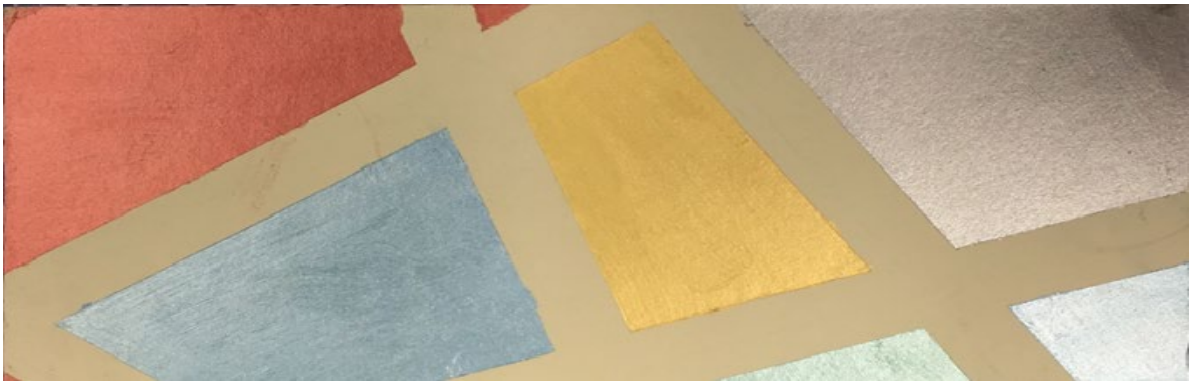

Welcome to the September 2025 Mental Capacity Report. Highlights this month include:

(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

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[1]

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.

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.*

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

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 sug gests 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 BGBI 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.

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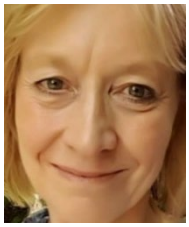

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Conferences

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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