HEALTH, WELFARE AND DEPRIVATION OF LIBERTY
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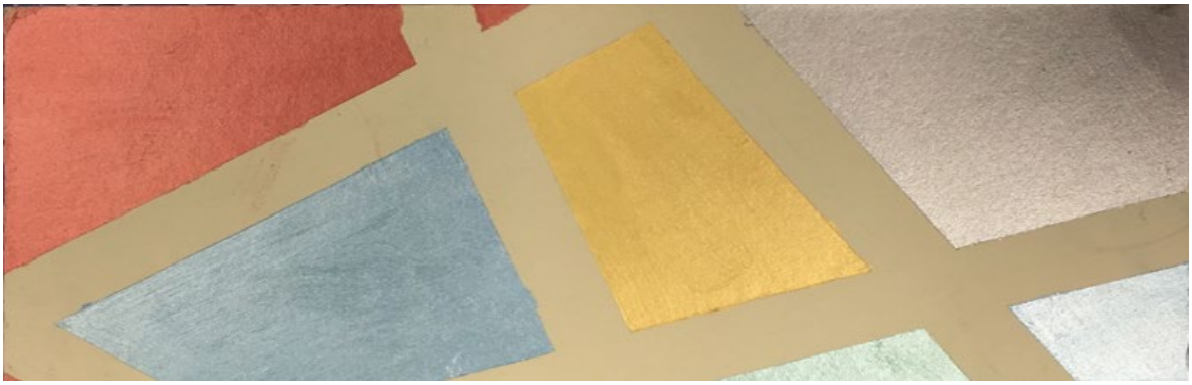

Welcome to the February 2026 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: two tributes following recent deaths of MCA champions, and best interests in the balance;

(2) In the Property and Affairs Report: *ACC* guidance from the OPG and guidance for regulated business on capacity issues;

(3) In the Practice and Procedure Report: personal welfare deputies revisited and facilitating access to pro bono representation;

(4) In the Mental Health Matters Report: the Mental Health Act 2025 and the Supreme Court considers illegality and insanity;

(5) In the Children's Capacity Report: looked after children and serious medical treatment and a consent confusion around DNACPR;

(6) The Wider Context: cannabis, criminality and capacity – a Jersey perspective.

(7) In the Scotland Report: a guest post from the Minister responsible for AWI reform and the Scottish perspective on treatment refusal by children.

We have also updated our unofficial update to the MCA / DoLS Codes of Practice, available here.

Chambers have launched a new and zippy version of our website. But don't worry, all the content that you might need – our Reports, our case-law summaries, and our guidance notes – can still be found via here. We know (flatteringly) that many of our materials are embedded on websites; the old links should automatically redirect to the new page, but do please let us know if you encounter difficulties. This is also perhaps a useful opportunity to flag that it is always best to link to the webpage which houses a guidance note, rather than a PDF of the guidance note, as we update them regularly, and linking to the PDF may inadvertently trap you in a time warp.

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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

Sir James Munby

The sense of shock amongst lawyers and others concerned with the rights of children and those with impaired decision-making capacity at the announcement of the sudden death on New Year's Day of Sir James Munby is palpable. I share it. I was, the morning I learned of it, writing a book chapter directly inspired by a lecture that he gave, and could hear him with particular vividness (it was an unusual ability to be able to both boom and twinkle at the same time, something he had a particular habit of doing when catching my eye and telling me that I was flat wrong about something about which we both had strongly held but different views). Many others have written tributes (that of Sir Nicholas Mostyn is both particularly illuminating and particularly touching), and others will no doubt be forthcoming. I wanted to record my own gratitude for all that he did to support the Court of Protection (and, alongside that, those working around it, including by writing the foreword to the first edition of the Legal Action Group's Court of Protection Handbook).

Alex Ruck Keene

(The photograph is of Sir James on the outing he took to the Kent countryside to mark his retirement at President of the Family Division)

Rachel Griffiths MBE

We were very saddened to learn of the death of Rachel Griffiths before Christmas. She had been a driving force behind the implementation of the MCA from its outset, including in her roles as MCA lead for Oxfordshire County Council, then as CQC's mental capacity lead. As she said in an interview, rightly, "by appointing me in 2013 to help the organisation embed the MCA into its policies and practice, the CQC did send a clear signal that the MCA matters." She was awarded the MBE in 2017 for her the work, the year she

also left CQC. In subsequent years – amongst other roles – she was a consultant for SCIE, and a membership of the National Mental Capacity Forum's leadership group. In part because she was a person who preferred to do, rather than to shout about doing, those who are newer to the world of capacity might not recognise her name. As Lorraine Currie – the former MCA / DoLS lead for Shropshire – put it in an email to me:

> *More recently she had time out due to unexpected illness which frustrated her. I hope she won't mind me quoting her directly, but when she returned to the National Mental Capacity Forum she (like all of us do in this situation felt a little out of things having been away this was her email to me (not in total)*
>
> *"so, I don't mind if I'm now an also-ran - though I prefer to think of myself as the old elephant who still knows where the watering holes and traps full of pointed sticks are…."*
>
> *We all need people with that kind of knowledge; Rachel had it in bucket loads and will be sorely missed.*

Her knowledge and her passion were also singled out by former SCIE colleagues Elaine Cass and Stephen Palmer; as Elaine put it, "she was always happy to explore and debate complex problems and to always stand up for people's rights." Alongside this was her kindness and sense of humour. As Stephen told me: "when she came into the office, it was always with a big smile." That smile was always in evidence, even though I saw it slightly pained on occasion when sitting alongside her in training or meetings where something was said by someone who profoundly did not 'get' the MCA. But Rachel's style was not to shout down, but rather to educate – above all by example.

We send our condolences to her family and friends; professionally, the world of the MCA is just that bit dimmer without Rachel's face beaming in on Zoom from in front of her bookshelves.

Alex Ruck Keene

Best interests in the balance

Royal Free NHS Foundation Trust v EF & Anor [2025] EWCOP 52 (T3) (McKendrick J)

Best interests – medical treatment – residence

Summary

In this case, McKendrick J granted an application by the applicant NHS Trust for EF to be removed from the lifelong care of his father, NN, and placed in a nearby supported living placement for the purposes of ensuring he received a sufficient level of dialysis and regular medication.

EF was a 44-year-old man with Down's Syndrome. He had kidney failure and required thrice weekly dialysis and medication to manage his phosphate levels. He had missed many sessions and had not stayed for the full required time at many more sessions, with the result that his dialysis was chronically inadequate, putting him at risk of sudden death or other complications, including difficulty breathing, heart and peripheral vascular problems, acute confusion, damage to bones and blood vessels, and painful, and/or uncomfortable skin conditions.

The three represented parties (NHS Trust, EF by the Official Solicitor, and the local authority with safeguarding responsibilities), agreed that EF lacked capacity to make decisions about his medical treatment, his residence and care. They all agreed that it was in EF's best interests to be conveyed to supported living for the purposes of receiving sufficient dialysis.

NN, EF's father, was EF's main carer and a litigant in person. He did not file a witness statement or attend the pre-trial review. He attended the final hearing and requested an adjournment, which was opposed by the three represented parties, but a short adjournment to the afternoon and following day was granted.

The court heard evidence that NN remained preoccupied with his bankruptcy and the death of his wife, EF's mother, and continued to believe that EF did not have any kidney damage and did not require dialysis. He had entrenched mistrust of professionals. He did not agree that EF had a kidney problem and insisted that he did not require dialysis. NN had considerable influence over EF's views. It was unlikely that EF's understanding of his condition and need for treatment would be successful whilst he continued to be subject to his father's influence. EF did not want to undergo dialysis in hospital, or move or live away from his father. There would be risks to EF's mental health if he were to be accommodated away from NN and have his contact with his father limited. NN opposed EF leaving his care or their home.

In weighing up EF's best interests, McKendrick J pointed out that, absent the issue of dialysis and medication, the local authority with safeguarding responsibilities, would not have intervened to separate EF from his father. NN had provided his son with a home and a social life. Given EF's strongly held wishes and feelings, it was unlikely that a court would have separated EF from NN if the issues of treatment for the failed kidneys had not arisen.

However, in the end, McKendrick J accepted that EF's quality of life was seriously impaired because of the symptoms caused by insufficient and infrequent dialysis. He was also likely being negatively psychologically impacted by the ongoing conflict between professionals and his father, and these proceedings. Both the quality and length of EF's life strongly weighed the best interests balance towards separation from his father to ensure he received regular and sufficient dialysis and medication to keep him as healthy as possible.

Comment

This case is a good example of the overlap between the various "domains" when it comes to best interests. The issue of EF's care and residence, and contact with his father, clearly overlapped with the main issue to be determined, namely whether it was in EF's best interests to receive medical treatment. Although the issues presented to court are typically considered under common headings such as care, residence, and medical treatment, it is important not to treat these issues in "silos", and to have regard to the wider picture when considering P's best interests, which will be highly fact sensitive.

We would also take this opportunity to draw attention to the pro bono scheme recently launched by Advocate in conjunction with the Court of Protection Bar Association to assist litigants in the Court of Protection (see further the Practice and Procedure section in this Report). It is not clear from the judgment whether NN sought legal advice or representation at any stage. However, McKendrick J "*wondered whether he does have difficulties and whether he has capacity to conduct the litigation. I do not conclude he lacks litigation capacity but it is clear he is vulnerable and the presentation of his case was impaired by some strange perspectives*."

Jumping the procedural tracks on capacity

Re LM [2025] EWCOP 50 (T2) (HHJ Khan)

Capacity – assessing capacity

Summary

This was a s.21A application issued by the Accredited Legal Representative ('ALR') for a man identified as LM, challenging the standard authorisation in respect of LM's residence at a care home for people with acquired brain injury. A three day hearing was listed to determine the issue of LM's capacity to make a variety of decisions. The evidence centered around the fact that the brain injury sustained by LM (in the words of HHJ Khan) "*gives rise to a frontal lobe paradox (FLP)*." As explained by HHJ Khan, this was the discrepancy between LM's ability to perform well on assessment and cognitive testing and his struggle to make decisions in every day life. This is often described as a person who can talk the talk but not walk the walk.

By the time the matter came before the court, the parties had agreed that LM lacked the capacity to make decisions about his care and support, and that he had capacity to make decisions about engaging in sexual relations. Following the conclusion of the evidence, the parties agreed that HHJ Khan did not need to decide whether LM had capacity to use the Internet and social media, or have contact with others. They also agreed that the mental capacity requirement in Schedule A1 to the MCA 2005 was met. Thus the only issues for determination were whether LM had capacity to conduct proceedings and to make decisions about his residence.

Oral evidence was heard from a case manager (TW), Dr Radcliffe as the jointly instructed expert and Dr L, a clinical psychologist employed by LM's placement. Both Dr L and Dr Radcliffe had concluded that LM had capacity to make decisions about his residence.

Notwithstanding the fact that the case had been brought under s.21A, HHJ Khan was persuaded that it was appropriate to make a s.15 declaration about LM's capacity to make decisions about his residence. He went on to reject Dr Radcliffe's and Dr L's evidence about LM's capacity and concluded that LM lacked the capacity to make decisions about his residence. He did so on the basis that the issues of care and accommodation could not realistically be separated and LM's inability to "*appreciate his need for intensive support directly affects his ability to make a meaningful decision about accommodation*."

Comment

The case serves as (yet another) reminder that there will be circumstances in which it is simply not possible to disentangle capacity to make decisions about care from capacity to make decisions about residence.

There are two further points of note. First, HHJ Khan expressed both surprise and disquiet regarding the trial timetable provided for one of the witnesses of fact to give evidence in chief – given that the issues that the local authority wished that witness to cover were known to the witness at the time the statement was made and had not arisen since the making of the statement. As HHJ Khan remarked, "*a party who serves an incomplete witness statement runs the risk of the other party being prejudiced by being taken by surprise by additional evidence being given in chief, with a consequence of the inevitable adjournment.*" Court of Protection judges are often prepared to give more latitude to a party wishing to adduce evidence in chief than in other courts, but it is important to bear in mind the risks of this approach as articulated by HHJ Khan.

Secondly, it appears that the parties did not seek a finding in respect of LM's capacity to make

decisions about contact and social media and the internet on the basis that the assumption of capacity should remain in place, with staff being able to utilise the provisions of s.5 MCA 2005 if appropriate. It may be that the rationale for taking this approach (despite there being 'no doubt' that LM was vulnerable when he accessed social media and the internet), was the difficulties that would ensue if steps were taken to restrict or remove LM's access to social media and the internet. This is in line with what may be seen as emerging as a new orthodoxy (or, perhaps, a reversion to what Parliament actually intended), namely that s.5 should be the first line of consideration in relation to acts of care and treatment. That does not mean, however, that judgment calls as to whether decisions about (for instance) contact are 'merely' unwise or incapacitous will necessarily be easy; above all, they will require sound ethical instincts.

Care planning in drift

London Borough of Lewisham v SL [2025] EWCOP 51 (T3) (Theis J)

Best interests – residence

Summary

This case concerned SL, a 30-year-old woman with complex needs who lived with her parents. By the time of the hearing, there was broad agreement between the parties that SL should remain living at home with her parents with the current comprehensive package of support. It was also agreed that there should be a pause of at least six months in assessing SL for, and introducing her to, alternative placements, given the level of distress that the process of moving placements had caused her to date.

Theis J heard oral evidence from GF, the allocated social worker, DL and TL, SL's parents, and Mr Caulfield, a jointly instructed independent social worker. The court was therefore presented with both professional and family evidence as to SL's needs, risks, and day-to-day lived experience.

SL developed epilepsy in 2010 and was diagnosed with atypical autism in 2011. She moved to a specialist autism school in 2012. In early 2023 she was diagnosed with sleep apnoea. SL's absconding behaviour began when she was 18 years old. She uses crack cocaine and, when she absconds, is exposed to very serious risks and harm. These risks have been a consistent feature throughout the proceedings and have significantly shaped care planning decisions.

In April 2024, the local authority formed the view that SL should move from her parents' home into a supported living placement, MC, a position that was supported at that time by the Official Solicitor. Between April and July 2024 a transition plan was proposed, involving a period of familiarisation with MC staff followed by respite stays at MC. In July 2024 the local authority applied for urgent authorisation for SL to be discharged from hospital to MC, but the placement did not proceed because MC withdrew its offer.

This level of instability continued for the next year – by the end of August 2025 the local authority had contacted 21 supported living providers, all of whom either declined to offer a placement or had no suitable vacancies.

At the time of the hearing there were no concrete alternative placements for the court to consider. In her evidence, GF acknowledged the need for a tailored respite solution that met SL's needs while providing meaningful relief to her parents. DL expressed concern that, as she and her husband get older, SL might in the longer term need to move to a residential care setting and that it would be beneficial for SL to become familiar with such environments gradually.

The local authority's search had focused on core and cluster supported living and residential placements. SL required ground-floor accommodation or accommodation with lift access because of the risk of falls associated with her seizures. Providers needed experience of supporting individuals with autism, learning disability, challenging behaviour, and epilepsy.

Although the local authority's initial position was that there should be no pause in assessing SL for and introducing her to new placements, following the oral evidence it accepted that a six-month pause was appropriate. GF stated that any future placement exploration would be undertaken in a staged and person-centred manner based on SL's assessed needs.

Theis J observed how the proceedings had been long-running and repeatedly disrupted by significant evidential developments between hearings, with the consequence that carefully constructed plans were repeatedly derailed. The evidence demonstrated the very serious risks SL faced when she absconded and the damaging consequences of those events. Those risks had repeatedly undermined attempts to arrange respite care or any transition away from the family home.

The evidential reality at the time of the hearing was that there was only one viable option: for SL to remain living at home with the existing comprehensive care package. Although the longer-term plan remained to explore alternative placements, the parties agreed – and Theis J endorsed the proposition – that there should be a six-month pause in assessing SL for and introducing her to new placements, allowing SL and her family a period of respite and stability and enabling SL to build on early signs of improved engagement.

Theis J noted an ongoing concern that SL appeared overly dependent on her family and that care planning needed to place greater emphasis on supporting her to develop independence and to engage with people closer to her own age. Despite the broad areas of agreement, Theis J identified an element of drift in the care planning.

While recognising the dynamic and difficult circumstances, Theis J made clear that, with the proceedings coming to an end and the care package relatively stable, there must be renewed and proactive planning by the local authority.

This included solution-focused work to support SL's engagement in community activities, a more creative and flexible approach to respite care, increased direct contact between the allocated social worker and SL and her family, clearer planning around the essential requirements for any future placement, and consideration of a more structured and informed decision-making framework, such as through a multidisciplinary team. The six-month pause was identified as an opportunity to establish this foundation. Theis J expressed concern that, without this foundational work, SL's current placement would remain fragile and vulnerable to emergency breakdown.

Comment

The case illustrates issues that are not uncommon in Court of Protection proceedings, including long-running disputes, changing evidential landscapes, limited placement availability, and unstructured decision-making. The guidance given by the court, particularly in relation to avoiding drift in care planning, provides a valuable framework for practitioners seeking to manage complex cases more effectively and to ensure that best interests decision-making remains active, focused, and person-centred.

Short note – securing the 'true' wish of the

person

In *King's College Hospital NHS Foundation Trust v LE* [2025] EWCOP 46 (T3), Theis J was concerned with LE, a 46 year old woman with a long standing diagnosis of schizophrenia and diabetes. [1] Theis J ultimately endorsed the amputation of "*all four fingers and part of the palm on LE's left hand, and most of her left thumb, the tips of the fingers on her right hand and parts of her toes on both feet due to dry gangrene. Then to carry out reconstruction surgery to both hands to cover exposed bone with tissue from other parts of her body. The plan is for this reconstruction to be done at the same time as the procedure for the amputations*." This draconian step was taken in the face of LE's objections, but in circumstances where LE had made clear that she did not wish to die. Theis J made a particular point of emphasising the fact of her meeting with LE, as "*extremely helpful. Wholly understandably she was scared and worried about what was being proposed. I was struck that she had some understanding of the court, that I would be making a decision and this was her opportunity to tell me what she wanted me to hear. I explained I would listen to what everyone said before I made any decision and she understood that*."

Short note: the end of the *ZX* saga?

Readers will remember the long-running proceedings concerning the very difficult question of whether a young man called ZX had capacity to decide to engage in sexual relations. Having most recently been in the Court of Appeal (*Re ZX (Capacity to Engage in Sexual Relations*) [2024] EWCA Civ 1462), the matter returned to Theis J for rehearing. Following the instruction of an independent clinical psychologist, Theis J made final declarations at hearing in June 2025, agreed by the parties, [2] pursuant to s.15 MCA 2005 that ZX lacked mental capacity to conduct these legal proceedings and to make decisions about (i) where to live; (ii) care and support; (iii) use of the internet and social media; (iv) managing his property and financial affairs; (v) entering/terminating a tenancy; and (vi) sharing personal information about himself, in particular, information about his parents, and details and information about proceedings. In relation to engaging in sexual relations, the court declared that ZX had the capacity to decide to engage in sexual relations.

Directions were made at the hearing on 17 June 2025 for further assessment in relation to ZX's capacity to decide about having contact with others. This was considered necessary due to the lack of clarity on this issue in Dr Williams' reports, ZX taking unusual risks with his own safety to meet people and in circumstances where ZX was due to commence a course later in the year which would provide further evidence regarding ZX's capacity as he interacted with others. The local authority wanted to explore ZX's ability to use and weigh the relevant information about his contact with others.

Unfortunately, ZX was not able to start the course as planned; a further addendum report was obtained from the psychologist, who gave oral evidence which led to agreement that it was open to the court to find that he lacked capacity to make decisions about contact.

In a relatively short judgment, Theis J rehearsed the reasons for endorsing that agreed position that ZX lacked that capacity. Of note, perhaps, is

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

[2] Agreed on behalf of ZK by his litigation friend the Official Solicitor. As ever, we confess to a degree of uneasiness at such agreement for the reasons set out a decade ago now in this article by Alex and Neil.

the way in which Theis J (gently but firmly) set out the problems with being too decision-specific in relation to contact in circumstances where the clinical psychologist had (our words) sliced the salami too finely without recognising that his specific deficits preventing him using and weighing the relevant information in the moment affected his decision-making ability in respect of all categories of those with whom he was likely to have contact.

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Annabel has a well-established practice in the Court of Protection covering all areas of health and welfare, property and affairs and cross-border matters. She is ranked as a leading junior for Court of Protection work in the main legal directories, and was shortlisted for Court of Protection and Community Care Junior of the Year in 2023. She is a contributor to the leading practitioners' text, the Court of Protection Practice (LexisNexis). To view full CV click here.

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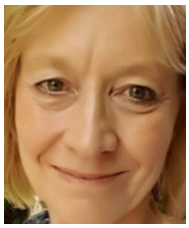

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Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Alex is speaking at a conference organised by St Christopher's Hospice on Mental Capacity in Palliative Care on 9 March. The conference is in person (in London) and online; for details and to book, see here.

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 March. 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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