neglect by his mother, including in relation to serious health issues. There were concerns about the mother's mental health, and after she was detained under the MHA, ZE was sent to live with his father.

The anonymised local authority made an application for an interim supervision order in February 2025, when ZE was 16. An interim care order was made shortly prior to his 17th birthday, and police attended to remove ZE from the family home, which his mother physically fought against. After ZE's 17th birthday, the local authority made an application to make ZE a ward of the court, and sought for ZE to live with his father and have supervised contact with his mother. This order was granted in March 2025, with a final hearing listed in July 2025.

McKendrick J noted the legal framework, and that there is no 'threshold' for wardship orders. He considered that there were legal errors in the relevant Practice Direction (PD12D):

> *20. The text of the last sentence of paragraph 1.1 of PD12D came about following Lord Wilson's review of the earlier text of the Practice Direction, which he held had incorrectly stated that Inherent Jurisdiction proceedings should only be commenced if the issue cannot be resolved under the 1989 Act – see NY (A Child) [2019] UKSC 49 at paragraph 44. The current iteration of the Practice Direction provides, therefore, for a wider role of the Inherent Jurisdiction. The parties in these proceedings agree that the court cannot make a care order and thereby permit the applicant to exercise parental responsibility to require ZE to reside with his father. No party has submitted that I cannot determine ZE's residence under wardship because the court cannot make ZE the subject of a care order as he is seventeen. No party has sought to appeal the confirmation of ZE's wardship on the issuing of the C66 application on 17 March 2025. Therefore I shall accept the agreed position that I can make a decision in respect of ZE's residence exercising my powers in wardship. For good reasons the courts are slow to place limits on the Inherent Jurisdiction and the court's role in wardship is clear and established.*

It was agreed that the relevant test was ZE's welfare, but McKendrick J did not agree that factual findings were necessary to act in a manner contrary to ZE's and his mother's wish that he return to his mother.

> *21* […] *…Given ZE's age and his capacity, his mother's rights are limited and as such, any interference in her Article 8 right to* ***respect*** *for a family life, would need limited justification for any such interference to be lawful. I have in mind what was said by Lady Hale in Re D [2019] UKSC 49; at paragraphs 23-24 (emphasis added):*
>
> > *23. The earlier "age of discretion" cases had established the principle that children could achieve the capacity to make their own decisions before the age of majority. It was no longer, if it ever had been, correct to fix that at any particular age, rather than by reference to the capacity of the child in question: it had already been established that a child below the age of 16 could consent to sexual intercourse so that it was not rape (R v Howard [1966] 1 WLR 13) or to being taken away so that it was not kidnapping (R v D [1984] AC 778****). Parental rights and***

authority existed for the sake of the child, to enable the parent to discharge his responsibilities towards the child, and not for the sake of the parent. Lord Scarman put it thus (p 185):

> *"The principle is that parental right or power of control of the person and property of his child exists primarily to enable the parent to discharge his duty of maintenance, protection, and education until he [the child] reaches such an age as to be able to look after himself and make his own decisions."*
>
> *The consequence was that (p 188):*
>
> *"… as a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed."*

24. As Lady Black explains in paras 69 to 72 of her judgment, the Gillick case is not directly relevant to the issue before us now. It had to do with medical treatment and not with deprivation of liberty. It was concerned with whether a child might acquire the capacity, and the right, to make such decisions for herself before she reached the common law age of discretion, not with whether parental authority endured beyond that age if the child lacked the capacity to decide for herself. And as Lady Black has shown, it is, to say the least, highly arguable that such authority did not extend to depriving such a child of her liberty once she had reached the age of discretion.

22. This point is further illustrated by the fact Article 8 does not necessarily protect the relationship between an adult child and his parent - see Kugathas v SSHD [2003] EWCA Civ 31 where Sedley LJ (with the agreement of Simon Brown and Arden LJJ (as they were)) at paragraph 14 accepts a relationship between an adult child and his parents does not necessarily acquire Article 8 ECHR protection….

McKendrick J stated that while the parental Article 8 rights were 'in play,' the court was more concerned with ZE's rights than his mother's. He further noted that he was not being asked to make coercive orders or deprive ZE of his liberty, and ZE has not been attempted to leave his father's care. McKendrick J summarised that:

> *27. It follows from what I have said above, that I recognise my role in these proceedings is limited. To a large extent I consider I am providing guidance to ZE. The court is at the outer reaches of its powers. All parties have accepted wardship since March 2025. Certainly, there has been no appeal that the test of exceptionality as set out in PD 12D, has not been made out. I have some doubts about the exceptionality of the circumstances I am presented with, however, recognising this is not a case about deprivation of liberty and recognising the limits to the mother's rights given her capacitous son can choose where he lives, I am persuaded that ZE welcomes the decision making of this court. Furthermore, I note that the decisions made in wardship for him to live with his father and see his mother are not decisions he has sought to undermine or otherwise go against.*

After considering all evidence, it was determined that living with his father was in ZE's best interests with contact with his mother. The orders were made from July-October 2025, with McKendrick J expressing the hope that the orders would not be necessary after this time.

Compelling the capacitous child

Re G (A Child) [2025] EWHC 1974 (Fam) (Family Division (Henke J))

Article 5 – deprivation of liberty – children and young persons

Summary

Re G (A Child) [2025] EWHC 1974 (Fam) is (yet another) case in which the High Court has refused to make a deprivation of liberty order in respect of a (17 year old) child. Henke J crisply outlined the background thus:

> *3. The young person at the heart of this judgment will be referred to herein as G. He was born in March 2008. In October 2023, G expressed himself to be suicidal. He left his mother's care and went to live with his father. Whilst living with his father, G again expressed suicidal ideation and on occasion absconded. G has been accommodated by the local authority since 18 March 2024, shortly after his sixteenth birthday. That accommodation has been pursuant to Section 20 Children Act 1989; the local authority accepting that G has the relevant capacity to provide consent to his own accommodation by the local authority. The accommodation followed G's relationship with his father breaking down and G referring himself to social services. G is estranged from his parents and does not want them to know of the identity he now uses or where he is. They and the local authority have accepted his wishes. Consequently, they have limited knowledge of their son's current circumstances.*
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> *4. Within that context, G whilst accommodated has been provided with a number of local authority placements. These have included children's homes, supported lodgings and foster care. When he has become dissatisfied with his placement, he has absconded to random locations, attended hospital and threatened to harm himself, on occasion he has threatened to kill himself. By his actions, G has put himself at risk, including at risk of death. Whilst professionals (social care and health) consider that G makes these threats to get his own way rather than because he is truly suicidal, there is nevertheless a real risk that he will unintentionally cause himself significant harm or indeed kill himself.*
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> *5. On 7 March 2025 G presented himself to the emergency department of a hospital with his social worker. He was in distress. He was expressing suicidal ideation. He was admitted to hospital as a voluntary patient. G is considered Gillick competent. Since his admission, G has not required any medical care with the only exception being a course (ten days) of phenoxymethylpenicillin on 7 March 2025. This treatment would ordinarily be given in the community rather than in an acute hospital. G has not required or received any other medical treatment. The hospital will not detain him against his will. His mental health is vulnerable, but he is outwith the statutory scheme provided for by the Mental Health Act 1983. He is medically fit for discharge, as he has been since admission. In the normal course of events, he would receive mental health support in the community. G cannot remain on the hospital ward indefinitely given:*
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> *a. G does not have a healthcare need requiring admission to hospital;*
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> *b. Remaining in hospital is detrimental to G's health because he does not have access to community mental health services and other services ; and*

c. *The Trust, responsible for the hospital in question, has a duty to provide healthcare services to those in acute need of the same. The acute paediatric ward where he is currently residing is not the appropriate environment to meet his needs and his admission is preventing the provision of services to those in acute need.*

6. G does not present with any substance misuse issues, or offending behaviour. He poses no risk to others. He is a bright and articulate young person who is pursuing and achieving his academic goals. He has a clear vision of what he wants for his future. It is accepted before me that he has capacity - including capacity to instruct his own solicitor - and to voluntarily admit himself as an inpatient to hospital. As already stated, in March 2024 he was considered by the local authority to have the capacity to consent to be voluntarily accommodated under section 20 Children Act 1989.

7. G's parents have parental responsibility for him until he turns eighteen - Sections 3, 4 and 105(1) Children Act 1989. G's father does not consent to his son's accommodation by the local authority; his mother does. However, G strongly objects to either of his parents being given any pertinent information about him. He objects to them knowing the name he now uses or where he is placed. There is thus an issue about his mother's ability to give fully informed consent. The local authority cannot acquire parental responsibility for him under a care or interim care order. By reason of his age, they cannot apply for a care order, including an interim care order, in relation to him - Section 31(3) Children Act 1989 applied. They could apply for an emergency protection order but that would be for limited duration – Sections 44 and 45 Children Act 1989. Such an order would not meet the needs of this case.

8. Against that background, the local authority applied for permission to invoke the inherent jurisdiction - Section 100 Children Act 1989. If permitted, within that jurisdiction they sought an order that will deprive G of his liberty for 6 months. They sought an order which will permit them to use force to take him from the hospital ward to the placement they consider will meet his needs and to keep him there. G does not wish to go to that placement, will not go there of his own free will and is unlikely to stay there unless prevented from leaving.

9. The local authority has identified a placement designed for therapeutic help for children aged 16 upwards and for adults. The placement is registered with the CQC but not with Ofsted. Within this judgment, I refer to this placement as option 2.

Henke J refused to accede to the local authority's application.

50. It was agreed before me that that the court cannot use the inherent jurisdiction in a manner which would offend Section 100(2)(b) Children Act 1989.

51. G has been an inpatient on a hospital ward on a voluntary basis. It is agreed that nothing within Section 100 has prevented me exercising my inherent jurisdiction and restricting his liberty, as I have, by making an order depriving him of his liberty whilst he has remained on that hospital ward.

52. It is agreed before me that without valid consent to section 20 accommodation, there would be a clear violation of s.100(2)(b) 'so as to require a child to be accommodated by or on behalf of a local authority.'

53. G does not want his parents to know where he is placed or any details about him, including his current identity. G has the capacity to make that decision. His wish is being honoured by the local authority and his parents. In my judgment they cannot, absent that knowledge, make informed

decisions about him. Without that knowledge they cannot exercise their parental responsibility effectively or give informed consent, even if they were minded doing so. Thus, whilst his mother has stated that she consents to G's accommodation, I do not consider in the circumstances of this case that consent can be regarded as informed or valid. Further, even if the mother's consent was valid (which it is not), G's father objects to G's accommodation. Thus, section 20 (9) and (10) Children Act 1989 apply and G cannot be accommodated with parental consent. Even if he were accommodated on his mother's consent, G's father could remove G from accommodation without notice at any time -section 20(10) Children Act 1989 and paragraph 37 HXA (above).

54. Previously, and in my judgment correctly, the local authority has not relied upon parental consent to G's accommodation. Until he was admitted to hospital, G consented to be provided with accommodation by the local authority under Section 20 Children Act 1989. Whilst he was in hospital G did not withdraw his consent to being voluntarily accommodated by the local authority. He remained a looked after child within the meaning of Section 22 Children Act 1989.

55. G is 17 years old and has capacity. It is agreed before me that he can consent to his own accommodation by the local authority. He has done just that since March 2024. G is free to withdraw his consent at any time otherwise his accommodation cannot be said to be consensual.

56. By reason of Section 20 (6) Children Act 1989 before accommodating a child the local authority must so far as is reasonably practicable and consistent with the child's welfare –

(a) ascertain the child's wishes and feelings regarding the provision of accommodation; and

(b) give due consideration (having regard to his age and understanding) to such wishes and feelings of the child as they have been able to ascertain.

57. Section 20(6) Children Act 1989 does not enable G to dictate this placement. It does, however, enable the local authority to factor into their decisions about accommodation and their placement considerations, his wishes and feelings. It also enables G to give informed consent. Knowing of the placement options available to him, he can either consent or not to his own accommodation under Section 20. Having consented to being accommodated by the local authority, he can withdraw that consent. In my judgment, it is pertinent that a local authority has no power to arrange a transfer of a voluntarily accommodated child from a residential institution to foster care without the permission of their parents - R v Tameside Metropolitan Borough Council ex parte J [2000] 1 FLR 942, QBD. Similarly, it seems to me that a local authority has no power to transfer a child consenting to his own voluntary accommodation to a placement to which he objects if he withdraws his consent to accommodation by the local authority. Consent to accommodation by a Local authority and the type of placement to be provided by the local authority are in my judgment inextricably interlinked. If G objects to the placement or type of placement proposed by the local authority, he may withdraw his consent to being accommodated. That would leave him in need of housing under the relevant housing legislation. However, that is a choice he is free to make and is one G in this case has decided to make. He is an intelligent 17-year-old with capacity who can weigh in the balance the advantages and disadvantages of the various options open to him and decide what he wants to do. He can decided to accept a service from the local authority or not. Whilst the choice G has made is not one with which the local authority agrees, it appears to me that they should respect it. By accommodating G, the local authority is providing him with service. Accommodation is not compulsory. As Lady Hale stated ta paragraph 1 in Williams, cited with approval at paragraph 35 in HXA: "Compulsory intervention in the lives of children and their families requires the sanction of a court process. Providing them with a service does not."

As Henke J noted:

> *58. The reality of the Deprivation of Liberty order sought by the local authority in this case is that they wish the court to authorise taking G against his will to a placement to which he objects and to confine him there; even though if placed there they know he will not and does not consent to his accommodation within the meaning of Section 20 Children Act 1989. The primary thrust of the application is to compel his accommodation rather than to authorise the Deprivation of his Liberty whilst he is voluntarily accommodated. However, Section 20 accommodation is not intended to be used coercively. I agreed with Mr Justice Hedley that section 20 must not be used compulsively in disguise - Coventry City Council above at paragraphs 27-28. Further an application to deprive a child or young person of their liberty under the Inherent Jurisdiction should not, in my judgment, be used to compel accommodation under section 20 at a placement to which G does not consent and to which both of his parents do not consent and even if they did consent do not have the relevant information to give valid informed consent. Seeking a Deprivation of Liberty order to forcefully remove a young person from a hospital ward to a placement where he does not wish to go without the valid consent of his parents or the young person himself, is in my judgment to seek to take a young person into care when the statutory scheme does not permit them to do so. As Mrs Justice Gwynneth Knowles said in Re Q (a child: interim care order: jurisdiction) [2019] 2 FCR 268 at paragraph 23*
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> > *'Parliament specifically chose to curtail the court's jurisdiction to make final and substantive public law orders in respect of children who had reached the age of 17'*
> >
> > *'Second, the Act consistently emphasises the age of 16 in recognition of a child's developing autonomy'*
>
> *59. In my judgment the primary purpose of the application before the court was to compel G to be accommodated against his will rather than to deprive him of his liberty at a placement in which he consents to be accommodated or to which both his parents validly consent to his accommodation. The application offends against the statutory scheme and section 100(2)(b) in particular. In those circumstances, the court declines to make the order sought by the local authority.*
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> *60. I am reinforced in my view that the primary purpose of the local authority's continued application for a Deprivation of Liberty order was to compel G's accommodation, by the local authority continuing to maintain their application that restrictions on his liberty were needed when the evidence from the hospital Trust supported by his Guardian was that the restrictions in place on the ward had not needed to be exercised although G knew of the application before the court. The reason why an order Depriving G of his Liberty was still sought by the Local authority was to compel him to be accommodated at a placement they considered to be in his best interests contrary to his wishes and absent his consent to be accommodated at such a placement. That in my view offends sections 100(2)(a) and (b) Children Act 1989.*

Having refused the application on jurisdictional grounds, Henke J also considered (in the alternative) that making the order sought was not in G's best interests.

> *62. G is 17 years old. He is intelligent. He has capacity to make his own decisions and has been doing so since March 2024 when he consented to his own accommodation by the local authority. He has recently consented to his own inpatient admission to hospital. He has made clear choices about his future education and is taking active steps to pursue that. The evidence is that he is willing to accept home treatment for his wellbeing and is now willing to engage with the local*

CAMHs team. He has not acted on any expressed suicidal ideation since September 2024. He does not consider the placement identified for him by the local authority, option 2, is suitable to meet his needs. The Guardian shares his views. Both G and the Guardian articulate their reasons for coming to the view they do. Neither G nor the Guardians views can be regarded as unreasonable. Both G and his Guardian express their concern that forcing G to reside in a placement which does not meet his needs, and which is contrary to his express wishes is likely to impact adversely on his wellbeing, including his mental health and is not in his best interests. Against that the local authority argue that option 2 is the most appropriate placement for G. The local authority argue that the deprivation of liberty order that they seek is necessary and proportionate to the risk that G will abscond from the placement, option 2, and put himself at risk of significant harm and possibly death. G and his Guardian argue that there is no need for a deprivation of liberty order in this case. G is willing to go without restriction to the placement I have called option 1. There he will engage with CAMHS and services intended to meet his wellbeing. In essence, the local authority counter that G is unlikely to remain safe if placed in option 1. It is they say likely that history will repeat itself. G, they argue, will become dissatisfied with his placement, abscond and the cycle of expressed demands and threats to harm and kill himself will start again.

63. In that context I remind myself that my decision to authorise the deprivation of a child's liberty does not act to authorise the placement itself. The task of the court when determining whether to exercise its inherent jurisdiction to grant a declaration authorising the deprivation of liberty is to determine (a) whether the restrictions proposed constitute a Deprivation of Liberty for the purposes of Art 5 of the ECHR and (b) if so, whether the that Deprivation of Liberty is in the child's best interests - Tameside MBC v AM & Ors (DOL Orders for Children Under 16) [2021] EWHC 2472 (Fam). In this case, it is agreed that the restrictions proposed will constitute a deprivation of G's liberty. That leaves the issue of G's best interests. I do not consider that it would be in the best interests of G to be deprived of his liberty. I agree with G's Guardian that to restrict his liberty in the manner proposed by the local authority is likely to be contrary to his welfare interests. Further I consider that the restrictions proposed are neither necessary nor proportionate to the risk of harm in this case. G has not acted on his expressed suicidal ideation since September 2024 and most recently, whilst on the hospital ward the restrictions authorised by the court have not need to be implemented to prevent him absconding even though he knew of the local authority plan for him. His objections to option 2 are reasoned and reasonable. He has made a reasoned and reasonable decision not to go to option 2 and it is not in his best interests to compel him to go there by making orders which would restrict his liberty.

64. Very properly the local authority has confirmed that if I do not grant the deprivation of liberty order they seek, they will offer G a placement at option 1, his preferred placement. The hospital Trust will transport him there without the need for any restrictions. G has confirmed that he will accept the option 1 placement and will consent to his own accommodation by the local authority. I have made it very clear to G that given my decisions it is a matter for him which services, including accommodation he accepts from the local authority. However, I have also emphasised that if he chooses not to accept services and accommodation from the local authority, he will be a young person aged 17 or over whose housing needs will be considered in accordance with the housing legislative scheme.

Comment

What is perhaps of note about this case, over and above the careful examination of the jurisdictional issues, is Henke J's clear-eyed determination to track through the consequences of G having the

relevant decision-making capacity – even if those consequences are likely to be ones of considerable concern to the local authority responsible for G.

Deprivation of liberty orders and licence conditions

In the Matter of Jake (A Child) [2025] EWHC 2230 (Fam) (Family Division (Mr Recorder Adrian Jack, sitting as a Deputy High Court Judge))

Article 5 – deprivation of liberty – children and young persons

Summary

This application for an authorisation of a child's deprivation of liberty related to 'Jake,' who was 16 years old at the time of the application. The background was set out by Mr Recorder Jack at paragraph 1 thus:

> On 24th July 2024 he was convicted of three serious sexual offences and was subsequently sentenced to two and half years' custody. He was released on licence on 30th July 2025. He will remain on licence until 29th October 2026.

In July 2025, the local authority applied to authorise Jake's deprivation of liberty at a placement where he has continuous 1:1 supervision, alarms on his bedroom and window restrictors.

Jake had been in the care system from a very young age, and had been the victim of sexual assault as a young child in a foster placement. Jake was placed in a residential home in July 2023, and began using drugs and alcohol. He was linked to criminal activities and placed on remand in a child detention centre even prior to the serious sexual offences committed in the summer of 2024. The judgement summarised his licence conditions:

> *8. He was released on licence on 30th July 2025 after serving half the custodial period imposed by the Crown Court (credit being given for the period from 30th April 2024, when he was on remand). The licence is granted in the name of the Secretary of State. The period of the licence runs to 29th October 2026, which is when the two and a half year sentence would expire after credit is given for the time spent on remand. He is under the supervision of [a named officer] of the Staffordshire Youth Justice Service presumably pursuant to section 38(4)(i) of the Crime and Disorder Act 1998. Although the Staffordshire Youth Justice Service is funded by the local authority, neither the Service nor its Youth Offender Team ("YOT") which manages Jake have taken part in this application.*
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> *9. There are thirteen conditions of the licence under which he has been released. The first nine can be summarised as these: (i) to be "of good behaviour and not behave in a way which undermines the purpose of the licence period"; (ii) not to commit any offence; (iii) to keep in touch with his supervising officer; (iv) to receive visits from his supervising officer; (v) to reside permanently at a named address in Wrexham "and obtain the prior permission of the supervising officer for any stay of one or more nights at a different address"; (vi) not to undertake work, or a particular type of work, unless it is approved by the supervising officer; (vii) not to travel outside the United Kingdom, the Channel Islands or the Isle of Man except with the prior permission of his supervising officer; (viii) to tell his supervising officer if he uses a different name to that on the licence; and (ix) to tell his supervising officer if he changes any contact details. The remaining four I should quote in full, since the impact of these is controversial:*

"(x) Confine yourself to an address approved by your supervising officer between the hours of 21:00 and 07:00 daily unless otherwise authorised by your supervising officer. This condition will be reviewed by your supervising officer on a monthly basis and may be amended or removed if it is felt that the level of risk that you present has reduced appropriately;

(xi) To comply with any requirements specified by your supervising officer for the purpose of ensuring that you address your sexual offending;

(xii) To comply with any requirements specified by your supervising officer to register and engage with an education provider;

(xiii) To comply with any requirements specified by your supervising officer to register and engage with housing/your support networks."

10. Paragraph 8 of the licence warns:

> *"If you fail to comply with any requirement of your supervision… or if you otherwise pose a risk to the public, you will be liable to have this licence revoked and be recalled to custody until the date on which your licence would otherwise have ended. If you are sent back to prison and are re-released before the end of your licence, you will still be subject to licensed supervision until the end of your sentence.*

The local authority considered that Jake would need comprehensive support to both address the trauma he has experienced and his high risk of harmful behaviour, particularly if he was released without intensive support. Jake was scheduled to commence therapeutic interventions around trauma approximately two months after moving to the placement.

The application for a deprivation of liberty order was opposed by Jake's Guardian, who felt that "*that the* [Youth Offending Team] *are using the DOLs order as way to address the work needed, which is not appropriate. The Guardian feels, with respect, that there has been somewhat of a taking the eye off the ball whilst Jake was in custody. The Guardian notes from his reading that this work should have taken place whilst Jake was incarcerated and the Guardian notes that if the DOLs is enforced it will likely not help with his engagement with his licence, or his social worker. There should have been some open transparent conversations with Jake about the DOLs and his licence expectation, which would in essence change or reduce his offending. However, the Guardian goes back to the question as to how and why the professionals are suggesting Jake is a high-risk offender*."

Mr Recorder Jack refused the application to authorise Jake's deprivation of liberty. He noted that, while the purposes of sentencing adult offenders includes the punishment of offender and reduction of crime, the purposes of criminal penalties for children is to prevent re-offending and promote the welfare of the young person, as well as to consider the risk of harm and culpability of the young person. He noted that the inherent jurisdiction had the child's welfare as its paramount consideration, and while "'t*his Court will obviously seek to reduce the risk of the child reoffending* […] *this will merely be one consideration under the paramountcy test, whereas for the Youth Offenders Team this will be a predominant factor*" (paragraph 19)

Mr Recorder Jack considered that the orders sought by the local authority would not achieve their aims.

23. […] *It is true that a DOLs order is merely permissive: it allows the local authority to do something which, in the absence of the permission given by the DOLs order, they could not do. If Jake breaches the terms of the DOLs order, he is — not even theoretically — liable to contempt of court or any other Court-imposed sanction for breach of the DOLs order. The only consequence of breach is that the local authority can use limited physical force to ensure Jake's compliance. It is in order to avoid the need to use physical force to prevent absconding, that DOLs orders regularly include provisions for locking doors and affixing restrictors to windows.*

24. The absence of sanction is, however, quite different in relation to a breach of the licence conditions. If Jake fails during the day-time period to be "of good behaviour [or behaves] in a way which undermines the purpose of the licence period" then the consequences are draconian: he can be brought back to [the detention centre] and incarcerated until 29th October 2026. Likewise, if he absconds, the consequence is potentially imprisonment following the rescinding of his licence. This sanction is much more severe than putting restrictors on Jake's bedroom windows and locking his doors.

25. Further, the local authority's desire to ensure a step-down period is not at odds with what seems to be contemplated by the licence conditions. Condition (xi) provides for Jake to comply with any requirements for his addressing his sexual offending which the Youth Justice Service may impose. Conditions (xii) and (xiii) impose similar requirements in respect of education, housing and social networks.

26. No evidence has been adduced from [Jake's YOT supervisor] as to the intentions of the Staffordshire Youth Justice Service's YOT. I am therefore hampered in assessing the relative merits of the DOLs route advocated by the local authority as against what the YOT propose. The local authority has provided a well-reasoned plan for ensuring Jake's development over the next six weeks. By contrast, all I have been able to do as regards the YOT's proposals is to examine what would be permitted under the licence conditions. It need hardly be said, however, that the YOT will no doubt do what they consider is best for ensuring Jake's safety and development.

27. What is the significance of this evidential lacuna? The Court's powers to exercise its inherent parens patriae jurisdiction are limited by section 100 of the Children Act 1989 […]

28. There is in this case no order falling under section 100(5) through which the local authority's aims can be achieved, so the condition for exercising the inherent jurisdiction in section 100(4)(a) is satisfied. However, in my judgment the local authority have failed to show reasonable cause to believe that Jake is likely to suffer significant harm in the absence of a DOLs order, so the condition in section 100(4)(b) is not satisfied. The management of Jake by the YOT is sufficient to exclude any reasonable cause for belief that Jake might suffer significant harm. The Court cannot therefore invoke the inherent jurisdiction.

29. I say this for three reasons. Firstly, the local authority are wrong in supposing that there will be no sanction if Jake absconds from his placement. On the contrary he has a very strong incentive not to, since, if he absconds, he is very likely to have his licence revoked. The same goes for the other terms of his licence. The local authority's view that there is no alternative to a DOLs order is severely undermined.

30. Secondly, the licence conditions permit the form of "step-down" which the local authority consider is desirable. There is no reason to suppose that the YOT are not cognisant Jake's needs in this regard. Even if the YOT took the view that more freedom should be given to Jake than the

> *local authority's social workers consider desirable, there are no grounds advanced to me on which any public law attack might be made in the King's Bench Division on any decision by the YOT to that effect. There is no reason to suppose that Jake will not receive appropriate support for addressing his sexual offending.*
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> *31. Thirdly, in this case the primary organ of the state with responsibility for rehabilitating young offenders is Staffordshire Youth Justice Services and the YOT responsible for Jake. The social work team of the local authority has only a secondary responsibility for Jake's rehabilitation. It is not for the High Court sitting in its parens patriae jurisdiction to micro-manage what a body such as the YOT, which operates in a specialist area of the criminal justice system for young offenders, might consider the best course for managing a particular young offender released into the community on licence. There are no grounds for supposing that the YOT is not doing what it considers to be in Jake's best interests. Thus the absence of evidence from [the YOT supervisor] is not in my judgment fatal to Jake's and the Guardian's opposition to the local authority's application.*

Comment

The observations of Mr Recorder Jack in relation to the different purposes of deprivation of liberty orders and criminal sentencing are both useful and of equal relevance to DoLS / deprivation of liberty orders made in relation to adults. Equally relevant for adults are his observations about the interaction between licence conditions and orders of the court authorising deprivation of liberty, something which often causes unnecessary confusion (an issue picked up further in the new chapter on 'When P is an offender' by Ian Brownhill in the next edition of the LAG Court of Protection Handbook, landing on bookshelves near you soon).

Life-sustaining treatment and very young children

Two cases decided over the summer, both tragic in their own way as only such cases can be, raise points of wider note.

The Trust v Z & Ors (Withdrawal of Medical Treatment) [2025] EWHC 2100 (Fam)[11] is an important reminder that a case may have to come to court because the parents and the Trust cannot reach agreement, but without both 'sides' having lost trust in each other. As Theis J noted:

> *Whilst the parents and clinical team disagree on the next steps for Z there is a strong and tangible mutual respect between the parents and the clinicians regarding their respective positions. As Dr A movingly said in evidence, they have walked this path together. The Trust in this case could not have done more for Z. They rightly sought extensive second opinions about Z's condition, prognosis and treatment prior to making any decision to issue proceedings. They have involved the parents at each stage, actively encouraging them to speak with those who attended hospital to see Z in advance of providing any second opinion. Whilst they have come to different conclusions the parents and the Trust have worked in a truly collaborative way that has benefitted Z. They both have the admiration of the court as to how they have done this in such difficult circumstances.*

[11] A case involving Arianna, who has therefore not contributed to this note.

In *Re J (A Child) (Withdrawal of Ventilation)* [2025] EWHC 2247 (Fam), McKendrick J noted the difficulty of applying the approach in *Aintree* of putting oneself in the shoes of the person to a baby (in that case, under a month old). As much as we are fans of the *Aintree* approach, it was decided in the context of adults, and we do have the gravest reservations about its direct applicability to very young children. Rather, we might suggest, the courts should be clear-eyed about the fact that they are considering best interests (in the common law sense) in a situation where it does not make conceptual sense to seek to take the decision that very young child would have taken.

THE WIDER CONTEXT

Terminally Ill Adults (End of Life) Bill

Second Reading of this Bill in the House of Lords is set for 12 September. The progress of the Terminally Ill Adults (End of Life) Bill can be followed on Alex's resources page here, and a set of briefings / amendments (including in relation to capacity) that he has worked on with other members of the King's College London-based Complex Life and Death Decisions group can be found here.

2023 LeDeR report published

As we went to press, and after a considerable delay the Government has blamed on data quality issues, the 2023 *Learning from Lives and Deaths – people with a learning disability and autistic people* report was presented to Parliament. The report shows that the percentage of "avoidable deaths" — where death occurs in someone under the age of 75 to a condition deemed preventable, treatable, or both — has fallen from 46 per cent in 2021 to 39 per cent in 2023, but the rate remains almost double that of avoidable deaths in the general population (21 per cent).

The analysis also found that 37 per cent of cases reported some form of delay in care or treatment, while 28 percent reported instances where diagnosis and treatment guidelines were not met.

Researchers found that, compared to those coming from White backgrounds, those from minority ethnic backgrounds had a significantly lower median age of death. Between January 2021 and December 2023, the median age of death in those from Asian and Asian British backgrounds reported a median age of death of 43 – a 20 year difference when compared to those from White backgrounds.

Further analysis found that, where 44 percent of people from White backgrounds were aged 65 and above when their deaths were reported, the same percentage of people from Asian backgrounds were in the 24 – 49 age category.

Researchers also analysed the data available for people with a severe or profound learning disability, approximately one third of the reported cases since 2021 fall into this category. Analysis established that those individuals have a younger median age of death (57 vs 64) and are more likely to have a treatable cause of death due to conditions such as pneumonia or seizures, while those with mild or moderate learning disability were more likely to have preventable causes of death, such as those related to heart disease or cancer.

Anonymity, vulnerability and the open justice principle (1)

PMC v A Local Health Board [2025] EWCA Civ 1126 (Court of Appeal (Sir Geoffrey Vos MR, Warby and Whipple LJJ)

Other proceedings – civil

Summary

The Court of Appeal has taken another run at how to balance open justice with the protection of the vulnerable in *PMC v A Local Health Board* [2025] EWCA Civ 1126, in the context of the grant of

anonymisation orders and reporting restriction orders in clinical negligence cases brought by children and protected parties and in proceedings brought to seek the court's approval of settlements in such cases. Nicklin J at first instance – and to the consternation of many, given that they had thought this issue had been settled by the Court of Appeal in the *Dartford* case – had questioned the jurisdictional basis upon which such orders were made. Following an extensive and detailed review of the case-law – including the decision of the Supreme Court in *Abbasi* (postdating the first instance decision in *PMC*), the Court of Appeal had little hesitation in finding that the common law did allow for such orders to be made.

As Sir Geoffrey Vos MR, giving the sole reasoned judgment, noted at the outset (paragraph 2):

> *The terminology for the orders sought in these cases has not always been clear. I shall use the terms in the following fashion: An order sought within court proceedings to withhold or anonymise the names of a party or a witness, including withholding information that would identify that person, will be referred to as a withholding order (WO). An order sought within court proceedings which has the effect of restricting the reporting of material disclosed during those proceedings whether in open court or by the public availability of court documents will be referred to as a reporting restrictions order (RRO). An order made within court proceedings which has the effect of both withholding or anonymising the names of a party or a witness and restricting the reporting of material disclosed during those proceedings whether in open court or by the public availability of documents will be referred to as an anonymity order (AO).*

Sir Geoffrey helpfully set out his conclusions in headline terms at the outset of the judgment as follows:

> *8. In outline, I have determined the jurisdictional questions as follows. The authorities demonstrate that there is a limited common law power to derogate from the principle of open justice in civil or family court proceedings by making, within court proceedings, both a WO and an RRO. This kind of RRO takes effect as an order preventing publication of specified material disclosed during proceedings whether in open court or in documents placed before the court. It is not, however, in the same category as an equitable injunction granted against the world, generally in relation to matters occurring outside court proceedings, preventing the identification of people or information, and now founded on section 37 of the Senior Courts Act 1981. Section 11 was enacted because there was uncertainty about the common law power to grant an RRO. Its enactment did not, however, resolve that common law question in itself. It simply established that RROs may be granted in the specific cases to which the restricted terms of section 11 apply.*
>
> *9. Secondly, I have determined that, in large part, Dartford remains good law, and is binding on us. But Dartford dealt only with AOs made in approval applications under CPR Part 21.10, which is not this case. It was, however, a case where proceedings had been started before the application for approval was made. The same principles apply, as explained below, to applications for AOs in personal injury actions brought by children or protected parties.*
>
> *10. Thirdly, I would respectfully disagree with the dictum of Lord Judge CJ at [14] in In Re Press Association [2012] EWCA Crim 2434, [2013] 1 WLR 1979 (Press Association) to the effect that it was a "pre-condition to the making of the order on the basis of section 11 that the name of the defendant should have been withheld throughout the proceedings". I see no reason, as a matter of jurisdiction, why an AO should not be made, relying on either the common law power or section 11, even if a WO was not made at the beginning of the proceedings.*

On the facts of the particular case, Sir Geoffrey considered that the judge had been wrong to refuse an application for an anonymity order in a personal injury claim brought by a severely injured child through their litigation friend. However, he noted, the terms could only be prospective, rather than retrospective, because of the previous publicity that the case had attracted.

Although, as set out above, Sir Geoffrey broadly followed the *Dartford* case, he nuanced the guidance given in the following fashion:

> *99. The first thing that I would respectfully suggest should be changed about Moore-Bick LJ's guidance is the suggestion [at 35(i)] that the application for an AO at an approval hearing should be listed under the name of the child or protected party. It seems to me that it would be better to avoid publicity being given to the name before the application for an AO is determined. The application can and should be listed either as "an application under CPR Part 21.10" (or similar formulation) or by reference to a threeletter pseudonym suggested in the application. The latter course has the advantage of giving the case a nearly unique identity. By listing the case anonymously, the name and identifying details of the claimant would not be mentioned in open court unless the application was dismissed. I entirely accept that the application under CPR Part 21.10 itself should be heard in open court.*
>
> *100. Secondly, I would be inclined to clarify the process suggested by Moore-Bick LJ. The judge suggested that Moore-Bick LJ was introducing an inappropriate presumptive priority for anonymity over open justice and reversing the burden of proof. I think he was doing no such thing. What he was doing, however, was seeking to introduce a simple and effective way of resolving the many applications for anonymity that are made in the context of approval applications under CPR Part 21.10. Moore-Bick LJ said at [34] that the court should normally make an AO in favour of the claimant without the need for any formal application, and that the press should file and serve on the claimant a statement setting out the nature of its case if it wanted to oppose such an order. Moore-Bick LJ was not saying that the applicant did not have to apply for an order, or that the order sought would be made automatically. He had already made it clear at [17] and [27] of his judgment that any derogation from the open justice principle had to be justified on grounds of strict necessity. What Moore-Bick LJ was trying to do, I think, was to streamline the process for cases where it was likely that the court would consider such a derogation strictly necessary.*
>
> *101. Thirdly, the evidence that needs to be adduced in support of an application for an AO in an approval context depends, in my view, on the case. The essential circumstances of the case must, of course, be set out in the evidence. There are no presumptions about the outcome of the application and no special rules exempting the applicant from producing the best available evidence in support of the application. The circumstances of the case may be sufficient to make it clear where the balance lies, and the minimum steps that are strictly necessary to protect the claimant in the interests of justice. I do not think, however, that the evidence needs to speculate as to future specific risks to the claimant. As Lords Reed and Briggs said at [138] in Abbasi SC, the fact that the risks to the party in question lay entirely in the future might mean that there would have to be reliance on generic evidence based on the adverse effects of publicity in earlier comparable cases (see [77] above). I do not think that Moore-Bick LJ was encouraging the determination of these applications on the basis of rival generalities as the judge suggested.*
>
> *102. With the exception, therefore, of [35(i)] of Dartford (concerning the listing of the application – see [99] above), I endorse the guidance in that paragraph. I agree that, in a case where the parties are aware that the media or other non-parties have published information about the case or have*

> *shown a specific interest in doing so, those nonparties ought to be notified of the court's consideration of the application so they can be heard if they wish. Where the media are present at an approval hearing, they should be afforded an opportunity to be heard on anonymity questions (see [35(iv] in Dartford). I cannot, however, see why, in cases where no third party is known to have an existing interest in the case, the media needs to be notified in advance of an anonymity application being made. The media will become aware immediately after an AO is made because of the provisions of CPR Part 39.1(5) requiring a copy of the court's order to be published on the Judiciary's website (see [39] above). The media can then apply speedily, if they wish, to set aside the AO.*

At paragraph 107, Sir Geoffrey noted that:

> *Whilst I have made clear that the judge went wrong in rejecting the common law power to grant an RRO and in doubting the Court of Appeal's decision in Dartford, the judge was right to emphasise the critical importance of the common law principle of open justice and its applicability in both the situations under discussion in this case. He was also right to make clear that the principle of open justice, even in these situations, should only be departed from where it is strictly necessary to do so in the interests of justice.*

He then set out the starting point for the process to be followed, which he identified as being found in Lord Reed's judgment in A v BBC, which Sir Geoffrey summarised as follows:

> *i) First, the interests of justice are not confined to the court's reaching a just decision on the issue in dispute between the parties.*
>
> *ii) Secondly, the administration of justice is a continuing process.*
>
> *iii) Thirdly, the court can, therefore, take steps in current proceedings in order to ensure that the interests of justice will not be defeated in the future.*
>
> *iv) Fourthly, anonymity may be necessary in view of the risks posed in the circumstances of the case. Those identified in the case law to date include: (i) risks to the safety of a party or a witness, (ii) risks to the health of a vulnerable person, and (iii) risks of a person suffering commercial ruin. AOs may also be made to protect a party to proceedings from the painful and humiliating disclosure of personal information about them where there was no public interest in its being publicised. Not all categories can be envisaged in advance.*
>
> *v) Fifthly, the application of the principle of open justice may change in response to changes in society and in the administration of justice*

Sir Geoffrey note that the standard form PF10 (approved by the Civil Procedure Rule Committee for use in relation to applications for anonymity orders in connection with approval applications under CPR Part 21.10) seemed inappropriate in light of the judgment, and invited the Civil Procedure Rule Committee to consider how it should now be revised.

Comment

The judgment applies not just to children, but those lacking capacity to conduct proceedings due to cognitive impairment. Whilst it does not apply directly to the Court of Protection, it reinforces the

proposition that the fact that a court is exercising a protective jurisdiction is a relevant consideration in the mix when it comes to the operation of the open justice principle.

Anonymity, vulnerability and the open justice principle (2)

SA v Secretary of State for the Home Department and Associated Newspapers [2025] EWCA Civ 1065 (Court of Appeal (Baker, Arnold and Andrews LJJ)

Other proceedings – civil

Summary

This judgment relates to an application made by Associated Newspapers ("AN") to discharge all the orders that had been made by the Court of Appeal, the Upper Tribunal (Immigration and Asylum Chamber) ("the UT") and the First Tier Tribunal ("FtT") anonymising the subject matter of immigration proceedings concerned with whether or not to revoke her refugee status. The subject matter of these proceedings was anonymised throughout as 'SA'.

The Court of Appeal's reasons for anonymising SA, are set out at paragraph 14 of the reserved substantive judgment dismissing the appeal:

> *The appellant is a protected party who is represented in these proceedings by a solicitor who was appointed by the Court of Protection as her Deputy on 8 June 2018. She has suffered from serious mental health issues for many years, and in consequence she lacks the capacity to litigate. For this and other reasons there are anonymity orders in place.*

AN's application centred on the Court of Appeal's order (being the only one AN was in time to challenge) and the issue under consideration was whether "*in the present circumstances and on the evidence as it now stands, there is a sufficient justification for continuing to derogate from the fundamental principle of open justice.*"

The Court of Appeal noted that SA had initially been afforded anonymity by the FtT and the UT on the basis that she was entitled to lifetime anonymity under section 1(1) of the Sexual Offences (Amendment) Act 1992 by virtue of her claim to have been the victim of forced child marriage in Saudi Arabia. As this claim had subsequently been found to be false (on the basis of compelling evidence), the factual foundation for that justification had fallen away. Accordingly, the Court (having set out the principle that derogations from open justice, including orders for anonymity and concomitant reporting restrictions, can be justified as necessary on two principal grounds: maintenance of the administration of justice, and harm to other legitimate interests and noting that SA's case falls within the latter category) carried out a balancing exercise between the two rights in play. Those being SA's right to respect for her private life under Article 8 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR") against the rights of the media and the public to freedom of expression under Article 10 ECHR). The Court of Appeal reminded itself that the balancing exercise must be performed with "*an intense focus on the comparative importance of the specific rights being claimed in the individual case*", per Lord Steyn in *Re S (A Child)* [2005] AC 593 at paragraph 17.

Giving the sole reasoned judgment, Andrews LJ held at paragraph 12 that:

> *the balance comes down firmly in favour of maintaining the order for anonymity. That is so notwithstanding the arguments advanced by Ms Palin which centred around the fact that a substantial amount of information about SA is already in the public domain. In my judgment, non-disclosure of her identity is still necessary to secure the proper administration of justice and in order to protect her interests, see CPR 39.2(4).'*

The reasons for this are set out at paragraph 44:

> […] *SA is an individual falling outside the ordinary class of persons to whom litigation and any ensuing publicity about it would be likely to bring about a degree of mental discomfort which would be an acceptable price to pay for open justice. She is seriously mentally unwell. Her condition is chronic and incurable. She has lacked the capacity to look after her own financial affairs and to litigate for some years, and although the resumption of medication appears to have helped to overcome some of the more disturbing features of her illness in early 2023, the Consultant Psychologist who had the advantage of treating her from December 2019 to March 2021 has expressed a professional view that lifting the anonymity order would present a serious risk to her psychological stability. That is not generic evidence, it is focused, it makes sense, and in my view it is compelling.*

Of particular interest is the fact that the Court of Appeal found SA's article 8 rights outweighed AN's article 10 rights even thought it would be possible for someone reading the most recent judgment to work out who SA is by putting certain pieces of information together based on what is already in the public domain from previous litigation. This is because even against this background the Court of Appeal was of the view that this did not render "*the order worthless or unworkable or that it places the press at an unfair disadvantage*" (paragraph 45).

It is perhaps unsurprising that this court came to the view that it did given the evidence it had from both SA's treating psychiatrist and psychologist as to the very serious mental illness from which she suffered, the impact that previous proceedings had had on her, and the likely impact that granting AN's application would have on her in the future. This is particularly so given the case law such as *Tickle v Surrey County Council [2025] EWCA Civ 42* which provides that the Article 8 threshold can be reached if there is a real risk that a person's physical or psychological integrity might be undermined.

It is interesting to note that the Court of Appeal did not trouble itself with the question as to where the power comes from to make an anonymity order – rather they assumed it does exist, and then focussed on the justification for it being used i.e. whether the balancing exercise between Article 10 and Article 8 has been conducted correctly in order to justify the derogation from open justice. This is at complete odds with the approach taken by a differently constituted Court of Appeal in the *PMC* case (noted above) which carried out an in-depth analysis of the jurisdictional basis for such orders. That was a case concerned with the anonymity of a child personal injury claimant, also in circumstances where there was considerable material in the public domain.

AN also sought disclosure, under the principles established in *Cape Intermediate Holdings v Dring* [2019] UKSC 38; [2020] AC 629 of (i) an unredacted version of the FtT's decision; (ii) the evidence SA filed in relation to her appeal to the FtT against the revocation order; and (iii) the skeleton arguments filed by the parties in the tribunal proceedings and in the Court of Apeal. The application for skeleton arguments (albeit in an anonymised and redacted form) was agreed.

The Court of Appeal dismissed this second part of AN's application swiftly, on the basis that it "*is unnecessary for journalists to have access to that evidence in order to have a full and fair understanding of the issues involved in the appeal or of the case being advanced by the parties to that appeal. The decision of the FtT is lengthy and detailed, and sufficiently describes the evidence that it has taken into account in making its various findings. The principle of open justice is satisfied by ANL having redacted copies of the FtT's decision and of the skeleton arguments that they have requested*" (paragraph 47).

This is consistent with yet another of the Court of Appeal's recent judgments (1st July 2025) *Re HMP* [2025] EWCA Civ 824, in which the limits of open justice are emphasised (in that case in the context of care proceedings under the Children Act 1989). In that case, the Court of Appeal had been clear there are two main purposes of the open justice principle: (i) to enable public scrutiny of the way in which the courts decide cases so as to provide public accountability and secure public confidence; and (ii) to enable public understanding of the justice system. The corut emphasised that the principle did not extend further than this (in that case, to enable the BBC to interrogate the workings of a public body).

As can be seen from the fact that the Court of Appeal has handed down three judgments concerned with open justice in the space of two months, this is a rapidly evolving area of the law, seemingly impacting on all areas of civil litigation.

Permission to appeal refused in *Thiam v Richmond Housing Partnership*

In our May 2025 Wider Context Report, we reported on the case of *Thiam v Richmond Housing Partnership* [2025] EWHC 933 (KB), in which Swift J considered an appeal in possession proceedings on the basis of Ms Thiam's hoarding behaviour.; In that judgment, Swift J considered and rejected an argument that the landlord ought to have "*taken steps to involve organisations with special experience of working with hoarders to tackle situations such as the one that existed in this case*" (paragraph 15). Swift J had rejected this argument at paragraph 25, stating:

> *This evidence, which was tested before the Judge but not undermined, shows the lengths that RHP went to when seeking to address the hoarding problem. In the abstract, it will always be possible to say that something more could have been tried, but the section 15(1)(b) proportionality test must be applied in context. The context here was that RHP was a landlord. The extent of its powers of control over the tenant were set by the terms of the tenancy agreement. RHP could seek to persuade the tenant to address the problem. I am satisfied that it did attempt to persuade the tenant. RHP could seek to involve others such as the local authority social services department who had wider powers to assist the tenant. RHP did that too. I do not consider that the obligation to act proportionally imposed by section 15(1)(b) of the 2010 Act required RHP itself to engage specialist help for the tenant. Taking such a step would go well beyond anything ordinarily or, in the circumstances of this case, reasonably within the ambit of a landlord and tenant relationship. It was entirely consistent with the section 15(1)(b) obligation for RHP to submit that interventions of that sort should be the responsibility of the social services department rather than the landlord. Mr Strelitz, counsel for RHP, also pointed to the likely cost of such specialist services and the finite resources of a social landlord such as RHP. That too is a material point.*

Ms Thiam, through her litigation friend, the Official Solicitor, sought permission to appeal, expressing particular concern about paragraph 25 of the judgment. Permission to appeal has been refused by Newey LJ, who stated:

…The appellant has expressed concern that other judges might follow paragraph 25 of Swift J's judgment. However, that paragraph cannot and should not be taken as laying down any legal principle. It represents no more than part of Swift J's analysis of how the law falls to be applied in the specific circumstances.

On top of that, the appeal would have no real prospect of success. Both Swift J and HH Judge Luba KC have provided reasoned explanations of why they consider the respondent to have done enough. There is no likelihood of the appellant persuading this Court to interfere with either the factual findings (which anyway are not the subject of express challenge) or the Judges' evaluations of whether the respondent acted proportionately. While the grounds of appeal assert errors of law, the complaints are in substance about how the Judges have applied to the law to the facts.'

Learning disability and 'social murder'

Professor Sara Ryan – the mother of Connor Sparrowhawk aka "Laughing Boy" – has published a new book, which pulls no punches. Its title may be *Critical Health and Learning Disabilities*, but its subtitle is starker: *People with learning disabilities, erasure and social murder*. Although all those involved, in whatever way, with working with those with learning disabilities, should purchase a copy, Professor Ryan has also published a (free) downloadable summary available here. We reproduce the opening section here:

In England people with learning disabilities die around 20 years earlier than people without learning disabilities. Many of these deaths could have been stopped. People are treated poorly by health and social care staff and members of the public because they are not seen as human. People with learning disabilities do not receive the same treatment as other people. The harm caused by this lack of care is not always noticed by health and care staff, or is noticed and not dealt with. When people without learning disabilities die early, action is taken to stop it happening to someone else. We know why people with learning disabilities die and yet the government does nothing to stop it happening. There is no action. Social murder happens when you know why people die early and do nothing about it. Social erasure is when people are not seen as people in their communities which means they lead poor lives.

Research Corner: *Support for decision-making guidance in England: a pragmatic review*

A very useful recent article by Jill Craigie and others in the Medical Law Review looks at guidance relating to support for decision-making. As the authors put it in the abstract:

Law and policy concerning personal decision-making increasingly recognizes a role for support to enable greater autonomy and legal recognition for adults whose decision-making ability may be limited. Support for decision making (SFDM) is embedded in England and Wales under the Mental Capacity Act 2005 (MCA). It has also gained traction internationally through the UN Convention on the Rights of Persons with Disabilities (CRPD), to which the UK is a signatory. However, these two legal reference points diverge in their understanding of SFDM, which presents challenges for putting it into practice. A pragmatic review methodology identified 40 resources containing SFDM guidance, providing insight into its implementation and conceptualization in England. An analysis indicates the need for authoritative guidance that provides more multifaceted advice, recognizing key variables including: the nature of the

decision, source of decision-making difficulties, and the relationship of the supporter. Gaps in guidance provision are also identified for decision-makers, third parties, and the mental health context. The resources largely conceptualize SFDM as a means to enable mental capacity. However, recent developments propose a CRPD-aligned approach that includes SFDM in the context of substituted decisions. This generates a dualistic model of SFDM in England, raising new questions in this area.

SCOTLAND

Contested guardianship: open-and-shut case – or was it?

Sheriff Robert D M Fife, sitting at Edinburgh, issued on 26th June 2025 his judgment in the contested application for a guardianship order by City of Edinburgh Council in respect of the adult "B". The case was contested by the adult's son "M" (designated "second respondent"). The sheriff issued his judgment following an evidential hearing which proceeded over six days, and concluded on 9th May 2025.

Edinburgh City Council ("the Council") sought appointment of its chief social work officer ("CSWO") as welfare guardian, and a solicitor ("R") as financial guardian. The powers sought for each are referred to by number and letter at various points in the judgment, but the terms of none of them are disclosed. The application was lodged in February 2023 and appointment of the CSWO as interim welfare guardian was made on 23rd February 2023. In pursuance of the interim welfare powers, the adult was moved on 8th May 2023 into a care home. Evidence at the hearing in May 2025 described her as being "incredibly happy and contented" there, at least by that time.

M ("the son") sought appointment of himself as welfare guardian. He also sought an intervention order authorising himself to make various decisions in relation to the property and financial affairs of the adult. The Council was successful. The CSWO was appointed welfare guardian for a period of three years with the unspecified powers sought. R was appointed as financial guardian for a period of two years with unspecified powers. The son's craves to have himself appointed welfare guardian, and for the intervention order, were dismissed. The only very limited success achieved by the son was that rather than award the Council's costs of opposing the application for an intervention order, the sheriff reserved the question of expenses for a subsequent hearing.

The judgment, correctly and helpfully, narrates the evidence that the sheriff heard, the conduct of the hearing, and the submissions made to him. That all takes a very large part of his judgment, but for the purposes of this Report that can all be condensed into two observations. Readers who are interested are recommended to read those narrations, and will no doubt reach their own conclusions as to these observations, which are (firstly) that rarely – if ever – can the evidence before the court have shown a candidate for appointment as guardian to be so unsuitable to be anyone's guardian with any powers, as was the son, subject to just one possible counter-indicator as regards welfare guardianship; and (secondly) that rarely if ever can a party litigant have subjected all of the witnesses and others involved to such a constant sustained, aggressive, and largely improper and unreasonable onslaught as did the son. The minor qualification on suitability, in relation to the welfare appointment, was assertions and evidence that the son "was proactive, with the family, in finding a suitable care home for the adult" [48] and the narration by the sheriff that he had:

> *"heard from several witnesses who spoke favourably of M [the son] trying to do the best for the adult, particularly his efforts in securing the best care home for the adult."*

In the next sentence, the sheriff recorded that:

> *"M, himself, acknowledged he could be intolerant of any delay and that his actions, at times, reflected his frustration."*

Next thereafter, however, the sheriff narrated that:

> *"Nevertheless, all the witnesses described M's repeated threats, abuse and bullying behaviour. There was no favourable suitability assessment of M to be appointed as welfare guardian or intervener."*

The forgoing three quotations comprise [104]. It would appear that the "repeated threats, abuse and bullying behaviour" were experienced by all of those who subsequently were witnesses, and others, in their previous dealings with the son. One must observe that it cannot have been other than a significantly stressful and unpleasant experience for all concerned to be subjected to such a constant bombardment throughout six days of a hearing. It is worth reading the full judgment to observe, through that medium, the sheriff's commendable handling of such a situation. By and large, it would appear that the same could be said of all those who "came under fire", though a minor exception was noted and considered by the sheriff as follows:

> *"During cross-examination, there was a brief terse exchange between R and M when R expressed some views about M's knowledge of company law. Against a background of a sustained professional and personal attack on R by M, and personal abuse directed towards R by M, throughout the proceedings, narrated in detail in R's affidavit and the written submissions for the applicant, the outburst was understandable. This has had no adverse impact on my assessment of R as a witness. The professional and personal attack on R by M was very concerning. M's conduct towards R was at times reckless, unwarranted and unacceptable." [101]*

That all said, the judgment appears to disclose some startling features.

The sheriff narrated the two "gateway" conditions upon which the sheriff must be satisfied to be able to grant a guardianship application. The Adults with Incapacity (Scotland) Act 2000, section 58(1)(a) specifies relevant incapability, and section 58(1)(b) requires the sheriff to be satisfied that no other means under the Act would be sufficient to enable the adult's relevant interests to be safeguarded or promoted. One would observe that these could be read as a development for the purposes of part 6 applications of some of the principles in section 1(1) - (4) of the Act setting out the obligations falling upon the sheriff to satisfy himself. Those are obligations upon the sheriff as the person responsible for authorising or effecting the intervention in terms of section 1 of the 2000 Act, and therefore apply regardless of whatever may have been produced, pled, submitted or otherwise been made available to the sheriff.

If there is one sentence that leaps out from the page in the whole judgment, it is – in relation to the condition in section 58(1)(a):

> *"The first precondition as to incapacity is a matter of admission." [71]*

That would appear to be a complete impossibility. The evidence all suggests total incapability of the adult in relation to all matters in respect of which guardianship powers were sought. If so, the adult must have been completely incapable of admitting her own incapability. Equally startlingly, the

judgment omits reference to anything done towards implementing the mandatory requirement in section 1(4)(a) to take account of the present and past wishes and feelings of the adult. All possible combinations of those four elements must be taken into account, without exception. The more impaired is the adult's relevant capacity, the more important are these. There is a mild indication that the adult had a favourable view of her son, but no indication of any rigorous investigation into that. One must also mention that the medical evidence seems to focus largely upon diagnosis, and drawing conclusions from that diagnosis, rather than clearly assessing capacity as a separate matter.

There appears to be no narration of the issue of capacity as an essential element in its own right. That rather appears to take us back to the generally, and firm, rejection of any remaining vestiges of the former view of capacity being the binary extremes of complete capacity or total incapacity. One could say that in Scots law the rejection of that binary approach could be dated back to the 1980s, and the introduction and development of partial guardianship, as an alternative to plenary guardianship, in the form of appointments of tutors-dative to adults, beginning with *Morris, Petitioner*, in 1986. That is reinforced every time a guardianship order under the 2000 Act is granted with specific, targeted powers. The section 1 requirements, with the generally accepted requirement that they be interpreted in the light of human rights requirements and obligations, could be said to represent clear rejection of the old binary approach. Coupled with that, one has to observe that the judgment does not narrate the necessary rigorous assessment of each of the powers granted in order to comply with section 1(3). Indeed, as noted above, the powers are not narrated.

It is notable that whatever were the powers granted in the interim order, the following May the adult was placed in a care home. There appears to have been no narration as to whether her placement and retention there was a deprivation of liberty by reference to the well-known "*Cheshire West*" criteria (see here the *RF* case). It is not possible from the judgment to determine whether her transfer there, and remaining there, was lawful. One cannot assert that it was unlawful, but one would have thought that the point ought to have been addressed.

If there is another "leaping out from the page" point, it is that a previous safeguarder had to withdraw, so badly had her relationship with M deteriorated, but for the remainder of the proceedings R became safeguarder as well as (it appears) being existing interim financial guardian and the candidate, who became the successful candidate, for appointment as financial guardian. It would seem from the narration that R in the course of a single continuous session of giving evidence intermingled evidence as safeguarder, on the one hand, and as interim financial guardian and candidate for appointment as guardian, on the other. There appears to have been no consideration as to whether in the circumstances this was a conflict of interest, and whether as such it disqualified him from appointment as safeguarder. This commentator is unaware of anything in the relevant jurisprudence to suggest that the position in Scots law does not reflect the requirement of Article 12.4 of the UN Convention on the Rights of Persons with Disabilities that "all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards …" and in particular are "free of conflict of interest". One must record regret that these issues were not subject to debate leading to clear expression of the sheriff's views in relation to them.

It is a feature of this case that there appears to have been no reliance upon, nor reference to, any decided cases. One must accept the sheriff's conclusions that the son was unsuitable for appointment

as either welfare guardian or financial guardian, linked to the sheriff's finding that a welfare guardian does not have fiduciary duties, but is in a "position of trust" impliedly equated Some mention might have been made of findings such as in *Application in respect of RA*, January 17, 2008, Glasgow Sh. Ct., under which a candidate who had been guilty of embezzlement was found unsuitable for financial guardianship, but nevertheless appointed welfare guardian. There could have been some mention why the facts demonstrated otherwise in relation to the son, indeed on a reading of the judgment one would expect that, but it might have been helpful for that to have been mentioned. Likewise, it is implied that the son did not make a separate application for an intervention order, but was this done only by minute (see *Cooke v Telford*, 2005 S.C.L.R. 367, Sh. Ct.) or because the sheriff has discretion to appoint "any individual whom he considers to be suitable for appointment and who has consented" (section 59(1)(a))? There was no need, where the sheriff proposed to do that, for any requirement such as a minute (see *Arthur v Arthur*, 2005 S.C.L.R. 350, Sh. Ct.). Notably, however, these both concerned appointment as guardian of someone not proposed in the guardianship application for the role. Is that transferable to an appointment under an intervention order? Just as the sheriff may appoint a different guardian, likewise under section 58(3) the sheriff may treat a guardianship application as being an application for an intervention order, and presumably that would include the option under section 53(5)(b) to "authorise the person nominated in the application" to act. It is not clear, however, that anyone other than the person nominated in "the application", meaning the nominee in the guardianship application, might be appointed: this commentator would suggest not.

Finally, one of the son's apparent misdemeanours was successfully to register in England a purported power of attorney granted by the adult. It was subsequently removed from the English register upon evidence that the adult was not capable of granting it. One wonders how the OPG for England & Wales accepted it for registration in the first place, in the absence of any apparent connection with England & Wales on the part of the granter ("donee") sufficient to justify the granting of an English power of attorney. One would suspect that in the converse situation such an application would be rejected by the (Scottish) OPG.

Adrian D Ward

AWI reform: progressing, but imperilled by SLAB

AWI reform is proceeding in accordance with the Ministerial Statement reproduced in the June Mental Capacity Report. The AWI Expert Working Group and the Ministerial-led Oversight Group, as described in the Ministerial Statement, have both been established, as has been a monthly programme of meetings of the Expert Working Group, from this month through to May 2026. Tom Arthur MSP, Minister for Social Care, Mental Well-Being and Sport, has not yet personally had a visible involvement in AWI reform externally to government, but has remained closely involved in the internal process, and from now on will be engaging externally. He will personally chair the Oversight Group. Relevant to this Report, his officials have arranged for me to meet him personally, one-to-one, shortly after issue of this Report. To the extent that may be appropriate and permitted, I shall include the outcome in the October Report.

In the meantime, the following ongoing matters will be (or are likely to become) relevant to proposed amending legislation, and to require to be taken into account before it is finalised and submitted to the Parliament. I give them separate headings.

Anti-disability discrimination by Scottish Legal Aid Board

The policies and established conduct of SLAB are already having a substantial and discriminatory adverse impact upon the rights of access to justice of people with relevant disabilities, their families, and others who are dependent upon Legal Aid to access the services of a solicitor, whether to make or oppose applications, or more generally to be advised and assisted about adult incapacity law more generally. The impact is likely to be severe by the time that legislation is enacted, seriously imperilling the implementation of the legislation.

For some years now legal aid funding for AWI services by solicitors has generally been less than the cost of provision of those services, which practising solicitors have generally had to subsidise from other work. This has arisen from several factors: failure to acknowledge the time that often needs to be spent with clients in order to provide an adequate service; refusal to fund at all much of the time necessarily spent by solicitors to address and comply with the demands arising from SLAB's own policies and conduct; and unreasonably low rates paid even for work that is remunerated. Some solicitors have reported that total time necessarily spent in AWI work can be remunerated by SLAB at a rate less than the national minimum wage. The sad consequence has been that progressively over recent years solicitors – generally the most committed to serving people with relevant disabilities and motivated to develop all necessary expertise to do so – are finding the cost to them of doing legally-aided AWI work have become prohibitive, and they have been forced to cease doing so. Solicitors continue to report this. Even more worryingly are predictions that those still providing such services will not be able to continue to do so indefinitely, unless this situation is ended. We hear predictions, the effect of which is that within a timescale of some two years the availability of suitable legal expertise to meet the needs of those dependent upon legally-aided services will have been further drastically reduced, if not substantially eliminated altogether.

In addition to its impact upon fundamental rights of access to justice, the current situation appears to have a significant adverse effect upon public finances, for which of course government is responsible. In present circumstances, one must hope that this factor, coupled with the fundamental human rights issue, will be sufficient to impel Scottish Government promptly to rectify this situation. The impact on resources and finances arises in this way. Many expert solicitors are continuing to offer their expertise as safeguarders. Although appointment of safeguarders currently appears to be variable from court to court, and from sheriff to sheriff, needs for compliance with legislation and human rights requirements may well lead to such appointments being mandatory in all cases where "the adult", or those attempting to support the adult, do not have the benefit of legal advice or representation. Lack of adequate legal advice and assistance means that attempts by adults and unqualified representatives tend to lack the focus and efficiency that result from professional advice and professional preparation. That is likely to result not only in more appointments of safeguarders, but in safeguarders having to spend more time upon appointments than would otherwise be necessary. That will all have impacts upon the public purse.

Even more serious in impact upon the public purse and public resources will be the similar impact upon the time required from mental health officers to discharge their duties. Even as matters stand, a reasonable estimate would be that Scotland's total time-allocation to services statutorily provided by mental health officers will require to be at least doubled in order adequately and efficiently to meet current needs. That does not take account of predictable increased demands.

At the end of the chain, so to speak, there is a further existing impact upon the public purse, again likely to increase, of substantially increased demands upon the courts as part of the chain reaction resulting from the policies and conduct of SLAB. Appropriately competent involvement of solicitors from the outset of applications, and weeding out of applications that would be inappropriate, can result in issues being identified and addressed at the outset, so that – for example – the need to appoint a safeguarder can be identified before a first formal hearing. Otherwise there is likely to be delay while that is addressed, and further court time required for a next hearing. Even with a safeguarder in place, inexpert presentation and conduct by unrepresented parties can give rise to further extensions and continuation of hearings, with avoidable demands on court time and resources, as well as being to the disadvantage of vulnerable adults who remain "in limbo" until their needs can actually be met. That can often have substantial impact upon services, notably – for example – all the consequences of delayed discharges from hospital.

Also "in the mix" are the existing and predictable further impacts upon local authorities. A principal example arises under sections 53(3) and 57(2) of the 2000 Act. If it appears to the local authority that an application for a guardianship or intervention order is necessary, that the conditions for doing so apply, and that no application has been made or is likely to be made by anyone else, then the local authority must apply. We understand that at least some local authorities are already experiencing substantial increases in workloads in consequence, with obvious impact on resources and funding.

Current cases

A hearing of the application to the Supreme Court by the Attorney General for Northern Ireland is due to commence on 20th October. It cannot be predicted when a decision might be issued. That decision, however, is likely to be significant for Scottish law reform, particularly as regards provisions to render lawful what would otherwise be unlawful deprivations of liberty. Put simply, Northern Ireland proposes that in addition to "capacity", an adult's wishes and feelings should be taken into account in determining whether there is sufficient consent to actual or proposed arrangements such as to take them out of the scope of Article 5 deprivation of liberty. The brief summary about the case on the website of the Supreme Court could be read as suggesting that this is applied to "young persons" (in Scottish terminology) only, not adults, in the context that adulthood commences only at 18 in Northern Ireland (and in England & Wales) but at 16 in Scotland. That impression would be incorrect. We understand that relevant court papers make it clear that the "wishes and feelings" approach should apply – in our terminology – to adults of all ages.

There is the major practical implication regarding the difficulty of avoiding unachievable demands upon services, if the definition of what constitutes a deprivation of liberty in *Cheshire West* is not mitigated. In Scotland, such mitigation could still be achieved if, for example, a situation was known to the relevant

local authority which could identify no reason for referral under adult support and protection legislation (which has no equivalent in the rest of the UK). There is also the question of the Scottish approach – acknowledged in relevant discussions, including in response to initiatives by the Mental Welfare Commission for Scotland, since shortly after the 2000 Act was passed – to the distinctive concept of assent in Scots law. Nevertheless, the UK Supreme Court will no doubt determine the consequences of the current Europe-wide position and jurisprudence. It might be possible, but would be difficult, to argue that "it can be accepted that that is the position, but its impact for Scotland and the practical results would be different".

However, also to be taken into account is the current French case before the European Court of Human Rights in which I understand that interveners are requesting that court to provide an updated ruling on the definition of an Article 5 deprivation of liberty, taking an overview of Strasbourg jurisprudence to date. That jurisprudence includes suggestions that a prerequisite is some element of suffering or other adverse impact experienced by "the adult". That review could have the effect of narrowing the definition in *Cheshire West*.

Cross-border aspects

In drafting legislation for Scotland in relation to cross-border aspects, it would be appropriate to take account of developments in legislation and recommendations by the European Union. These would certainly require to be taken into account in cross-border situations with member states of the European Union. That would be likely to add an "additional layer" to the provisions of Hague Convention 35 of 2000 on the International Protection of Adults, in particular in relation to the treatment of powers of attorney, advance directives/advance choices, and official certificates to be used in cross-border situations. Also relevant is the possibility of European provisions for inter-connectivity of registers: it is not yet known whether suggestions by European Law Institute that non-EU states could "opt in" to such arrangements are likely to be progressed. It is notable that EU legislation and recommendations tend to have wider influence across Europe, just as provisions of Hague 35 can have impact beyond the states that have ratified Hague 35, an example being that although the UK has not ratified in respect of England & Wales, Schedule 3 to the Mental Capacity Act 2005 to a significant degree replicates the wording and effect of Hague 35.

"The 2026 election"

The progress of AWI reform may be impacted by how the Scottish Government is made up, and the attitude to AWI reform of all parties whether in government or in opposition. The Scottish Government officials are there to serve government, however constituted, and cannot be involved beyond that. However, it will obviously be helpful to the cause of AWI reform if everyone who is able to do so takes or makes opportunities to encourage all parties to support AWI reform, preferably in their manifestos, with a view to making the overall drive for long-outstanding reform a matter that is in principle one of cross-party consensus, rather than undue political contention, notwithstanding that there will no doubt be matters which may be contentious, and which will require to be addressed, towards achieving best achievable legislation through the Parliamentary process. Such consensus was achieved in relation to the 2000 Act through the support of all parties prior to the first elections to the Scottish Parliament.

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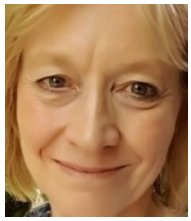

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Conferences

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 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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