PRACTICE AND PROCEDURE
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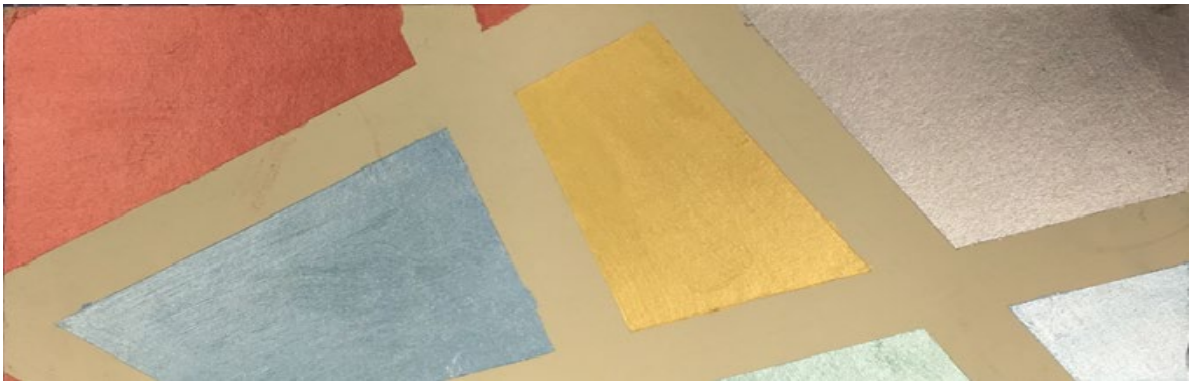

Welcome to the February 2026 Mental Capacity Report. Highlights this month include:

(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.

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

Personal welfare deputies, principle and pragmatism

Parr v Cheshire East Council & Anor [2026] EWCOP 1 (T3) (Poole J)

Deputies – welfare matters

Summary

This case concerned an application by Alison Parr, the mother of an 18 year old to be appointed as welfare deputy for her daughter, Ruby. Ruby lived with her mother and two siblings, with her mother being her lead carer and the person co-ordinating Ruby's care package. Ruby had a severe learning disability and multiple serious health problems including intractable epilepsy, and was on long term ventilation and was fed by PEG. Her mother's application had been rejected on the papers (as is common) but on reconsideration, Poole J granted the deputyship order and permitted the family to be named. Poole J noted that Ruby's mother was "*highly attuned to her daughter's needs, always acts in in what she considers to be Ruby's best interests, and is extremely well placed to assess what those best interests are, including in medical emergencies and when making decisions about her residence and care.*" Moreover, Poole J accepted that there had been times when it would have been positively advantageous to Ruby for her mother to be welfare deputy, because her status as deputy would mean that her views were not at risk of being sidelined by professionals who did not have the same background knowledge and experience of Ruby, and information about Ruby would not wrongly be withheld from her. Poole J accepted that there would be '*countless*' health and welfare decisions to be made daily for Ruby and that there would be important one-off decisions too, such as whether she should move to a unit run by a specialist care provider. Poole J applied the decision of Hayden in *Lawson, Mottram and Hopton* [2019] EWCOP 22 but, reflecting the reality that best interests decisions would always have to be made for Ruby, noted that "*put bluntly, someone with Ruby's level of cognitive functioning will never have capacity to make any decisions about her personal welfare other than at a very rudimentary level. She might express a dislike of a particular experience or enjoyment of another, but she cannot, and never will be able to, understand consequences of decisions such as where to live, what care package is best for her, or whether she should have a particular medical intervention or an admission to hospital. Appointment of a deputy would not take away autonomy from Ruby because she cannot exercise autonomy in relation to anything except the most basic activities and needs. I would not view the appointment as being restrictive of Ruby's freedom or right to self-determination.*"

Poole J further noted that there was no conflict of views with the family or with professionals

about her mother being an appropriate welfare deputy, and that as she was the person '*most in tune with Ruby's wishes and feelings*' and '*most committed to ensuring that Ruby's best interests are met*' it was appropriate to appoint her as deputy: "[n]*aturally, not all adults without capacity and with severe disabilities, who have significant daily care needs, need a PWD. But Ruby's particular history and circumstances, combined with her likely change of residence and therefore carers, mean that a constant voice in decision-making will be to her advantage.*"

Comment[1]

Although Poole J was keen to stress that welfare deputies will not be required "*in most cases,*" the factors relied on in this judgment will be familiar to many other families of disabled young people. Many will be able to point to a series of decisions that need to be made, the sidelining of their input once their son or daughter turns 18, failures to implement the MCA properly, and the value of ensuring that the people with comprehensive background knowledge of P must be involved in decisions about them, particularly where social workers and care staff are frequently replaced. The judgment also helpfully adopts a realistic approach to whether a deputyship order is more restrictive than professionals relying on s.5 MCA to make best interests decisions – both result in the person having decisions made for them, and both require the decision-maker to act in P's best interests and only where they lack capacity.

The court's recognition that third parties often want to see evidence of an LPA or deputyship before sharing information about P with the parent of a disabled adult ties reflects wider experience. For example, the gov.uk guidance page entitled 'Medical disclosure information to attorneys and deputies' does not say anything about being able to disclose such information to a person who is not a deputy or attorney in reliance on s.5 MCA, and says that "*There are no specific statutory provisions enabling a third party to exercise subject access rights on behalf of an individual who does not have the mental capacity to manage their own affairs, but the Information Commissioner's Office advises that "it is reasonable to assume that an attorney with authority to manage the individual's property and affairs, or a person appointed by the Court of Protection to make decisions about such matters, will have the appropriate authority'."*

Fact-finding and capacity

SW v (1) Nottingham City Council (2) JW [2025] EWCOP 53 (T3) (Poole J)

Practice and procedure (Court of Protection) – fact-finding

Summary

In this (complicated) case, Poole J dealt with an application to appeal from findings of fact made by HHJ Rogers (sitting in retirement).

SW and JW had been married for over 29 years. SW was diagnosed with muscular dystrophy, was a long-time wheelchair user and now largely bedbound. JW was diagnosed with OCD and long-standing depression. They lived together in their own home until JW was admitted to hospital in July 2023 with a very serious leg infection. SW could not be left alone and was moved to a care home. On JW's discharge from hospital, she was moved to the same care home. After some time living together in the same care home, the care home raised concerns about SW's conduct, including his conduct towards JW

[1] For more commentary on this case, see Alex's post about it on his website here.

which was thought to be controlling and coercive. The care home gave notice to SW and JW resulting in the local authority making an application to the Court of Protection.

The parties instructed a psychologist to report, amongst other things, on JW's capacity in relation to contact. At the first meeting, the psychologist relayed the concerns and allegations to JW but she either did not accept them or she took responsibility herself for matters such as the failure to seek medical attention for her infections. The parties agreed that a fact finding hearing should be listed before further expert evidence on capacity could be sought. However, DJ Buss disagreed and held that a fact-finding hearing would generate excessive delay and was not necessary.

The local authority appealed. HHJ Rogers reversed the decision of DJ Buss not to hold a fact-finding hearing, and directed the local authority to set out a schedule of allegations upon which findings were sought. The schedule produced by the local authority ran to 20 pages. Poole J drew on experience in the family courts and gave the following guidance:

> *24.* […] *In family proceedings, the courts have considered how best to present allegations of fact on which a party seeks findings, in particular where the allegation is of a pattern of behaviour said to constitute controlling or coercive behaviour. In Re H-N [2021] EWCA Civ 448, the Court of Appeal said that when an allegation of controlling and/or coercive behaviour is alleged, that should be the central allegation to be considered and "Any other, more specific, factual allegations should be selected for trial because of their potential probative relevance to the alleged pattern of behaviour, and not otherwise, unless any particular factual allegation is so serious that it justifies determination irrespective of any alleged pattern of coercive and/or controlling behaviour" In Re JK [2021] EWHC 1367 (Fam) and Re B-B [2022] EWHC 108 (Fam) suggestions were made about how to draft allegations of fact in such cases. On the one hand it is unhelpful to have a long Scott Schedule containing multiple allegations about individual events. On the other hand a simple, unparticularised allegation that a person has been guilty of coercive or controlling behaviour is not helpful. It might be helpful to have a narrative statement of the relationship but include some specific examples of abuse and evidence as to when it started and ended, if it has ended. It might assist to group allegations under different headings of control or coercion.*

In his judgment, HHJ Rogers referred to the large bundle of documentary material and witness statements. He gave pen pictures of the evidence of thirteen witnesses who gave oral evidence, including SW. In conclusion, the judge was satisfied on the balance of probabilities that the factual accounts advanced by the local authority were made out, and that the conduct could be properly categorised in part as coercive and controlling.

SW, supported by JW, appealed, which came before Poole J. After recounting the history of the case, Poole J set out the relevant law, emphasising that, *"*[t]*he appellate court should be slow to interfere with findings of fact."* Poole J then dealt with thirteen grounds of appeal one by one, which were summarised as follows:

> *40.* […] *In essence the Appellant contends that the Judge failed to provide any analysis of the evidence and failed to give any or any adequate reasons for his conclusions. The Judge did not identify SW's case, where his evidence differed from that relied upon by the Local Authority, and did not explain how he had resolved those*

> *differences. The Judge did not weigh the evidence "warts and all". Any analysis was superficial and the approach taken was confused. There was no specificity about findings made and there was no consideration of the wider context in which SW's behaviour ought to have been analysed. As a consequence any conclusion that he was guilty of coercive and controlling behaviour is unsustainable.*

The appeal was dismissed, but not without a distinct sense of trepidation. For example, Poole J acknowledged that "*this very experienced Judge's analysis of the large bundle of written evidence and oral evidence given by 13 witnesses as well as SW over three days, was at best concise*". Furthermore, Poole J identified that the judge "*did not refer expressly to any specific document within the bundle*", and "[h]*is analysis of the evidence relied upon by the Local Authority to support the seven findings it sought is found in one paragraph*". Later on, Poole J expressed, "*I am sure that many other Judges would have referred to at least one or two specific alleged events to demonstrate why they preferred the evidence relied upon by the Local Authority over SW's evidence. This Judge did not do so. Nor did the Judge analyse the oral evidence beyond his pen-pictures of the individual oral witnesses including SW.*"

In the end, Poole J found that "*the Judge was certainly concise, but he gave adequate reasons. His analysis of the evidence was brief but the dispute on the underlying factual accounts was not nuanced.*" After describing this as "*a difficult case*", Poole J held that:

> *61.* […] *There was no discernible error of fact or law. The Judge was entitled to make the findings that he did on the evidence before him. His judgment was coherent and his reasons were adequate. There was no procedural irregularity rendering the proceedings or the judgment unfair.*

Comment

Fact-finding hearings in the Court of Protection are relatively uncommon at Tier 3 level (although they are more prevalent at Tiers 1 and Tier 2), and reported appeals from findings of fact are even more uncommon still. This judgment is a salient reminder that the utmost care should be taken in handling allegations that require findings of fact.

Although there was no appeal against earlier case management directions, it is apparent that this case would have benefited from better preparation in the earlier stages. Poole J found that "[t]*he procedural pathway to the fact finding hearing in this case was problematic and the presentation of the findings sought was not particularly conductive to achieving clarity*". For example, in relation to the allegations presented, Poole J expressed the view:

> *49.* […] *It is regrettable that specific events or examples of SW's conduct were not specified. There was not express allegation that on a certain date at a certain place SW acted in a certain way. However else they may have been presented, the allegations were in fact in the form of general statements about the effects of SW's behavior on JW – affecting her access to health care, to care services, to the community, to her autonomy over finances and so on.*

Poole J made the following suggestion, "[f]*or clarity of understanding it would have been preferable if the specific events had been set out in the schedule rather than referring to them by way of bundle page references.*"

We would stress the need for early, careful, and precise particularisation of specific allegations, especially where it is alleged that a pattern of behaviour amounts to coercive or controlling

behaviour, and/or abuse. This would not only be of benefit to the judge making determinations, but to all parties involved.

Separately, athough it did not form part of the appeal, Poole J also observed at (paragraph 20) that:

> *In this appeal I am not concerned with Dr Todd's conclusion that JW's "borderline intellectual functioning" met the diagnostic test, nor the potentially nuanced question of the causal nexus between her inability to make decisions as to care, residence and contact, and her borderline intellectual functioning. However, being a victim of coercion and control is unlikely to be found to be an impairment of or a disturbance in the functioning of the mind or brain. A victim of coercion and/or controlling behaviour may or may not lack mental capacity to make certain decisions including contact with the person who exercised control or coercion. A person who otherwise has mental capacity but is who is so subjugated by abusive behaviour that their will is overborne, may be the subject of an application to the High Court to exercise its inherent jurisdiction to protect the autonomy of such a person.*

As Poole J made clear in remitting the case to HHJ Rogers (having clarified what, in fact, stood as findings of fact), one of the matters that he would have to address as soon as practicable in reaching a conclusion as to capacity was: "(d) [w]*hether the causal nexus is established given the significant role of coercion and control and the need to identify a causal nexus between the inability to make a decision and an impairment or disturbance in the functioning of the mind or brain*." It is to be hoped that there is a judgment forthcoming on this point, as it is one which causes very considerable difficulties, both conceptual and practical (see further this shedinar conversation between Dr Kevin Ariyo and Alex on the former's research on interpersonal influence and capacity)

Short note: compliance with the 'Closed hearings' guidance

In *Bristol City Council v CC* [2026] EWCOP 4 (T3), Theis J followed the guidance issued by her predecessor [2] in giving a short judgment to explain why steps had been taken behind closed doors, and in respect of material kept closed. For reasons which are not material for present purposes, the position of the relevant parties had evolved in relation to the closed material. Theis J concluded by observing that:

> *this case has provided an important reminder of the need to adhere to the Guidance when considering whether an application should be made for a closed hearing/material. Prior to any such application being made there must be careful analysis of the legal and evidential basis upon which the court is being asked to order such a hearing, and for any material to be withheld in accordance with the principles so clearly set out in the Guidance.*

Facilitating access to pro bono representation

A new protocol has been put in place between Advocate and the Court of Protection Bar Association. [3] It sets out the process for sourcing a Court of Protection Bar Association

[2] Which she was at pains to note "*is not in and of itself binding upon the court (as is made clear by paragraph 4* [of the Guidance]*) however the principles set out have their foundation in applicable authority*."

[3] Her fellow editors pay particular tribute to Tor for her work in starting the ball rolling on this during her tenure as Chair of the CPBA.

volunteer barrister to help with urgent advice or representation. "Urgent" means that there is a hearing in the next 14 days.

The organisation Advocate helps in two ways: by helping find a barrister and helping with direct public to barrister access. The Protocol can be used by judges, judges' clerks, court staff, lawyers, and people who are a party in the case, or want, or think they need, to be a party in the case.

For non-urgent hearings, the person needing free legal advice or representation can send an application to Advocate.

Requests for a CPBA barrister who can provide free urgent COP advice or representation should be sent to:

courtofprotection@weareadvocate.org.uk

Advocate and the volunteer barrister will be helped by having as much of the following helpful information as possible:

- Case name and number;
- Name of unrepresented party;
- Contact details for the unrepresented person Names of representatives of other parties (solicitors and counsel), and their contact details, where known;
- Date and time of the hearing, hearing time estimate, the judge's name;
- Hearing type (eg, case management or final hearing);
- Whether the volunteer can attend remotely (that will greatly increase the chances of securing very short notice representation);
- An outline of what the case is about and the main issues;
- How those issues relate to the unrepresented party;
- Particular documents to consider.

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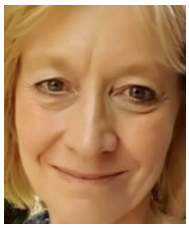

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Conferences

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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