



Welcome to the December 2024 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Court of Appeal grapples again with sexual capacity, and important reminders of best interests as good governance and operating in an imperfect world.

(2) In the Property and Affairs Report: Simon Edwards retires, and deputyship updates;

(3) In the Practice and Procedure Report: flight risk, and a coercive control dilemma regarding a lasting power of attorney;

(4) In the Mental Health Matters Report: a Mental Health Bill update, detainability and the courts, and Right Care, Right Person under scrutiny;

(5) In the Wider Context Report: Assisted dying / assisted suicide developments, capacity and surrogacy and two important Strasbourg cases;

(6) In the Scotland Report: Kirsty Mcgrath retires, and a blank space for developments regarding legislative reform in Scotland.

There is one plug this month, for a [free digital trial](#) of the newly relaunched Court of Protection Law Reports (now published by Butterworths). For a walkthrough of one of the reports, see [here](#).

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#), where you can also sign up to the [Mental Capacity Report](#).

Her fellow editors know that you will join us in congratulating Arianna on her recent appointment as a Recorder: she will sit in Family cases on the North Eastern circuit (alongside sitting as a fee-paid First-Tier Tribunal judge, (Mental Health) and fee-paid Court of Protection judge).

As is now standard, there will be no January report (but Alex will give essential updates on his [website](#)); we hope that at least some of you will get something of a break over the December period.

#### Editors

Alex Ruck Keene KC (Hon)  
Victoria Butler-Cole KC  
Neil Allen  
Nicola Kohn  
Katie Scott  
Arianna Kelly  
Nyasha Weinberg  
Simon Edwards (P&A)

#### Scottish Contributors

Adrian Ward  
Jill Stavert

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

Flight risk and the threshold for the court’s involvement ..... 2

Coercion, control and powers of attorney ..... 3

CoP user group minutes ..... 7

### Flight risk and the threshold for the court’s involvement

*Hywel Dda University Health Board v P & Anor [2024] EWCOP 70 (T3)* (Morgan J)

*Court of Protection jurisdiction and powers – interface with inherent jurisdiction – undue influence*

#### Summary

This private hearing, without notice to P or her mother due to a flight risk, was to determine whether, in the absence of a capacity assessment, there was reason to believe that P lacked capacity to make the relevant decisions and, if not, whether the inherent jurisdiction was available. P was 18 and lived with her family. She had global developmental delay, autism and likely learning disability. She had only ever been away from her home once for a 24-hour period in hospital, and the application was to seek her removal from the family home to undertake a series of capacity, treatment, and needs assessments.

Morgan J held that s.48 MCA 2005 required no gloss and although there was reason to believe that P was unable to make the relevant decisions, in the absence of a capacity assessment the causal nexus with her mental impairments had not been established, even on a ‘reason to believe’ basis. However, P was a vulnerable adult and there was reason to believe she was unable to decide because of the

coercive control or constraint of her mother. This was demonstrated by the lack of response to clinicians during periods of difficulty, refusal to allow community learning disability nurses to enter the family home, declining assistance and visits, and reported changes in P’s own presentation from open and polite to hostile and refusing to engage.

In terms of case management, Morgan J noted that the flight risk must be seen in the light of the resources available to her mother to put any such plan into effect and the injunctive steps the court could take to ameliorate that risk. She very much loved P and, despite having previously fled with her children when they were much younger, it could not be assumed the same would happen now that two of them were adults and the third a late teenager. Moreover, public transport in West Wales was not plentiful, and her mother was reliant on state benefits.

Accordingly, exercising the inherent jurisdiction, injunctive orders were made to enable entry to the family home, access to P for assessment purposes in that setting, and prevention of P’s removal from the home by her mother or others on her instruction. The capacity assessment was the most pressing and a short return date was listed which would be on notice to all parties.

#### Comment

Court of Protection orders are routinely made under s.48 MCA 2005 pending further capacity evidence because “*there is reason to believe that*

*P lacks capacity in relation to the matter*” and “it is in P’s best interests to make the order, or give the directions, without delay”. This decision transposes the obiter of *DP v London Borough of Hillingdon* [2020] EWCOP 45 into its legal reasoning.

Although both judges agree that s.48 requires no gloss, at paragraph 62(vi) of *DP*, Hayden J observed that “*The exercise required by Section 48 is different from that set out in Section 15. The former requires a focus on whether the evidence establishes reasonable grounds to believe that P may lack capacity, the latter requires an evaluation as to whether P, in fact, lacks capacity.*” Whether this description of the threshold mirrors the wording in s.48 is not necessarily a moot point, given – as was noted in *DP* at paragraph 57 – “*under the aegis of s.48, there may be significant infringements imposed on people’s civil liberty.*”

This judgment reflects the importance and relevance of the statutory principles when considering the s.48 threshold. Section 2(5) provides that “*In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.*” Whether this only applies to s.15 or holds true when considering whether “there is reason to believe that P lacks capacity” for s.48 purposes remains to be seen. *Somerset NHS Foundation Trust v Amira* [2023] EWCOP 25 at paragraph 54 would suggest the former, as does *Barnet Enfield And Haringey Mental Health NHS Trust & Anor v Mr K & Ors* [2023] EWCOP 35, albeit that, perhaps, it ends up being a distinction without a difference:

*the language of section 48 needs no gloss and that the court need not be satisfied, on the evidence available to it, that the person lacks capacity on the balance of probabilities, but rather a lower test is applied. Belief is different*

*from proof. Section 48 requires: ‘reason to believe that P lacks capacity.’ Section 2 requires: ‘whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities’. That being said in a case of this nature, where medical treatment is being considered which the patient does not consent to, the court must be satisfied there is evidence to provide a proper basis to reasonably believe the patient lacks capacity in respect of the medical decision.*

This case was before a judge who was able to exercise the inherent jurisdiction. Where there is real cause for concern about a person’s capacity which cannot be properly assessed, similar injunctive orders may be required in the High Court in undue influence cases so as to determine whether the Court of Protection can then exercise its statutory jurisdiction.

### Coercion, control and powers of attorney

*Re CA (Fact finding – capacity – inherent jurisdiction – injunctive relief)* [2024] EWCOP 64 (T3) (Arbuthnot J)

*Lasting powers of attorney – revocation*

### Summary

This is a decision which is very helpfully summarised in the case title. In summary terms, it involved the court having to decide what to do, and how to do it, to secure the interests of CA, a 79 year old woman with dementia. Her daughter, DA, held lasting powers of attorney in respect of her mother’s property and affairs and health and welfare.

Arbuthnot J found, after conducting a fact-finding hearing, that:

*63. Overall as I look at the evidence as a whole, I find that DA fails to make any allowances for her mother’s age and*

frailty. She is hoping that by force of her personality she can keep her mother healthy and able to look after herself. There is no doubt in my mind that mother and daughter love each other deeply and DA has certainly cared for her mother as much as she is able to.

64. I am concerned too that DA has persuaded her mother that she is lazy and stubborn and that her failure to look after herself better is her own fault. I consider that that view has arisen from what CA has been told repeatedly by DA in the same way that CA's fear that she will be moved into a care home comes from her daughter and indeed EA on 20<sup>th</sup> November 2023, when the court and the local authority have been at pains to make it clear that that was not – and is not – the intention.

65. To that end, DA bullies and forces her mother to do the things that she believes will keep her alive for longer. When she force-feeds her it is because her mother is not eating enough and she has had anorexia. Their relationship of verbal abuse is mutual, but CA is ageing and getting increasingly frail and deserves a different approach from an adult daughter.

66. I am no expert, but after seeing DA in court in the four-day hearing and on other occasions before this, it is the daughter's personality issues that lead her to treat her mother in the way she does. She lacks self-control and in particular she is unable to control her anger at times. CA describes her daughter as bullish and brutish, and I agree with that description. It is a dysfunctional, volatile relationship with a mother and daughter who are enmeshed and depend on each other emotionally.

67. I have carefully considered DA's argument that the local authority are

"out to get her" (my words, not hers). This is simply not the case. The safeguarding concerns originated from the hospital where any number of different staff reported DA's concerning behaviour towards her mother. These complaints then continued via the care agency. The social work team have primarily gathered the information together to get a picture of the relationship and the way this elderly lady is treated by her daughter.

68. There is no protection for CA from other members of the family. EA leads his own life and to the extent he steps in, he has swallowed his daughter's story that the local authority is prejudiced against her and wants to put her mother in a home. CA's son has only a limited involvement with his mother, and I suspect is only too glad to leave everything to his sister. DA's partner is one step removed from CA, but there is no evidence he would mistreat CA.

69. Finally, at times CA has told the court that her daughter did not force-feed her. Indeed, in court on 2 October 2024, she said the force-feeding had not happened, but in the near past including to Dr Barker on 20 August 2024, she was less certain and has complained of her daughter pulling her hair. I certainly do not consider her accounts help me to determine either way the truth or otherwise of these allegations.

70. It was clear that CA is subject to the undue influence of her daughter in a number of different ways. One example is above, what CA said in court on 2 October 2024 when her daughter was next to her, it is clear (and on a number of other occasions) that CA says what she thinks her family would like her to say.

71. On the balance of probabilities, I find the allegations proved.

The question of CA's capacity in the material domains was one that both the expert instructed and Arbuthnot J clearly found somewhat difficult, but ultimately she reached the conclusion that CA lacked capacity to conduct proceedings and to make decisions concerning her care and her property and affairs. Indeed, ultimately, neither CA's daughter nor CA's ex-husband (the third respondent) contested these conclusions. The conclusion as to whether CA had capacity to make decisions about unsupervised contact was more finely balanced, but ultimately Arbuthnot J agreed with the expert that,

*124. [...] applying the presumption of capacity, CA was making unwise but capacitous decisions about contact with DA. It is a relationship that is of great importance emotionally to CA and although DA is as CA says "brutish" and "bullish" she is doing her best to keep her mother alive and as healthy as she can persuade her to be. CA recognised the relationship had negatives but considered the positives, outweighed these. I found in this finely balanced case that she had capacity to decide on unsupervised contact.*

Arbuthnot J also found that CA had capacity both to enter into and to revoke an LPA for health and welfare. She then, therefore, had to change her judicial headgear to wear the hat of a High Court judge exercising its inherent jurisdiction over the capacitous but vulnerable. She found that CA was clearly within the scope of the jurisdiction, and that there was no other statutory scheme which could be used to protect her from the contact risks posed by her family. This therefore meant the inherent jurisdiction was in play:

*138. The test which must be met before the inherent jurisdiction could be engaged to regulate contact is whether*

*the proposed intervention, here supervised contact, is necessary and proportionate.*

*139. I heard evidence from Ms Haverson, NCC's Adult Team Leader. She provided a graph which showed that DA's behaviour towards her mother had improved markedly in recent months since their contact had been supervised, since proceedings had been on-going and since allegations of breaches of undertakings DA had given had been made.*

*140. The risks of future harm to CA remain at present. CA needs to be protected from the harm particularly from DA but also from EA, CA's ex-husband. Another risk to CA is from DA's misuse of the LPA for health and welfare. As Mr Lewis observed in his position statement on behalf of NCC, such was the extent to which DA sought to exercise control over CA, that she purported to make best interests decisions for DA as health welfare during a long period of time when DA believed CA had capacity to decide on her care, knowing that she had no lawful authority to make these decisions.*

*141. The proportionality of any proposal had to be considered. I noted that the number of times that DA and EA can see CA and the time they spend with her is not limited in any way. There are no restrictions on DA's partner's contact with CA. The continuation of supervised contact is the least intrusive measure commensurate with the risks I have found in CA's relationship with DA.*

*142. It should not remain in the long term but I have decided to direct the parties to jointly instruct an independent psychological expert to consider the family relationships and how they can be managed so that CA remains safe when she sees her family. It may then be*

possible for unsupervised contact to take place. Using the inherent jurisdiction to impose a supervised framework around contact is a temporary way of ensuring that CA can be safe. All contact that CA has with DA and/or EA will accordingly be supervised by one of CA's professional carers, but, at NCC's suggestion supported by the Official Solicitor, I will impose no limit as to frequency or duration.

As regards the question of what to do with the LPA:

143. In terms of the LPA, Mr Lewis for NCC submitted that there were three approaches that could be taken by the Court now the Court had found that CA had capacity to make and revoke the LPA. The Court could revoke the instrument which he contended would be the "smoothest and clearest remedy". It would avoid arguments between DA and NCC when DA was constantly suspicious of NCC's motives and thought she was in a battle with the local authority and would avoid the risk of satellite litigation about the terms of an injunction.

144. The second route would be for the Court to "edit" the instrument itself and direct the Office of the Public Guardian to register the Court's amendments. This would be analogous to the powers in section 23 of the Mental Capacity Act 2005 concerning LPAs and which are most commonly deployed when the attorney is, for example, directed not to sell P's house.

145. The third route was the Official Solicitor's preferred route and in the event the Court's. The instrument would be left intact, but a series of injunctive directions would be made against DA. Mr Lewis relied on a case where similar circumstances, elder abuse by a son against his parents had led to this

happening: *DL v A Local Authority* [2012] *EWCA Civ 253*. Theis J's approach was approved by the Court of Appeal, although it was noted that there was no LPA in that case.

Arbuthnot J noted that:

148. Mr Chisholm for the Official Solicitor, supported the third route (namely the making of injunctive orders) but on the basis that the injunctions could and should be made under section 16(2) of the Act to support best interests decisions relating to DA's care, the Court having found that DA lacks capacity to make decisions concerning her care needs.

149. It seemed to me the third route respected CA's wishes for DA to be her LPA, and having found that CA had capacity to make or revoke the LPA, I did not consider that the inherent jurisdiction could or should be used to revoke the LPA. The injunctive directions which were discussed by the parties and for the most part agreed would protect CA from further physical and emotional harm. These were a proportionate response to the risks CA faces.

She also found that:

150. The use of the inherent jurisdiction to impose the continuation of supervised contact between CA and DA/EA in circumstances where CA has capacity pursuant to the MCA 2005 decide on contact with others, was compatible with Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention), namely the family's rights to respect for private and family life. The interference with the Article 8 rights was justified to protect CA.

151. In the circumstances, the injunctions would allow DA to continue to be health and welfare attorney under the LPA whilst her use of it would be compatible with ensuring CA's safety.

### Comment

This was a very complex case, as can be seen by the range of tools that the court had to deploy to respond to the situation. Of particular, wider, interest was the dilemma posed by the fact that CA had capacity to revoke the health and welfare LPA (and although the judgment did not say this in terms, was clearly not choosing to do so), but lacked capacity to make decisions in relation to her care. One issue that could perhaps have been teased out a little more in the relevant section of the judgment was whether the real concern was:

- (1) Whether DA would use her powers as attorney in such a way as might harm her mother – in which case, directions under s.23(2) would have seemed the right course of action.
- (2) Whether DA would act towards her mother in such a way as to compromise her mother's best interests, in which case directions under s.23(2) could not assist.

Logically, it would appear that the real concern must have been (2), and hence the s.16(3) injunction route was the right course to adopt.

### CoP user group minutes

The minutes of the general CoP user group meeting of 16 October 2024 have now been [published](#).

Points of particular interest include an exchange between Vicki Cook of TSF Assessments Ltd and Senior Judge Hilder as to whether capacity assessments had to be conducted face to face. Senior Judge Hilder:

*clarified that the purpose of the assessment is to satisfy the decision maker that the threshold of jurisdiction has been reached. The Court will want to know that P has been given the best opportunity for assessment. Remote assessments were permitted during the pandemic but should not be regarded as a standard expectation. If an assessment is conducted remotely, the report should include a clear explanation as to why and set out the support provided to P. If you do not agree with a direction for further assessment, a rule 13.4 application may be made.*

On the subject of capacity assessments, Julian Partridge of Devon County Council noted that:

*We have received 3 directions orders in the last few weeks and each one is asking for a formal diagnosis on the COP 3 despite a full explanation of P's impairment being contained within the COP3 ..is this a new requirement? We haven't experienced this before....what if there is no formal diagnosis ?*

*[Senior Judge Hilder] advised that there is no formal diagnosis requirement. A decision maker may request more information if they are not satisfied with the evidence provided. Again, the R13.4 reconsideration may be used where considered necessary.*

---

## Editors and Contributors



**Alex Ruck Keene KC (Hon):** [alex.ruckkeene@39essex.com](mailto:alex.ruckkeene@39essex.com)

Alex has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website [www.mentalcapacitylawandpolicy.org.uk](http://www.mentalcapacitylawandpolicy.org.uk). To view full CV click [here](#).



**Victoria Butler-Cole KC:** [vb@39essex.com](mailto:vb@39essex.com)

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She is Vice-Chair of the Court of Protection Bar Association and a member of the Nuffield Council on Bioethics. To view full CV click [here](#).



**Neil Allen:** [neil.allen@39essex.com](mailto:neil.allen@39essex.com)

Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website [www.lpslaw.co.uk](http://www.lpslaw.co.uk). To view full CV click [here](#).



**Arianna Kelly:** [Arianna.kelly@39essex.com](mailto:Arianna.kelly@39essex.com)

Arianna practices in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in inherent jurisdiction matters. Arianna works extensively in the field of community care. She is a contributor to Court of Protection Practice (LexisNexis). To view a full CV, click [here](#).



**Nicola Kohn:** [nicola.kohn@39essex.com](mailto:nicola.kohn@39essex.com)

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5<sup>th</sup> edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2022). To view full CV click [here](#).



**Katie Scott:** [katie.scott@39essex.com](mailto:katie.scott@39essex.com)

Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click [here](#).





**Nyasha Weinberg:** [Nyasha.Weinberg@39essex.com](mailto:Nyasha.Weinberg@39essex.com)

Nyasha has a practice across public and private law, has appeared in the Court of Protection and has a particular interest in health and human rights issues. To view a full CV, click [here](#)



**Simon Edwards:** [simon.edwards@39essex.com](mailto:simon.edwards@39essex.com)

Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click [here](#).



**Adrian Ward:** [adrian@adward.co.uk](mailto:adrian@adward.co.uk)

Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

**Jill Stavert:** [j.stavert@napier.ac.uk](mailto:j.stavert@napier.ac.uk)



Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click [here](#).

## Conferences

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

Alex is also doing 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](#).

Adrian will be speaking at the European Law Institute Annual Conference in Dublin (10 October, details [here](#)).

Peter Edwards Law have announced their autumn online courses, including, Becoming a Mental Health Act Administrator – The Basics; Introduction to the Mental Health Act, Code and Tribunals; Introduction – MCA and Deprivation of Liberty; Introduction to using Court of Protection including s. 21A Appeals; Masterclass for Mental Health Act Administrators; Mental Health Act Masterclass; and Court of Protection / MCA Masterclass. For more details and to book, see [here](#).

### **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 February. 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](mailto:marketing@39essex.com).

**Sheraton Doyle**  
Senior Practice Manager  
[sheraton.doyle@39essex.com](mailto:sheraton.doyle@39essex.com)

**Peter Campbell**  
Senior Practice Manager  
[peter.campbell@39essex.com](mailto:peter.campbell@39essex.com)

Chambers UK Bar  
Court of Protection:  
Health & Welfare  
*Leading Set*

The Legal 500 UK  
Court of Protection and  
Community Care  
*Top Tier Set*

[clerks@39essex.com](mailto:clerks@39essex.com) • **DX: London/Chancery Lane 298** • [39essex.com](http://39essex.com)

**LONDON**

81 Chancery Lane,  
London WC2A 1DD  
Tel: +44 (0)20 7832 1111  
Fax: +44 (0)20 7353 3978

**MANCHESTER**

82 King Street,  
Manchester M2 4WQ  
Tel: +44 (0)16 1870 0333  
Fax: +44 (0)20 7353 3978

**SINGAPORE**

Maxwell Chambers,  
#02-16 32, Maxwell Road  
Singapore 069115  
Tel: +(65) 6634 1336

**KUALA LUMPUR**

#02-9, Bangunan Sulaiman,  
Jalan Sultan Hishamuddin  
50000 Kuala Lumpur,  
Malaysia: +(60)32 271 1085

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.

39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.