Neutral Citation Number: [2026] EWCA Civ 640

Case No: CA-2025-001953

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COURT OF PROTECTION
MR JUSTICE POOLE
[2025] EWCOP 25 (T3)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/05/2026

Before :

SIR STEPHEN COBB
(President of the Family Division and of the Court of Protection)
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE COULSON

- -

Re: Gardner (Deceased) (Court of Protection: Disclosure of Position Statements)

- -

Between :

Ruth Cowles (previously 'EF')	**Appellant**
- and -	
[Carl Gardner (deceased) (previously 'AB')]	**Respondents**
NHS Staffordshire & Stoke on Trent Integrated Care Board	
Midlands NHS Partnership Trust	
Danielle Huntington (previously 'CD')	
Professor Celia Kitzinger	**First Intervener**
The Official Solicitor	**Second Intervener**

Alex Ruck Keene KC (Hon) (who did not appear below) and **Eliza Sharron** instructed by **Irwin Mitchell LLP**) for the **Appellant**
The Respondents were not present and were not represented on the appeal
Emma Sutton KC and **Gemma McNeil-Walsh** (who did not appear below and who are instructed on the appeal by **Advocate**) for the **First Intervener**
Katie Scott (instructed by **MJC Law**) for the **Second Intervener**

Hearing date : 25 March 2026

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 21 May 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Sir Stephen Cobb, President of the Family Division and of the Court of Protection:

Introduction

1. Proceedings brought under the Mental Capacity Act 2005 ("the MCA 2005") in the Court of Protection not infrequently involve consideration of the most intimate aspects of an individual's (i.e., P's) life. In many cases, as here, they raise questions relating to P's end-of-life care and death. Rights under the Articles of the European Convention on Human Rights ('ECHR'), including but not limited to the right to life (Article 2), the right not to be arbitrarily deprived of one's liberty (Article 5), the right to family and private life (Article 8), and the associated right to consent to or refuse medical treatment, underpin many of the court's decisions. For those reasons, there is a strong public interest in ensuring transparency as to the manner in which the court conducts its business and the principled basis upon which disputes are determined.

2. Hearings in the Court of Protection often attract observers who have no connection with the parties to the case. Members of the Open Justice Court of Protection Project ('the Project') are regular observers of proceedings in the Court of Protection. The Project is a small voluntary unfunded organisation, run by members of the public, none of whom are lawyers, journalists or Court of Protection professionals.

3. The issues raised by this appeal have engaged P's right to respect for his private and family life on the one hand, and the public interest in the dissemination of information about the court proceedings concerning him on the other. The specific question for determination, both before the court below and on this appeal, is whether, and if so in what circumstances, position statements drafted by the advocates and filed by the parties for a court hearing in the Court of Protection can be disclosed to non-party observers, specifically in this case, Professor Celia Kitzinger, the founding co-director of the Project.

4. The proceedings in which the issue under appeal arises concerned Carl Gardner. He had suffered a catastrophic brain injury in May 2024, and died on 8 July 2025, aged 44. Proceedings had been instituted in the Court of Protection in November 2024 by his fiancée, and were, for the main part, case managed by Mr Justice Poole ('the Judge').

5. In its concluding stages, the Judge delivered three substantive judgments: *Re AB (ADRT: Validity and Applicability)* [2025] EWCOP 20 (T3), ('the first judgment') (hereafter, where specific references are made to the paragraphs [*] in that judgment they will appear as '[J1/*]') which focused on the effect of an Advance Decision to Refuse Treatment ('ADRT'); *Re AB (Disclosure of Position Statements)* [2025] EWCOP 25 (T3) ('the second judgment' - '[J2/*]') which addressed the contested issue of the disclosure of position statements to non-party observers of the proceedings; and

Re Gardner (Deceased)(Duration of Transparency Order) [2025] EWCOP 34 (T3) ('the third judgment' - '[J3/*]') by which the Judge gave his reasons for discharging the Transparency Order. This appeal focuses on the Judge's decision to order the disclosure of position statements to Professor Kitzinger explained in the second judgment.

6. The Appellant is Mr Gardner's mother. She had opposed the disclosure of position statements prepared and filed by lawyers on her behalf to Professor Kitzinger. She now appeals, with the permission of King LJ, against the Judge's disclosure order. It was recorded by the Judge that she "effectively, if not formally, speaks for the whole of Mr Gardner's large family" ([J1/3] and [J3/1]).

7. Although the other parties to the substantive proceedings in the Court of Protection (namely, Mr Gardner's fiancée, the Integrated Care Board ('ICB') and the NHS Foundation Trust) have filed short statements in accordance with CPR PD52C para.19, they have chosen to play no part in this appeal.

8. The first intervener to the appeal is Professor Kitzinger, who had been given leave to intervene in the proceedings in the court below on the issue of transparency, as discussed in the third judgment. Professor Kitzinger is a regular observer of Court of Protection proceedings; she had been a regular observer of the court hearings concerning Mr Gardner. It was she who had applied for disclosure of the position statements.

9. The second intervener to the appeal is the Official Solicitor, who had represented Mr Gardner in the Court of Protection as his litigation friend and whose formal engagement in these proceedings ended on his death; she was given leave to intervene on this appeal to make representations of a more general nature to the court.

10. We are grateful to all counsel for the care with which they have presented the arguments in this appeal both orally and in writing. We are particularly grateful to Ms Sutton KC and Ms McNeil-Walsh for providing their services to Professor Kitzinger *pro bono*.

11. For the reasons which I set out below, I propose that this appeal is allowed; I would set aside the Judge's order requiring the Appellant to disclose her position statements to Professor Kitzinger.

Summary of Conclusions

12. The following conclusions can be drawn from this judgment:

    i) Court of Protection proceedings are private by default (rule 4.1 of the Court of Protection Rules 2017) ('COPR 2017'), even where the court directs that *hearings* are to be held in public under rule 4.3 of the COPR 2017. Many hearings in the Court of Protection are of course in public, but a direction for a public hearing does not convert the proceedings into "public proceedings" equivalent to litigation in the civil courts or tribunals. The judge below erred in treating the proceedings as public *simpliciter* and in importing openness principles from jurisdictions which are public by default;

ii) Once lodged, position statements are "court records" within the meaning of rule 5.9(2) of the COPR 2017 (following *Dring v Cape Intermediate Holdings Ltd* [2019] UKSC 38 [2020] AC 629) ('*Dring*'). However, they are not automatically disclosable to observers or non-parties, and court authorisation is required for disclosure of them to non-parties under rule 5.9(2) COPR 2017;

iii) Open justice does not entitle observers to access all material informing judicial decision-making. Access to documents must be justified by a demonstrable application of the open justice principle, not by curiosity, research, education, or personal interest;

iv) Disclosure of position statements which cite highly personal source material from the written evidence is a serious interference with Article 8 ECHR rights; in this case, the court failed to engage with rule 5.9(4) COPR 2017 and specifically consider whether disclosure should be: refused, redacted, or subject to use restrictions (e.g., in relation to source evidence);

v) The procedure for disclosing position statements to members of the public should be considered as a matter of priority by the *ad hoc* Court of Protection Rules Committee ('COPRC'); in the meantime, the guidance offered by the Judge at [J2/36] should *not* be followed; the court should in the meantime consider disclosing case summaries, chronologies and lists of issues to observers who request information;

vi) The Court of Protection exists for P's benefit. Transparency must support justice, not overwhelm it.

Background facts

13. The background facts can be ascertained from the first judgment at [J1/2-3]. I summarise them as follows.

14. On 4 May 2024, Mr Gardner suffered a hypoxic brain injury following a cardiac arrest; this caused him to enter a prolonged disorder of consciousness. He was hospitalised. It was not disputed that in this state he lacked capacity to make decisions about his residence, care and treatment or (once issued) the conduct of these proceedings. In August 2024, Mr Gardner's fiancée revealed that Mr Gardner had signed an ADRT, which was contained within a document entitled 'Living Will'. That document was dated 3 April 2024 (i.e., approximately one month prior to the onset of his critical ill-health). A number of documents were generated at that time alongside the Living Will, including a document entitled 'Presiding judge letter' dated 27 April 2024 and a letter to his family which was undated and unsigned. Contained within those letters was sensitive personal information, involving serious allegations made by Mr Gardner about some of his family members. The content of those documents, and the allegations made within them, were not accepted by the family. The ADRT and Living Will were of course directly (and immediately) relevant to the treatment of Mr Gardner, specifically the provision of clinically assisted nutrition and hydration, and/or the potential administration of cardiopulmonary resuscitation and/or life-saving antibiotics.

15. Mr Gardner's fiancée brought proceedings in the Court of Protection in November 2024. Relying on the Living Will and associated documents, she sought to restrict

access by family members to Mr Gardner, and applied for appointment as Mr Gardner's Deputy for his personal welfare. Once the proceedings were underway, she was appropriately replaced as applicant in the proceedings by the ICB. Given the issues involved in the proceedings (i.e., the serious medical treatment of an incapacitated adult), Theis J decided early on that the court hearings would, unless otherwise ordered, be held in public but that key identifying information would not be publishable, and would be subject to a 'Transparency Order'. The first such Transparency Order was made on 15 November 2024; it protected from disclosure "any material or information that identifies or is likely to identify" that Mr Gardner was the subject of these proceedings, or that any person was a member of his family, and/or the parties to the proceedings, and any information which identified or was likely to identify where any of those people live, and/or their contact details.

16. The Transparency Order contained this standard provision:

> "At any time the Court may give such directions as it thinks fit (including directions relating to anonymisation, payment, use, copying, return and the means by which a copy of a document or information may be provided) concerning the provision of information or copies of documents put before the Court and the terms on which they are to be provided to any person who attends an attended hearing (and is not a person to whom the document can be provided under Part 3 of Practice Direction 4A to the Court of Protection Rules 2017)."
>
> (Emphasis by underlining added).

17. The explicit reference to the application of Part 3 of PD4A COPR 2017 reinforced the limited circumstances in which information arising from proceedings which are held in private or subject to reporting restrictions can be disclosed, for the purposes of the law relating to contempt. The Transparency Order was modified (as to its scope) as the proceedings developed, and was ultimately discharged by order on 24 September 2025, for reasons explained in the third judgment.

18. Within the proceedings, the Appellant challenged the 'validity' and 'applicability' of the Living Will and its associated documents ('validity' and 'applicability' are the core ingredients of section 26(1) MCA 2005), and separately claimed that the Living Will had been, as a matter of fact, procured by fraud or undue influence. Directions were given for the filing of evidence relevant to these challenges. Unsurprisingly, significant portions of the evidence relevant to the allegations of fraud and undue influence were extracted and re-produced within position statements drafted by the lawyers for the parties, which had been filed for the various hearings which took place on 26 March, 12 May, and 22-23 May 2025.

19. In the first judgment, the Judge explained his reasons for concluding that the ADRT was both 'valid' and 'applicable', but declined at that stage to determine whether Mr Gardner had actually made and signed the document, and if so under what circumstances (see [J1/49]). He set down a four-day hearing, to commence on 30 June 2025, for the court to determine the allegations of fraud and undue influence.

20. Professor Kitzinger observed the court hearings referred to in §18 above. In advance of the hearing on 26 March 2025, she had applied to the Judge for disclosure to her of the position statements prepared by the parties for that hearing. The Judge, having heard submissions on the point, gave 'permission' for the parties to disclose their position statements to Professor Kitzinger, but did not require them to do so. The ICB and the Appellant, as they were entitled, chose not to disclose their position statements. The Appellant, through her solicitors, made known to Professor Kitzinger that Mr Gardner's family had found the request for disclosure of the position statements distressing and intrusive given the intensely personal nature of the material involved.

21. After the hearing on 26 March 2025, Professor Kitzinger applied to the court (informally by email) for sight of the ADRT; objection was raised by all parties, and the court declined her request.

22. On 12 May 2025, Professor Kitzinger made a further oral application for disclosure to her of position statements from that hearing. Having received oral submissions, the court made an order that there would again be 'permission' to disclose position statements, and on this occasion the court added the words "at the discretion of the parties". The court repeated that order following the hearing on 23 May 2025. On each occasion, the Appellant and the ICB chose not to disclose their position statements.

23. On the morning of 30 June 2025, the first day of the listed four-day hearing, the Appellant withdrew her allegations of fraud and undue influence; she confirmed that she would accept the effect of the ADRT, thereby obviating the need for a trial of the facts. The personal and sensitive material which had been disclosed in the Living Will and associated documentation was therefore not aired in court. Acknowledging that the Living Will was therefore "determinative for the purposes of life sustaining treatment" (recital to the 30 June 2025 order), the Judge went on to make a number of welfare decisions to give effect to the withdrawal of treatment for Mr Gardner and his transfer to a hospice for the commencement of palliative care. The Judge resolved a minor dispute about final contact for Mr Gardner with members of his family and his fiancée.

24. Following that difficult and doubtless emotive public hearing, Professor Kitzinger applied for disclosure of the parties' position statements. The Judge declined to determine the application immediately and directed her to file a position statement explaining her request by 4pm on the following day (1 July), and for the family to file and serve documents in response 24 hours later. In her position statement, Professor Kitzinger widened her request to include all position statements from earlier hearings, including those prepared by the ICB and the Appellant which had not previously been disclosed. She argued that the case was of legitimate public interest, illustrating the Court of Protection's role in end-of-life decision-making, and that meaningful open justice required access to position statements so that observers could understand, report on, and educate the public about how the case had unfolded. Her document included these paragraphs:

> "[3] This case is of legitimate public interest. It was held in public, subject to reporting restrictions. As a public observer, it vividly displayed for me the way in which the law, in the shape of the Court of Protection, intervenes in what many people consider the "private" sphere of family life – in this case, at one of the most emotionally challenging times for

> any family, with a family member close to death. It reveals how end-of-life decisions are made especially in the context of conflict and how individuals can attempt to plan for these decisions in advance. Publication of judgments is one important component of open justice – but few judgments are read by members of the public. It is also important for open justice that those of us who watched it unfold, and who approach it from a range of perspectives of our own, should also be able to report on it (subject to the Transparency Order) and that we should be able to do so with sufficient understanding of what we have seen to be able to report accurately and with confidence on the facts of the case. That requires access to the Position Statements of all parties"…
>
> "[11] I have explained that I am seeking disclosure of the Position Statements in order to better understand how this case unfolded over time and the (shifting) position the parties took on different issues. It's important for me to understand this for two reasons: (1) as an individual personally invested in making my own end-of-life plans in a manner than will hopefully convince medical professionals to act in accordance with my advance decisions and pre-empt judicial scrutiny (see (Determining the legal status of a 'Living Will': Personal reflections on a case before Poole J); (2) in my role as an educator and as author and editor for the Open Justice Court of Protection Project blog, which serves to inform and educate the public about the law – both statutory and case law – as applied by judges in the Court of Protection. In addition to my own blog posts cited above, I worked with another member of the public as editor on a third blog about this case …".
>
> (Emphasis by underlining added).

25. The parties filed written responses in accordance with the Judge's directions. The Appellant objected in particular to the widened scope of disclosure sought. Having considered the submissions, the Judge ordered on 14 July 2025 that copies of the position statements from four specified hearings (listed in §18 above) be provided to Professor Kitzinger by 5 August 2025, and directed that the Transparency Order would expire on 30 August 2025. The Judge's reasoning was set out in the second judgment ([J2]), which I will consider in more detail below. It is this order which is under appeal.

26. Following the hearing, Mr Gardner was transferred to a hospice where his life-sustaining treatment was withdrawn, and he died on 8 July 2025.

27. A further dispute arose concerning the duration of the Transparency Order. The Appellant sought its continuation for a substantially longer period. Following a contested hearing, the Judge discharged the order on 24 September 2025, for reasons set out in his third judgment [J3], resulting in the naming of the parties in this appeal.

The status of Position Statements in the Court of Protection

28. Proceedings in the Court of Protection do not involve formal pleadings. A personal welfare application is commenced by filing form COP1, ordinarily with a COP3 (assessment of capacity), and where required COP1B and COP4. These documents identify the issue for determination, the order sought, the parties and any person whom the applicant proposes to notify; they do not define the case in any substantive sense. In the absence of a prescribed pleading framework, the court routinely directs the filing of position statements. Such statements typically provide a narrative account of the case; identify and delimit the issues requiring resolution for effective case management; set out the party's position on those issues; cross-refer to the written evidence; and identify the relevant legal principles and authorities relied upon. They are drafted primarily to assist the judge in resolving the issues arising at a particular hearing.

29. Position statements are not formally filed with the court. They are usually provided to the judge electronically via the court office or clerk, are neither date-stamped nor sealed, and, where prepared by a legal representative (as they commonly are), should bear the author's signature (PD5A para.2 COPR 2017). Notwithstanding this informal mode of transmission, the provision of position statements has become a well-established practice in Court of Protection proceedings, and such documents assume particular importance for both the court and the participants. As Ms Sutton KC aptly observed, they occupy a 'special place' in the process.

30. Although position statements are expressly mentioned in rule 5.3 COPR 2017 ("[n]othing in these Rules requires a position statement to be verified by a statement of truth"), they do not otherwise feature explicitly within the Rules or the Practice Directions. Perhaps surprisingly, they are not listed under either PD4B COPR 2017 ('court bundles') nor PD5A COPR 2017 ('court documents'). This stands in contrast to skeleton arguments, which are expressly included among the 'preliminary documents' for hearings under PD4B COPR 2017: "where appropriate" for interim or directions hearings (para.4.3(h)) and fact-finding hearings (para.4.5(b)), and as a matter of course for final hearings (para.4.6(b)).

31. The absence of any meaningful reference to position statements within the COPR 2017 and associated Practice Directions, contrasted with the express treatment of skeleton arguments, may explain why the two terms are sometimes used interchangeably in the Court of Protection, as counsel before us confirmed and as the Judge observed at [J2/26]. I do not consider such terminological flexibility desirable. The two documents serve distinct functions and should be identified accordingly. Whereas a position statement performs the role described at §28 above, a skeleton argument ordinarily sets out a party's submissions on contested issues, whether interim or final, supported by legal authority. That distinction is expressly maintained in the family jurisdiction: see para.4.3(c) and para.4.3(e) of the PD27A Family Procedure Rules 2010 ('FPR 2010'), which separately lists position statements and skeleton arguments within the category of 'preliminary documents'.

32. Finally, it may be noted that within the Civil Procedure Rules the term 'position statement' appears only in rule 82.26A CPR (inserted by the Civil Procedure (Amendment) Rules 2026), permitting a special advocate to file a position statement in closed material proceedings. The term 'skeleton argument' does not appear in the CPR itself, though it features extensively in PD52A, PD52B and PD52C supplementing Part 52 CPR (appeals). In practice, however, both position statements and skeleton

arguments are widely used across civil jurisdictions and increasingly perform much of the function formerly discharged by oral submissions.

The law in respect of Court of Protection hearings

33. Part 4 of the COPR 2017 contains the rules relating to 'Hearings'. Rule 4.1 (ibid) sets out the "general rule" that "a hearing is to be held in private"; this means that only the parties, P, the litigation friend and the lawyers may be present in court, with court officials. Rule 4.1(3) enables the court to authorise "any person or class of persons, to attend the [private] hearing or a part of it" or indeed to exclude a person. Rule 4.3(2) COPR 2017 provides the power to order a public hearing:

> **"Court's power to order that a hearing be held in public**
>
> 4.3.—(1) The court may make an order—
>
> (a) for a hearing to be held in public;
>
> (b) for a part of a hearing to be held in public; or
>
> (c) excluding any person, or class of persons, from attending a public hearing or a part of it.
>
> (2) Where the court makes an order under paragraph (1), it may in the same order or by a subsequent order—
>
> (a) impose restrictions on the publication of the identity of—
>
> (i) any party;
>
> (ii) P (whether or not a party);
>
> (iii) any witness; or
>
> (iv) any other person;
>
> (b) prohibit the publication of any information that may lead to any such person being identified;
>
> (c) prohibit the further publication of any information relating to the proceedings from such date as the court may specify; or
>
> (d) impose such other restrictions on the publication of information relating to the proceedings as the court may specify.
>
> (3) A practice direction may provide for circumstances in which the court will ordinarily make an order under paragraph (1), and for the terms of the order under

> paragraph (2) which the court will ordinarily make in such circumstances

34. Rule 4.4(l)(a) COPR 2017 states that an order for a public hearing may only be made where it appears to the court that there is good reason for making the order, but this is subject to provision in a practice direction. The practice direction contemplated by rule 4.3(3) and rule 4.4 is PD4C COPR 2017 ('Transparency'). The effect of PD4C is to create a default position to the effect that most hearings (described as 'attended' hearings – as defined by para.2.2 of PD4C COPR 2017) will in fact be in public, subject to a standard Transparency Order (an order being made restricting the publication of information "about the proceedings": PD4C para.2.1(b)). The combined effect of Part 4 COPR 2017 and PD4C is to create a supposition in favour of a public hearing with accompanying reporting restrictions. As Peter Jackson LJ described it in *Hinduja v Hinduja* [2022] EWCA Civ 1492 ('*Hinduja*') at [33]:

> "The Practice Direction [i.e., PD4C] accordingly reverses the general position signalled by the Rules by requiring there to be a good reason for the court to sit in private rather than in public with reporting restrictions. This balance reflects well-known case law articulating the principles of open justice and personal privacy, while giving the court the ability to tailor its arrangements to the circumstances of the individual case".

35. A case may be heard in private (or largely in private) if it appears to the court that there is good reason for doing so (see PD4C para.2.4). In making that decision, the court will consider a range of factors listed in PD4C para.2.5; the court will consider in that regard whether there also exists "good reason to deny access to duly accredited representatives of news gathering and reporting organisations". In this way, the court may manage the extent to which the proceedings are in public.

36. For completeness' sake, I should mention Rule 4.2 COPR 2017 and PD4A which endow the court with the general power to authorise publication of information about proceedings which are heard in private (not relevant to this case). PD4A COPR 2017 refers at para.1 to the "default position" being that the hearings will be in private and at para.8 to the "general rule … that hearings will be in private", while endowing the court with wide ranging powers to authorise the publication of information from (and attendance of non-parties at) a private hearing and regulating the communication of information relating to proceedings, both for hearings held in private or in public subject to reporting restrictions.

37. Part 5 of COPR 2017 deals with 'Court Documents'. I have referred elsewhere to rule 5.3 COPR 2017 (i.e., position statements and the statement of truth: see §30). We are principally concerned with rule 5.9 COPR 2017:

> **"Supply of documents to a non-party from court records**
>
> 5.9.—(1) Subject to rules 5.12 and 4.3(2), a person who is not a party to proceedings may inspect or obtain from the court records a copy of any judgment or order given or made in public.

> (2) The court may, on an application made to it, authorise a person who is not a party to proceedings to—
>
> (a) inspect any other documents in the court records; or
>
> (b) obtain a copy of any such documents, or extracts from such documents.
>
> (3) A person making an application for an authorisation under paragraph (2) must do so in accordance with Part 10.
>
> (4) Before giving an authorisation under paragraph (2), the court will consider whether any document is to be provided on an edited basis".
>
> (Emphasis by underlining added).

Rule 5.9 applies equally to court hearings conducted in private and those conducted in public.

38. There are two rules mentioned above in rule 5.9(1): namely, rule 4.3(2) and rule 5.12. Rule 4.3(2) (reproduced at §33 above) gives the court the power to restrict the publication of information arising from the proceedings held in public; rule 5.12 concerns appointing a person to act as a deputy, and is not relevant here. Part 10 (referred to in rule 5.9(3) above) deals with 'Applications within Proceedings'; rule 10.2 makes clear that "the applicant must file an application notice to make an application" (emphasis added). Pausing there, at no stage did Professor Kitzinger ever issue any formal application for sight of documents in this case, but: (a) the court nonetheless has powers to grant "an interim remedy" before an application form is issued if it is urgent or otherwise "necessary to do so in the interests of justice" (rule 10.1(3) COPR 2017), and (b) in any event, Part 10 must be read in the light of the wide case management powers vested in the court under rule 3.1 and rule 3.3 of the COPR 2017, which includes the power to dispense with requirements of any rule.

39. One further point arises. Proceedings in the Court of Protection are closely aligned with family proceedings, in that both commonly involve scrutiny of the private and family lives of individuals who have often (particularly in the Court of Protection) had little or no choice in the institution of proceedings. In considering issues of transparency and disclosure, it is therefore instructive to have regard to the regime established by rules 12.73, 12.73A and 12.75 of the FPR 2010, read together with rules 27.10(1) and 27.11, PD12G and, in particular, PD12R FPR 2010. PD12R applies specifically to "reporters" (as defined in para.2.1: "a duly accredited representative of news gathering and reporting organisations"), with the stated aim of supporting their ability "to report on what they see and hear in court in accordance with the terms of a Transparency Order ('the transparency principle')" (para 3.1 PD12R).

40. The rules and associated PDs in the family jurisdiction provide that the issue of transparency should be considered by the parties *prior* to any hearing (para.4.2), and will be considered by the court "at the outset of the hearing if possible" (para.4.1). Any requests for sight of a document should be made "at or before a hearing" (para.4.6). Notably, (per para.4.11- 4.13):

> "4.11 Where any document … [such as a position statement]… quotes from a document which the Reporter would not automatically be entitled to see (such as source evidence), the passage quoting may not be reproduced or reported without permission of the court.
>
> 4.12 If a document is referred to during a hearing, that does not entitle the Reporter to see that document in its entirety, although an application may be made at the hearing for access to the document in question.
>
> 4.13 If a Reporter wishes to see any other document not permitted to be disclosed by the Transparency Order, they must apply to the court for permission. Such other documents may not be disclosed to a Reporter without that permission".

41. Para. 6.2 of the PD12R FPR 2010 provides that under the template Transparency Order a reporter is entitled on request to be provided with copies of, see, and quote from case outlines, summaries, position statements (including skeleton arguments), threshold documents, and chronologies (and any indices from the court bundle).

42. As I mentioned earlier, the regime of PD12R of the FPR applies specifically to reporters and legal bloggers. In family proceedings, an observer who is not a reporter or legal blogger does not have an automatic right to see position statements, whether they are being used in a hearing they are to observe or have been used at a hearing they have previously observed.

Judgment

43. For obvious reasons, I confine my analysis to the second judgment. It opens with a summary of the facts, before turning to the relevant court rules, in particular rule 4.3 of the COPR 2017 and Practice Direction 4C. The Judge continued:

> "[J2/9] … some parties contended that because the default position is for COP hearings to be in private then these are private proceedings. That is not how the COP Rules and Practice Directions should be read. In very many cases such as this one, the Court has directed that hearings shall be in public but subject to a Transparency Order. <u>The proceedings are not therefore in private or "essentially private": they are in public</u> … It is true that COP hearings will involve consideration of matters that are personal and most usually kept private, but if a hearing is heard in public then those matters will be aired in public".
>
> (Emphasis by underlining added).

44. The Judge went on to reference *Re M* [2016] EWCOP 34, where Hayden J had said:

> "[J2/9] … In a jurisdiction where there is a human, and inevitable pull to the protection of the vulnerable, (this is after all the Court of Protection), it is easy to overlook how some

> of the wider, abstract concepts also protect society more generally and in doing so embrace the vulnerable."

The Judge observed that the COPR 2017, the accompanying PDs and the standard Transparency Order are designed to meet the requirements of the principle of open justice whilst protecting the privacy of P and their family members; he remarked that: "… if a hearing is in public, then a certain loss of privacy will be inevitable" [J2/9].

45. The Judge specifically then reviewed the rules relevant to disclosure of position statements and skeleton arguments within the Court of Protection, comparing the position with the appeals environment (i.e., PD52C, para.33), and family proceedings (see §39 above). He referenced a number of authorities which had been cited to him, including *R (MPC) v PMP* [2025] EWHC 1462 ('*R (MPC) v PMP*'), *Dring, Hayden v Associated Newspapers Limited* [2022] EWHC 2693 (KB) ('*Hayden*'), and *Moss v The Upper Tribunal* [2024] EWCA Civ 1414 ('*Moss*'). All of these authorities contained commentary on the value of written arguments to the due administration of justice, so as to reduce time spent on oral submissions, and the flexibility of the court to order disclosure of them. The Judge noted that lack of access to the position statements can mean that observers find it difficult to follow a hearing ([J2/28]).

46. At [J2/36] the Judge observed that there is:

> "… presently no guidance on the provision of position statements to observers of Court of Protection hearings. I am told that practice varies and there is some confusion amongst parties, representatives, and observers as to the correct procedure and whether copies of position statements may be provided to observers on request or whether a court order is required".

He therefore offered such guidance "pending any formal reconsideration of the standard terms of the Transparency Order or changes to the COP Rules" ([J2/36]), and although he acknowledged that the issue of disclosure was "not … straightforward" ([J2/37]), he modelled his proposed, and detailed, procedures on those which had been set out in *Moss*.

47. None of the counsel appearing on this appeal support the formulation or promulgation of the guidance set out in [J2/36]; it is therefore not helpful for me to reproduce it here. Specifically, none of the advocates appearing on this appeal supported the proposition that an observer could request and obtain disclosure of position statements in the Court of Protection directly from a party without reference to the court at all ([J2/36.4-8]). This was, it was agreed, directly contrary to the rule 5.9(2) COPR 2017. The Judge had also suggested that advocates could or should prepare anonymised position statements (using initials where appropriate) in addition to or substitution for particularised documents naming the parties ([J2/36.2]); this approach (which Mostyn J had described as "utterly demoralising" … "patronising and insulting" in *Re EM* [2022] 4 WLR 101 at [39]) also attracted little if any support from the advocates appearing on this appeal. Anonymisation of *judgments* in this jurisdiction (supported by the terms of a Transparency Order) is commonplace, and while alphabet soup may not to be to everyone's taste (and can be administratively burdensome to produce), it is often

necessary to protect P. The requirement to anonymise judgments does not imply a requirement to do the same for position statements: see §65 below.

48. The core of the Judge's reasoning for ordering disclosure of the position statements in this case is to be found at [J2/41] - [J2/45]. Given that these paragraphs are relevant to both grounds of appeal, I recite them in full:

> "[41] Even though I am satisfied that Professor Kitzinger was entitled to make the application orally, albeit belatedly towards the very end of the hearing, she made it for herself. She applied to see position statements used at the hearing in which she made her application. Later, in writing, she sought provision of position statements previously used at earlier hearings which she had attended. However, I am satisfied that at each of those hearings her request had been made and that I had said that I had no objection to her being provided with those position statements. Thus, these are not applications made after a hearing for access to court documents, they were applications made informally at the time. I have now determined that such applications should have been approached in the manner set out above. Some parties provided their position statements to Professor Kitzinger at the earlier hearings and they were entitled to do so because I had, in effect but without the precision I ought to have applied to the process, given permission for them to do so (insofar as the documents were not fully anonymised and permission was therefore required). But some parties have not given Professor Kitzinger their position statements from previous hearing[s] she observed. Therefore, I have now to make a determination as to whether I should direct them to do so.
>
> [42] In this case I am persuaded that the provision to Professor Kitzinger of the position statements of all the parties, including the Applicant ICB and the Fourth Respondent would advance the open justice principle. It would advance her understanding of the hearing and the proceedings. The fact that the proceedings eventually resolved without the need for a full hearing and without the need for submissions to be made on, for example, the issue of fraud, does not negate the conclusion that sight of the position statements advances understanding and the open justice principle. To understand what occurred at the hearing, an observer would need to know the initial positions of the parties prior to concessions being made. Given the protections offered by the Transparency Order, which include the protection of the anonymity of the Fourth Respondent and other members of AB's family, I do not accept that there is any risk to AB or members of his family from allowing the provision of copies of the position statements to Professor Kitzinger or any other observer. Their

> Article 8 rights are appropriately protected. This is not a task that is at all disproportionate and is in fact wholly proportionate given that the purpose is to aid understanding so as to meet the principles of open justice.
>
> [43] Professor Kitzinger made similar applications at previous hearings on 26 March, 12 May and 22-23 May 2025. Unfortunately, the refusal of some parties to give their position statements to her was not brought to the attention of the Court and dealt with at the hearings. In this complex case, I am again satisfied that provision to her of all Position statements used at those hearings would advance the open justice principle by giving her an understanding of the hearings. Again, she remains bound by the Transparency Order which protects the Article 8 rights of the parties and AB's family, as well as AB himself. The direction for provision is proportionate.
>
> [44] I therefore vary the Transparency Order accordingly, to allow the provision of position statements from all parties to Professor Kitzinger in respect of the hearings on 26 March, 12 May, 22-23 May, and 30 June 2025. Insofar as any party has objected to the provision of the position statements to her, I direct that they shall be provided.
>
> [45] In future, in line with the process I have suggested, any disputes about provision of a position statement to an Observer must be brought to the attention of the Judge and resolved during the hearing".
>
> (Emphasis by underlining added).

Grounds of Appeal

49. There are two Grounds of Appeal, which I summarise as follows:

    i) [Ground 1] The Judge's decision on 14 July 2025 to provide disclosure to Professor Kitzinger of position statements which had been prepared for earlier court hearings (i.e., on 26 March, 12 May, 22-23 May 2025) in relation to the treatment of Mr Gardner was unjust, due to a serious procedural irregularity. The court had previously determined, at a hearing on 23 May 2025 that those earlier position statements could be disclosed, but only "at the discretion of the parties"; there had been no appeal against that decision; there was no proper basis for varying the order, especially without proper notice or application.

    ii) [Ground 2] The Judge's decision to disclose *all* of the positions statements in the proceedings to Professor Kitzinger was wrong in all the circumstances and based upon a number of errors of law:

        a) The court erred in finding that once a decision is made to convene a hearing in the Court of Protection in public, that the *proceedings* become

public proceedings and should be treated in the same way as other *proceedings* which are public by default; this challenges the Judge's comment: "The proceedings are not therefore in private or "essentially private": they are in public" [J2/9];

b) The court held that a procedure akin to that set out in *Moss* should be applied in Court of Protection proceedings, when a request for a position statement by a non-party is made [J2/36 & 37];

c) The Judge failed to apply rule 5.9(2) of the COPR 2017 and erred in law in holding that position statements could be provided to non-parties without the need for court authorisation;

d) In ordering unconditional disclosure, the Judge failed to apply rule 5.9(4) of the COPR 2017, and specifically failed to consider whether there was any need for redaction or restriction on reproducing source material set out in position statements [J2/37.3];

e) The Judge erred in finding that the existence of the Transparency Order was sufficient protection against interference with the Article 8 ECHR rights of the family, engaged in the provision of position statements to observers [J2/37.3 & 42]. The court failed to take account of the fact that the Transparency Order in place expires on 30 August 2025, and so would not offer any lasting protection against interference in the Article 8 ECHR rights of the family.

Points of Agreement, and Arguments on the Appeal

Points of Agreement.

50. Before turning to the arguments raised in this appeal, it is instructive to record what was, by the end of the appeal hearing, common ground between the parties.

51. There was consensus that personal welfare proceedings of this kind engage intensely private issues, and that it is within that context that the court should consider the transparency provisions in the COPR 2017; it was further explicitly agreed that:

i) The Judge fell into error when formulating his guidance on disclosure of position statements ([J2/36]), in particular at [J2/36.5] (see above §47);

ii) It would be appropriate for the issue of disclosure to non-parties of documents filed in the Court of Protection to be considered by the COPRC; this issue should be considered by that committee as a matter of some priority;

iii) It would be helpful if this court could suggest a procedure to cover the issue of disclosure of filed documents to non-parties until the COPRC can consider the issue;

iv) Once position statements have been lodged with the court (whether to the court office or to a judge's clerk) they become "documents and records which the court itself keeps for its own purposes" (Baroness Hale in *Dring* at [22]) and therefore

fall within the class of "any other documents in the court records" within the terms of COPR 2017 rule 5.9(2)(a) (see §37 above);

v) While the Judge had the power to vary an earlier case management order (in this case the provision for the parties to exercise their own discretion as to whether to disclose position statements), such a power had to be exercised fairly and judiciously.

The Arguments

52. As to **Ground 1**, Mr Ruck Keene's argument focused on the procedural irregularity and unfairness of the Judge varying the earlier order without a formal application before the court, or indeed proper notice having been given to the parties. He argued that the orders made on 12 May and 22-23 May 2025 had followed proper judicial determination after hearing argument; there were no new circumstances justifying the revisiting of those orders and no intimation had been given at the hearing on 30 June that the application to vary the earlier orders was to be made. The Judge knew that one or more of the parties had declined (as he had permitted them to do) to exercise their discretion to provide copies of position statements (the Judge had been specific in indicating that the disclosure should be "at the discretion of the parties").

53. In response, Ms Sutton argued that the Judge's ruling was a legitimate case management decision; the Judge had a wide discretion to vary an earlier direction, with which the Court of Appeal should be reluctant to interfere. In this submission, she relied on Peter Jackson LJ's comments in *Hinduja* at [47]: "[t]he threshold for appellate interference with an evaluative conclusion of this kind is a high one, particularly in the field of case management". As a general proposition, this corresponds with comments in the judgment of Lewison LJ in *Mannion v Ginty* [2012] EWCA Civ 1667 at [18], to the explicit effect that it was "vital for the Court of Appeal to uphold robust, fair case management decisions made by first instance judges" ([18]).

54. In relation to **Ground 2**, it was argued on behalf of the Appellant, that the central flaw of the Judge's decision on disclosure (underpinning all aspects of this ground) was that he regarded the entire *proceedings* before him as being public whereas they are in fact private (rule 4.1(1) COPR 2017), albeit that within the proceedings a direction had been given that the *hearings* would be in public (rule 4.3 COPR 2017). Mr Ruck Keene described as an 'urban myth' the proposition that the 'open justice' principle applied to Court of Protection proceedings. It was said that the Judge had wrongly adopted an approach from which he had drawn heavily from other types of proceedings – civil and tribunal – which are public by default (see in this regard CPR 39.2(3)); in this respect, he had placed reliance erroneously on *R (MPC) v PMP*, *Hayden* and *Moss*. The judgment in *Moss* had referenced *R v Guardian News and Media Ltd v City of Westminster Magistrates Court* [2012] EWCA Civ 420, [2013] QB 618 and *Dring*. In *Dring* Baroness Hale had said at [41]:

> "The constitutional principle of open justice applies to all courts and tribunals exercising the judicial power of the state. It follows that, unless inconsistent with statute or the rules of court, all courts and tribunals have an inherent jurisdiction to determine what that principle requires in terms of access to documents or other information placed before the court or

> tribunal in question. The extent of any access permitted by the court's rules is not determinative (save to the extent that they may contain a valid prohibition). It is not correct to talk in terms of limits to the court's jurisdiction when what is in fact in question is how that jurisdiction should be exercised in the particular case."

55. Mr Ruck Keene argued that as proceedings before the Upper Tribunal are (a) heard in public by default (see rule 37.1 of Tribunal Procedure (Upper Tribunal) Rules 2008), and (b) not governed by rules determining the provision of material from the court record to non-parties (as there are in the Court of Protection: see rule 5.9 COPR 2017), reliance on *Moss* was inapposite. In this respect, all counsel focussed on the proposed guidance at [J2/36.5], where it was agreed that the Judge had been wrong (given the terms of rule 5.9 COPR 2017) to have held that "a party is free to provide a position statement to an observer attending a hearing without requiring a Court direction".

56. Mr Ruck Keene argued that there is nothing in the standard Transparency Order which contains any expectation or requirement for the provision of position statements, as the Judge considered should be the case. Comparisons were drawn with PD12R of the FPR 2010, noting that: (a) in the family jurisdiction the disclosure contemplated would be only for reporters and/or accredited members of the press (not members of the public), and (b) there is in any event a restriction on reporters re-producing or reporting any 'source evidence' quoted in the documents without further permission of the court PD12R para.4.11 (see §40 above). It was argued that under the Judge's approach, members of the public would have an expectation of walking into court, or logging into hearings being conducted online, and being provided with position statements on request, without application or authorisation from the court. The release of such material to members of the public attending hearings would enable intensely personal and private information to flow straight into the hands of people connected or unconnected with the family of P, with little control, let alone safeguards, over how the information is then used.

57. It was said that the Judge was wrong to conclude that the Transparency Order protected the Article 8 ECHR rights of Mr Gardner's family; the Judge's approach failed to take into account that the Transparency Order: (a) only protected limited information about Mr Gardner and his family and his occupation, and (b) would in any event cease to have effect on 30 August 2025, at which point Mr Gardner and all of the family members mentioned within the material could be named publicly in connection with the same. Mr Ruck Keene questioned the general 'public interest' in facilitating the disclosure of detailed position statements; given that the Judge was not required to decide the issue of fraud or undue influence at the hearing on 30 June 2025, the order for disclosure of all of the position statements going back many months (particularly in the face of opposition from more than one party) could not be justified on 'open justice' principles, and/or was in any event disproportionate.

58. Ms Sutton argued that these proceedings *were* public proceedings, albeit subject to the terms of the Transparency Order. She contended that it had not been shown that the procedure in *Moss* was expressly limited to proceedings in the Upper Tribunal, and did not see how adopting this process would be contrary to rule 5.9(2)-(4) of the COPR 2017. The judge had not (she argued) erred in law by following *Moss*. She emphasised that the principle of open justice applies to all courts. That said, she conceded that:

i) position statements are 'records' of the court, per rule 5.9(2) COPR 2017, following Baroness Hale in *Dring* (at [23]);

ii) (as mentioned above) the Judge had indeed erred in law in holding that position statements could be provided to non-parties without the need for court authorisation (albeit that she disagreed with the Appellant as to the limits of disclosure);

iii) the Judge had "gone astray" when drafting the guidance, and it was now necessary to reconsider this.

59. Ms Scott on behalf of the Official Solicitor offered independent and well-researched submissions on the issues which arose in this appeal; her arguments aligned closely with those of the Appellant. She urged caution in relation to the wide dissemination of essentially private information to non-parties, drawing attention to:

i) the significant cohort of cases concerning 16 or 17 year olds which come before the Court of Protection straight from, or concurrent with, Family Court proceedings (i.e., where P has been the subject of the proceedings or the parent or sibling) which have sat in *private*;

ii) the invariable vulnerability of P (by reason of their lack of capacity); this renders them less well equipped to cope with the impact of invasion to their privacy;

iii) the likely views of P on this issue (section 4(6) MCA 2005). She submitted that:

> "… it is reasonable to assume, in the absence of any evidence to the contrary, that most people who are the subject of proceedings in the Court of Protection would prefer, insofar as it is a decision which is theirs to make, that strangers are not given copies of documents containing intimate information about them, even if those strangers are to receive that information subject to a transparency order which prevents them from publishing it".

She further drew attention to the results of a survey conducted of the Court of Protection Practitioners' Association which revealed significant concerns about the impact on P of observers being present at hearings and being privy to the issues being ventilated in the proceedings; this, it was said, was overwhelmingly experienced as negative by P.

60. On the issue of future guidance, the Official Solicitor was keen to emphasise the importance of the court ensuring that any procedure concerned with the provision of position statements to observers must have "baked into it" (both procedurally and substantively) a profound respect for each P's Article 8 ECHR rights. Ms Scott also suggested that the procedure for disclosure of position statements could (with adaptations) borrow from that laid out in the Remote Observation and Recording (Courts and Tribunals) Regulations 2022 ('the 2022 Remote Observation Regulations') (brought into effect in 2022 by section 85A of the Courts Act 2003 ('CA 2003')). This regulation sets out the current procedure to allow reporters and other members of the public to observe public hearings, and other hearings to which the public or sectors of the public have been permitted to attend, remotely. In deciding whether to permit the

transmission of proceedings to such persons to enable them to watch or listen, the court "must" have regard to the matters set out in regulation 4, which include:

> "(a) the need for the administration of justice to be, as far as possible, open and transparent;
>
> (b) the timing of any request or application to the court or tribunal to make a direction, and its impact on the business of the court or tribunal;
>
> (c) the extent to which the technical, human and other resources necessary to facilitate effective remote observation are or can be made available;
>
> (d) …;
>
> (e) …;
>
> (f) any impact which the making or withholding of such a direction, or the terms of the direction, might have upon-
>
> > (i) the content or quality of the evidence to be put before the court or tribunal;
> >
> > (ii) public understanding of the law and the administration of justice;
> >
> > (iii) the ability of the public, including the media, to observe and scrutinise the proceedings;
> >
> > (iv) the safety and right to privacy of any person involved with the proceedings."

61. Ms Scott invited attention to this non-exhaustive checklist, to be read with the power to add conditions to any permission granted for remote attendance (see section 85A(5) CA 2003) as pertinent to the issue in hand, and submitted that the provision of position statements to remote observers could be slotted into this procedure.

Discussion

62. The objective of transparency is not to put a non-party observer in the position of the judge on the bench, nor does it entail, as a condition of achieving that objective, that the observer be furnished with the entirety of the material underpinning the judge's decision. The objective of open justice is long-acknowledged to be twofold: first, to enable public scrutiny of the way in which courts decide cases, to hold judges to account for the decisions they make and to enable the public to have confidence that they are "doing their job properly" (*Dring* at [42]); secondly it is "to enable the public to understand how the justice system works and why decisions are taken" (*Dring* at [43]) (see also *Re HMP* [2025] EWCA Civ 824; [2025] 1 WLR 5201 at [2] and [21]: '*Re HMP*'). As Rajah J said in *W v P* [2025] EWCOP 11, a case concerning P's property and affairs, at [12]:

> "The public interest lies in knowing what goes on in the Court. It is primarily about ensuring public scrutiny and accountability of court process and decision making. There may be features of a particular case which enhance or raise the public interest in transparency. There is, however, a clear distinction between the public interest and what the public is interested in."

It is material to note that *Dring* was an asbestos-linked personal injury claim, and Article 8 ECHR rights were not engaged at all. In this case, there is no question but that Article 8 is firmly engaged, adding significantly greater weight to the privacy arguments which were outlined by Baroness Hale in *Dring*.

63. It is for the person seeking access to documents to explain why they seek them and how granting them access will advance the open justice principle (see *Dring* at [45] and *Re HMP* at [23]). If there is no good reason for granting disclosure, that will be the end of the matter. Moreover, disclosure of court documents in the fulfilment of the transparency objectives (outlined above) should be limited, in my judgment, to the extent essential to achieve those objectives and no further. Indeed, there are many legitimate reasons why extensive disclosure of court documents should *not* be ordered in cases involving such intensely personal matters arising in the Court of Protection; Baroness Hale in *Dring* acknowledged that "obvious" exceptions to the disclosure principle are:

> "[46]… national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests more generally…"
>
> (Emphasis by underlining added).
>
> (See also [124], per Lord Reed and Lord Briggs: "exceptions to the open justice principle are capable of being justified… to protect the interests of a child… or in the interests of justice".)

In this regard, Rajah J in *W v P* further observed at [9] (where he had in turn referenced *Independent News Media v A* [2010] 1 WLR 2262):

> "[9] Those who have mental capacity can deal with their private affairs confidentially and in private. The general rule in COPR 4.1 recognises that a person who lacks mental capacity to deal with their private affairs should similarly be entitled to the same privacy. The Court of Protection is only involved because the person's reduced capacity requires interference in their personal autonomy. Court of Protection hearings should therefore be held in private unless there is a good reason not to. The provisions of COPR 4.1 to 4.3 encapsulate the Article 8 rights of persons who are vulnerable, and whose involvement in court proceedings arises from their vulnerability and not their choice. The provisions rearticulate a longstanding common law exception

> to the principle that justice should be done in open court: see for example *Scott v Scott* [1913] AC 417. The jurisdiction for good reason to depart from these provisions recognises that there will be cases where the public interest in an individual case outweighs the privacy considerations. These propositions are derived from the judgment of Lord Judge CJ [in the *Independent News Media* case] particularly at [18] – [19], [26] – [27], [34] – [35]".
>
> (Emphasis by underlining added).

64. Both *W v P* and the instant case serve as a useful and timely reminder of the many (and in some respects conflicting) responsibilities of judges who sit in this often complex and emotionally challenging jurisdiction. The primary duty of any court is to administer justice in the individual case before it; disclosure of personal documents in the name of transparency may either support or jeopardise that aim. While public scrutiny undoubtedly strengthens the integrity of the process, it must not be forgotten that such proceedings exist for P's benefit. The administration of justice must never be compromised in the name of openness. To give two examples:

    i) Justice will not be done if a witness refuses to provide material evidence knowing that it may be reproduced word for word (i.e., by being quoted in a position statement) and thus readily accessible to non-parties;

    ii) One of the core aims of the MCA 2005 and the associated rules is the involvement of P in decision-making. Accordingly, and so far as is reasonably practicable, welfare proceedings in the Court of Protection should be conducted in such a way as to involve P, and to promote P's fullest possible participation in any decision affecting them (see section 4(4) MCA 2005, and rule 1.2 of the COPR 2017). The quest to achieve openness should not operate as a deterrent to P from direct engagement in the proceedings, nor should it (as it might do) add to confusion for them.

    Furthermore, satellite disputes about the form, content or disclosure of position statements risk obscuring the key issues and objectives of the proceedings.

65. A case concerning the efficacy of an ADRT is one which properly engages a strong and legitimate 'public interest', but the extent to which documentation in a case concerning an ADRT is opened up to the public will always need to be carefully considered so that it supports, rather than overshadows, the court's core purpose. Anonymisation of the filed documents (i.e., by the substitution of initials for real names) may unhelpfully depersonalise the process as I have mentioned above: see §47.

    Ground 1

66. I am satisfied that, even in the absence of a formal application, it was open to the Judge to vary his earlier case management direction in relation to the disclosure of position statements to non-parties. However, I have reached the conclusion that the Judge was wrong to do so, for procedural and substantive reasons. There are three principal reasons which, taken together, demonstrate the *process* by which he undertook this

exercise placed the Appellant at a litigation disadvantage which was in fact unfair to her:

i) First, the Appellant had had no warning at all, prior to service of the document on 1 July, that Professor Kitzinger was materially extending the reach of her disclosure application to revisit a previously determined issue; this gave the Appellant merely 24 hours to respond to an altogether different disclosure request than that signalled as the parties had left court on 30 June 2025;

ii) Secondly, and in the context of the above, the family were, on 30 June and in the hours / days thereafter, and for the reasons reflected by the Judge's substantive decisions, facing the immediate move of Mr Gardner into a hospice for what was likely to be, and indeed was, a short period of palliative care prior to his death. There was no need for the Judge to determine the disclosure application at that precise point in time, and it was, I believe, unfair to place the family under pressure to deal with it; whilst this was a foreseeable consequence of the timing of the application, we accept the submission of Ms Sutton that this was not Professor Kitzinger's intention. In varying the earlier order, the Judge does not appear to have given much if any specific thought to Article 8 ECHR, to the welfare of P, nor to the benefits (at the very least) of some level of redaction of the earlier filed material in accordance with rule 5.9(4) COPR 2017;

iii) Thirdly, I sensed that, by the Judge's use of the words 'refusal' and 'objection' in [J2/43 & 44] to describe the Appellant's reluctance to disclose her position statements prepared for earlier hearings to Professor Kitzinger, he had viewed the Appellant's earlier opposition to disclosure as unco-operative, possibly even obstructive. Mr Ruck Keene (fairly it seems to me) described this choice of language as pejorative. Of course, the Appellant's stance at the time was entirely in accordance with the order which the Judge himself had made.

67. More significantly, and quite apart from the procedural unfairness outlined in §66 above, it seems to me that the Judge was wrong *substantively* to permit Professor Kitzinger to delve into an archive of previously filed position statements (which had not been the subject of an order for compulsory disclosure at the time of the hearing for which they were prepared) so that she could gather information, well after the event, on a factual point which was no longer in issue. Professor Kitzinger had sought to justify this exercise (see [11] on §24 above) on the basis that she could better understand how the case had "unfolded" given her wish to "pre-empt judicial scrutiny" in relation to her "own end-of-life plans" and separately "in my role as an educator and as author and editor" for the Project's blog. The Judge largely accepted these arguments ([J2/42] above) when he referred to these documents "advancing" her "understanding of the hearing and the proceedings". I find it hard to agree with the Judge in this regard; these arguments do not, in my judgment, support the case for retrospective disclosure of sensitive information in order to "advance the open justice principle" (*Dring* at [45]) for the benefit of members of the general public.

68. This leads me to consider more broadly the timing and form for determining disputes of this kind. The Official Solicitor has observed that precious court time is often taken up at the outset of a hearing which has been set up to determine welfare issues concerning P with argument about the provision of documents to observers. She points to the language of the 'Open Justice – Remote Observation of Hearings – Practice

Guidance' (June 2022) ('the 2022 Remote Observation Regulations'), when describing the judicial approach to the timing of requests for remote access to hearings, which she suggests – and I agree – is apt in this regard:

> "[18] … Judicial office holders might properly guillotine the process, limit the numbers given access, or decline to deal with an application if they would otherwise be disabled or impeded from administering justice in the case itself, or diverted from other pressing judicial duties".

69. Thus, it was suggested that any proposal and/or application for disclosure of documents should wherever possible be discussed by the advocates in a pre-court meeting (see by analogy para.4.2 PD12R FPR 2010), and made to the court in advance of any hearing. This would allow the parties the opportunity to consider: (a) how to respond to the application (i.e., to consent to or oppose it), (b) to redact / anonymise the position statements if appropriate and/or possible for the purposes of disclosure, and (c) specifically, for the litigation friend, where appropriate and possible, to take P's views on the issue of disclosure of a position statement to a non-party.

70. In this case, it is regrettable that the application was only made at the end of a difficult court hearing requiring action (i.e., to fulfil the court's direction) in the first 48 hours after the palliative care determination and, as it turned out, in the last precious week of Mr Gardner's life. In this regard, the Appellant was, it seems to me, fair in her strong complaint about the timing of Professor Kitzinger's request.

Ground 2

71. These were private proceedings in which the court had given a direction that the hearings would be conducted in public. The error in the Judge's approach in this case had been specifically warned against by Charles J a decade ago in *V v Associated Newspapers Ltd & Ors* [2016] EWCOP 21:

> "[9](4) Generally a staged approach that applies the relevant rules and so, in the COP, starts with the consideration of whether there is a good reason for a public hearing should be taken. But, this first stage is not an isolated or preliminary stage that, if such a good reason exists, founds an approach that the second stage is addressed on the premise that COP proceedings are treated in the same way as other proceedings where the default rule is that they are heard in public".
>
> "[9](5) …. a balance will have been struck between the relevant competing Convention rights and the factors, propositions and public interests that underlie them. … as between Articles 8 and 10 (and so the factors, propositions and public interests that underlie and promote them) neither takes precedence".

The Judge did not, it seems to me, entirely follow that approach, and was in my judgment wrong when he described the proceedings concerning Mr Gardner as 'public':

(viz. "[t]he proceedings" as "not … in private or 'essentially private': they are in public": [J2/9], see §43 above).

72. The starting point had to be that the open justice principle did not apply to proceedings which are by default private (see rule 4.1(1) COPR 2017 and *Abbasi v Newcastle upon Tyne Hospitals NHS Foundation Trust* [2025] 2 WLR 815 at [117] and [119]). In this regard (and although in the third judgment the Judge acknowledged the distinction with civil cases "where cases are routinely heard in open court without reporting restrictions" [J3/21]), the Judge fell into error in determining this application (i.e., for disclosure of position statements) when he wrongly relied on guidance from judgments delivered in jurisdictions which operate in public (see *R (MPC) v PMP*; *Hayden* and *Moss* above). It is notable that in *Moss* this court positively rejected the invitation to issue guidance of any broader application ("it would be inappropriate to trespass beyond the narrow confines of this case" ibid. at [33]); in any event, in civil or public law proceedings for example, when the court is balancing the competing considerations of privacy and openness, no consideration needs to be given to the welfare of P as must happen in the Court of Protection.

73. The Judge was faced in this case, as in many like it, with the challenge of balancing the privacy of P on the one hand, and the transparency of the process on the other. He plainly and rightly recognised that for transparency to be effective, it needs to be informed, and not merely cosmetic (my word). For the reasons which I have set out above (§28) position statements offer the court, and therefore an observer, a good account of the proceedings, its personalities and its issues. But the applicant who seeks sight of such documents must have a good reason for their request; for my part, as earlier mentioned (see §67) I am unpersuaded that Professor Kitzinger had a good reason for mining the archive of position statements filed weeks or months earlier in this case, and the Judge was wrong to find that she did.

74. I do not criticise the Judge for embarking upon a well-intentioned endeavour to offer guidance to practitioners in relation to the process of disclosure of position statements at [J2/36]. These are not easy issues, as this appeal has demonstrated. However, I am satisfied that the guidance in material respects did not conform with the COPR 2017 and in the circumstances, unsurprisingly, no party argued for their endorsement by this court.

75. I agree with all counsel (see §51(ii) above) that it would be helpful to practitioners and the judiciary in the Court of Protection for the issue of disclosure to non-party observers of documents filed in the Court of Protection to be considered by the body responsible for framing the court rules, the COPRC; that body can consult as appropriate and then devise a scheme which reflects the issues of principle and good practice (see *Dring* at [51], where this approach was also advocated). Practitioners and judges in the Court of Protection should not follow the guidance offered in [J2/36] pending consideration of these issues by that committee.

76. I agree with the Appellant that the provision of position statements to an observer which contain large amounts of highly personal and sensitive source evidence (including allegations which were disputed and never subject to findings) without redaction or restriction on the use of such material, represented a significant intrusion on her Article 8 ECHR rights and those of the family, which was neither necessary or proportionate. I agree with Mr Ruck Keene that the Judge's analysis of this issue at [J2/42] (see §48

above) was deficient. Moreover, the Judge had placed weight and emphasis on the fact that the Transparency Order would offer Mr Gardner and his family sufficient Article 8 ECHR "protections" ([J2/42]) yet he neglected to address the fact that:

i) the Transparency Order was limited in its scope (i.e., it protected only limited information about Mr Gardner). It did little more than protect his anonymity and that of his family; it did not extend to protecting the wider extent of intensely personal and sensitive information contained in Mr Gardner's Living Will and associated documents;

and

ii) the Transparency Order was, in any event, due to expire shortly after the judgment was given.

Future practice

77. If, as I suggest, the COPRC are to consider this issue, then what should happen in the meantime? It seems reasonably clear that in determining the issue of disclosure of documents drafted by lawyers for Court of Protection proceedings, there needs to be a two-stage process:

i) At the first stage, the person seeking to be provided with the document must explain the reason for wanting sight of the document, and how granting access to the document will advance the open justice principle (*Dring* at [45]);

ii) If good reason is shown, then the court will go on to the second, fact-specific, stage, namely to consider the competing factors, the practicalities and proportionality (*Dring* at [27]), for and against provision of the document. I agree with Ms Scott (§60) that the process must fully respect P's Article 8 ECHR rights; moreover, there is plainly much to be said for a regime which mirrors the factors set out in regulation 4 of the 2022 Remote Observation Regulations (see §60 above).

78. As to the documents themselves, it seems to me that the open justice objective would be well-supported by disclosure of any one, or in the right case all three, of the documents listed at PD4B para.4.2(a)-(c) COPR 2017, namely: (a) the case summary, (b) a chronology of relevant events, and (c) the issues for determination at the hearing. These documents are generally expected to be short and uncontentious; indeed, they should ideally be agreed. The case summary will usually set out the essential background to the proceedings without any, or any material, quotation from the source material (i.e., the filed evidence), and should also comply with the Transparency Order. A useful and concise description of what should be included in a good case summary is to be found in the 'LiP Guide' to PD27A FPR 2010 (published 2 March 2026) at paragraph 5.7 namely:

> "… to help the judge understand what the case is about and the purpose of the hearing. They should be factual and focused on the issues the court needs to decide rather than setting out arguments or disputed evidence. Where possible,

> the content of these documents should be agreed with the other party before they are sent to the court."

79. The three documents identified in PD4B para.4.2(a)-(c) will in the majority of cases meet the needs of the observers to receive basic information about the case and fulfil the objective for open justice. With the benefit of the information contained within such documents, an observer can, if they feel compelled to do so, then make an application to the judge (on a more informed basis than they would at present) for disclosure of other documents, in accordance with rule 5.9 COPR 2017.

80. In this regard, I would add three short procedural points: (a) that it would be appropriate for the observer / non-party to make some form of application to the court for sight of the filed documents in accordance with rule 5.9 COPR 2017 so that the respondents know what is in issue and have the chance to express views, (b) the decision about disclosure should be that of the Judge, not the parties or their legal representatives, and (c) the issue should (unless impractical) be dealt with proportionately and briskly in advance of (or at the very outset of) a hearing so as to ensure that observers are best able to understand the hearing, and to avoid disputed issues of disclosure arising after the substantive determination. Adopting again the philosophy of the 2022 Remote Observation Regulations, I suggest that judicial office holders should guillotine the process, or even decline to deal with an application if they would otherwise be disabled or impeded from administering justice in the case itself, or diverted from other pressing judicial duties.

Conclusion and Consequences

81. For the reasons set out above, I would allow the appeal on both Grounds 1 and 2, and would set aside paragraph 2 of the order of 14 July 2025.

82. We were informed that Professor Kitzinger has in fact received all of the position statements from the previous hearings in line with the Judge's orders; but once she knew that an appeal was likely, she confirmed that she would not use or refer to these positions statements or their content publicly. Ms Sutton was able to reassure us at the hearing that in the event that the appeal were to be allowed, Professor Kitzinger would voluntarily destroy the position statements and delete them from her computer hard drive. We greatly appreciate the characteristically responsible stance which she took in those respects.

83. Two relevant position statements had also been sent to one other observer following the order of 14 July 2025; following the hearing of the appeal we were advised that the other observer has in fact destroyed the documents. These combined assurances obviate the need for us to consider making orders in this regard.

Lord Justice Peter Jackson

84. I entirely agree with the above judgment, and add only these assenting words.

85. The Court of Protection decides questions of often fundamental importance for those who lack capacity to decide them for themselves, and for their families. It is strongly in the public interest for the public to be able to reach its own conclusions about how the court is working, and to do so on the basis of reliable information. However, as My

Lord has so clearly explained, the amount of information that can lawfully be put into the public domain has to be controlled so that proceedings that exist to protect vulnerable individuals do not become a means of harming them. The rules of court are accordingly designed to help judges to strike the balance in a way that can enjoy the confidence of parties, practitioners, reporters and members of the public, including those with an informed interest, such as Professor Kitzinger, who has made such a signal contribution in this field.

86. Court of Protection proceedings are private by default but they will often be heard in public under the protective umbrella of a Transparency Order. Although the order is necessarily framed in restrictive terms, it is in fact the means by which the greatest possible transparency is achieved. Its restrictions are no more than the price that has to be paid to make it lawful for the proceedings to be heard in public. I accept that this is somewhat counter-intuitive, as Males LJ recently remarked in *Pringle v Nervo* [2026] EWCA Civ 266 at [72]. He commented that the sole purpose of a Transparency Order is to ensure privacy, and that it is odd that it does "precisely the opposite of what it says on the tin". However, as I have explained, the purpose of a Transparency Order is much wider than that. By ensuring that, where it is appropriate, these important decisions can be taken in public, these orders decidedly advance the interests of open justice rather than hampering them.

Lord Justice Coulson

87. I agree with both judgments.