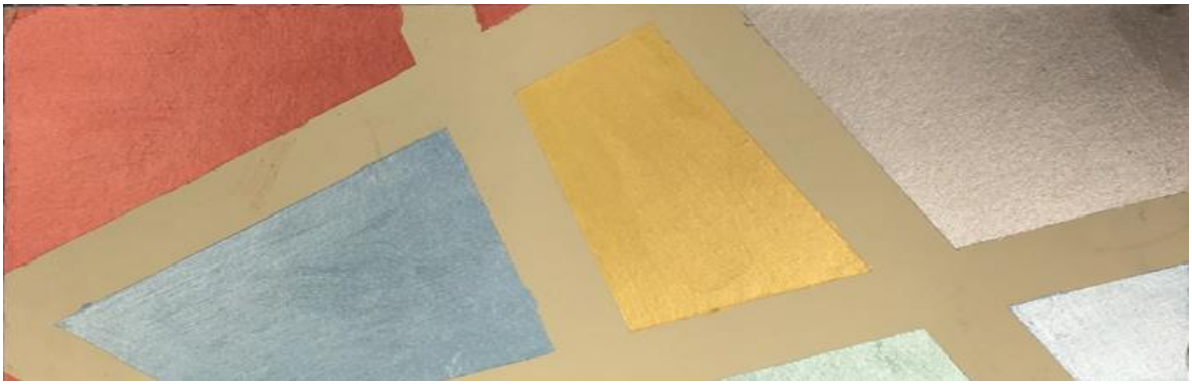

Welcome to the February 2025 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: myth-busting about DoLS and strong words about assessment of capacity of D/deaf people;

(2) In the Property and Affairs Report: revoking Deputyship for a person no longer present in England & Wales;

(3) In the Practice and Procedure Report: litigation capacity and a very clear statement of the ordering of the capacity test, delays in obstetric cases and guidance on neurodiversity before the courts;

(4) In the Mental Health Matters Report: the Mental Health Bill progresses and two important Upper Tribunal cases;

(5) In the (new) Children's Capacity Report: deprivation of liberty before the courts and Parliament, when capacitous consent is not enough, and best interests and the clinical circling of the wagons;

(6) In the Wider Context Report: The Terminally Ill Adults (End of Life) Bill and capacity, CCTV and care homes, and using the arts to be more creative in capacity assessment.

(7) In the Scotland Report: Scottish Government's law reform proposals – the consultation responses, and the OPG digitalises.

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.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

Contents

Litigation capacity and a very clear statement from the Court of Appeal about the ordering of the capacity test

MacPherson v Sunderland City Council [2024] EWCA Civ 1579 (Court of Appeal (King, Asplin and Birss LJJ))

Mental capacity – litigation

Summary

This is the latest judgment in the long running Court of Protection proceedings about Ms MacPherson's daughter. The matter came before the Court of Appeal on an appeal brought by Ms MacPherson against an order made by Poole J on 22 January 2024 sentencing her to an immediate custodial sentence for a total of four months, for contempt of court. The first instance judgment can be found at [2024] EWCOP 8. This however was not the first order for a custodial sentence that the Court had made against Ms MacPherson in the COP proceedings. She had previously been sentenced in January 2023 for contempt for 28 days, suspended for 12 months. Poole J's judgment in relation to the 2023 committal proceedings can be found at [2023] EWCOP 3.

Despite Ms MacPherson having issued her application to appeal the January 2024 order in March 2024, there were significant delays in the appeal being able to progress. It was therefore not until November 2024 that Ms McPherson's legal team (two counsel and one solicitor), were able to have a remote conference with her. All members of the legal team expressed concerns about her capacity to conduct the appeal proceedings. She was therefore invited to participate in a capacity assessment. She refused this invitation in what was described by the Court of Appeal as '*strong terms*'.

The lawyers therefore made an application to the Court of Appeal under CPR 35.4, for permission to instruct an expert to undertake a desk top report into Ms MacPherson's capacity to conduct the appeal proceedings. Permission to do so was granted, and a consultant psychiatrist filed a desk top report in which he stated that on the balance of probabilities Ms McPherson's lacked the capacity to conduct the proceedings.

The Court of Appeal then convened a hearing of the appeal, which Ms MacPherson attended remotely, along with the local authority and the legal team who had raised the concerns about her litigation capacity. The Court of Appeal was at pains to emphasise the diligence with which it was made clear to the court that Ms MacPherson's previous legal team were not acting upon her instructions or making submissions to the court, but were there to assist the court, by providing information and setting out the options available to it to progress the appeal.

Three options were put before the court. The first option was for the Court of Appeal to declare that Ms MacPherson had litigation capacity. The second option was for the Court of Appeal to declare that Ms MacPherson lacked litigation capacity. Both of these options were dismissed swiftly by the court on the basis that there was not a sufficient evidential basis for the court to come to a conclusion one way or another. The third option did however find favour with the court. This was for the Court of Appeal to make a s.48 MCA declaration that there was 'reason to believe' that Ms MacPherson lacked capacity to litigate, and to then transfer the determination of that matter back to a Tier 3 Judge of the COP, with a view to the matter then being returned to the Court of Appeal to hear the substantive appeal.

The Court of Appeal considered the powers that it had to make such an order both under the COP rules and under the CPR (which of course governs procedure in the Court of Appeal). In short, the Court of Appeal took the view that the both sets of rules gave them the all the powers of the first instance court, and in particular gave them the power to refer any issue to the first instance court for determination.

Comment

The challenges posed where a client appears to lack the capacity to conduct proceedings – for both the lawyers, and the court – were recently emphasised in the Civil Justice Council's November 2024 report. The instant case shows the importance of getting it right, on the basis of the right evidence. The lawyers in the instant case also took scrupulous steps to alert the court to the potential that their client lacked litigation capacity (by contrast, we note, to those in *Aslam v Seeley* [2025] EWHC 24 (Ch), where the court identified that "*the decision of the claimant's lawyers* […] *to keep their concerns* [about litigation capacity] *up their sleeve, only revealing them when required to do so by a direct question from the court, was a serious error of judgment*" (paragraph 11).

More broadly, the Court of Appeal in this case was at pains to emphasise the importance of capacity assessments complying with the approach set out by Lord Stephens at paragraphs 66 and 79 of his judgment in *A Local Authority v JB* [2021] UKSC 52, namely that the proper approach to the determination of capacity should be considered in the following order:

i) Whether P is unable to make a decision for himself in relation to the matter (s.3 MCA 2005 – the functional test).

ii) Whether the inability to make a decision is "because of" an impairment of, or disturbance of the functioning of, the mind or brain (s.2(1) MCA 2005 – the 'diagnostic' or mental impairment test).

The Court of Appeal noted that, while this approach was contrary to paragraph 4.11 of the current MCA Code of Practice (which stipulates that the first stage of an assessment is to identify the impairment and then go on to consider the functional test), a new draft Code (dated June 2022 but not yet implemented) adopts the *JB* approach. The Court of Appeal was clear that:

> *Regardless of the fact that the new Code has not yet been implemented, all assessments should comply with the Supreme Court approach (see Hemachandran v University Hospitals Birmingham NHS Foundation Trust [2024] EWCA Civ 896 para.[140] (iii)).*

The Court of Appeal's very clear direction that capacity assessments should comply with the ordering of the test set out in the MCA (and confirmed in *JB*) rather than the Code of Practice,

is very helpful, but only reinforces how problematic it is that progress on updating the Code is stalled. In the meantime, this unofficial update highlights the (many) paragraphs that should not be followed because case-law has confirmed that they do not accurately reflect the requirements of the MCA 2005.

The only part of the judgment that might raise eyebrows was the view taken by the Court of Appeal that they could rely upon the provisions of rule 20.13 of the Court of Protection Rules 2017 to cloak themselves with the necessary power to remit the question of the appellant's litigation capacity to a Tier 3 Judge. The Court of Protection Rules 2017 are conventionally understood only to apply within the Court of Protection, and hence the provisions of Part 20 (appeals) to apply only in relation to 'internal' appeals within the Court of Protection. Appeals which escape the gravitational pull of the Court of Protection are conventionally understood to be governed by the CPR (if in the Court of Appeal), and the Supreme Court rules (in the Supreme Court): see, for instance, *Cheshire West and Chester Council v P (No 2)* [2011] EWCA Civ 1333 at paragraph 3, where Munby LJ noted that "[i]*t is common ground that although this is an appeal from the Court of Protection the Court of Protection Rules do not apply*." However, and for the avoidance of any doubt, this does not mean that the Court of Appeal in Ms MacPherson's case lacked the power to do what it did, given that (as King LJ herself noted), it had the equivalent power to do so under rule 52.20(1) of the CPR.

Short note: obstetric cases and the Court of Protection – the need for timeliness (again)

Peel J in Leicestershire Partnership NHS Trust & Anor v PQ *[2024] EWCOP 73 (T3)* has reiterated the need for timely applications to be made in the context of cases involving birth arrangements:

> *7. The applicants have known about PQ's pregnancy since week 20, and have long been aware of her mental health history, including potential capacity issues. The application before me should have been made far sooner than the date upon which full term was reached and the birth was due. I understand that the applicants failed to take legal advice until the last moment. As a result, they did not follow the judgment of Keehan J in NHS Trust v FG [2014] EWCOP 30, and in particular the annex thereto, which sets out in clear terms what is required of applicant Trusts in cases concerning obstetric care. Regrettably, almost none of the stipulated steps were taken, including making an application no later than 4 weeks before the due date.*
>
> *8. When the application was made on Thursday 28 November 2024, it was inevitably accompanied by a request for a hearing that day or the next because of the perceived urgency. The court was placed in an extremely difficult position to try and arrange a listing. It came before me the next day, Friday 29 November 2024. Papers trickled in during the morning. There was no bundle. I had a flurry of last minute requests for legal representatives and clinicians to attend remotely. The Official Solicitor had not been notified of the application until the day before and had next to no information. She was not able to arrange for an agent to meet PQ. Counsel instructed on behalf of the Official Solicitor said candidly that the Official Solicitor could not advance a positive case. Counsel for the applicants invited the court to proceed to a full hearing, with oral evidence, to enable the CS, if approved, to take place at 4.30pm that day. All of this was, to put it mildly, unsatisfactory, as well as being unfair to the subject of these proceedings, PQ.*

> *9. In the end, I decided to adjourn from Friday 29 November 2024 to Monday 1 December 2024. By good fortune, the medical presentation which was thought to be so urgent on Friday 29 November 2024 (the risk of pre-eclampsia) dissipated over the weekend and the case, while still urgent, was not at the level of immediate and imperative necessity which it appeared to be.*
>
> *10. The lesson from all of this is for applicant Trusts, when dealing with potential issues about obstetric care, to follow the guidance of Keehan J scrupulously. Failure to do so is likely to create the difficulties which faced me in this case, at a time when judicial resources are under enormous strain. As I have already said, failure to do so is unfair to the patient and likely to be contrary to their best interests.*

Guidance documents

Two important guidance documents have been published which purport to relate to family proceedings, but which are equally relevant to practitioners before the Court of Protection.

The first is practice guidance from the President of the Family Division concerning the use of Intermediaries, Lay Advocates and Cognitive Assessments in the Family Court. This reinforces the messages of recent cases that the courts consider the appointment of intermediaries to be a last resort:

> *12. Vulnerability covers a wide spectrum. Only towards the far end of the spectrum will there be cases where an intermediary is necessary for the giving of evidence. Only at the very far end of the spectrum will there be cases where an intermediary is required for the whole of a hearing and only in the very rarest of cases will an intermediary be necessary to enable the party to give instructions in advance of a hearing or be required for conferences.*

The practice guidance places an obligation on practitioners to familiarise themselves with the Advocates Gateway and in particular, Toolkit 132, which relates to vulnerable witnesses in the Family Court – materials which are equally relevant for proceedings before the Court of Protection.

The second guidance comes from the Family Justice Council, and addresses neurodiversity in the Family Justice System, ahead of specific guidance for the judiciary to be published later in 2025. As it notes in its opening section:

> *The evidence available suggests that neurodivergence is overrepresented among court users and the fact that it is often underdiagnosed is likely to further mask its prevalence in those accessing family justice. Failure to recognise and take into account neurodivergence impacts children and families within the Family Justice System in two key, and intertwined, ways:*
>
> *(a) Assessments undertaken before, during and after proceedings, or as part of dispute resolution; and*
>
> *(b) Barriers to participation in proceedings, which in turn restricts access to justice and to a fair trial.*
>
> *Failure to recognise and accommodate neurodivergence within the Family Justice System leads to parties, witnesses and children not being able to fully participate in proceedings and dispute resolution, potentially compromising their Article 6 and Article 8 of the European Convention of Human Rights (ECHR) and/or Article 12 of the United Nations Convention on Rights of*

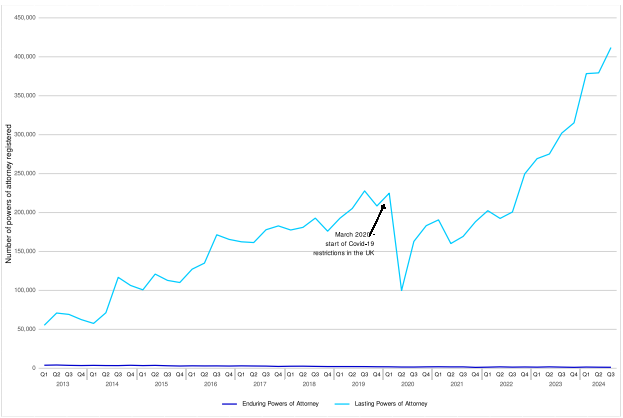
> *the Child. A lack of recognition and unmet support needs can also lead to distressed behaviour, which can significantly impact proceedings through a lack of understanding and tolerance.*

The guidance includes best practice guidance on identifying needs and making adjustments.

Family Court Statistics Quarterly: July to September 2024

The most recent set of statistics published do not include full Court of Protection statistics "*due to a transition to a new system and data platform*," the publication noting that "[t]*hese series will be reinstated as soon as possible*."

However, from July to September 2024, there were 411,880 LPAs registered, the highest in its series and up 36% compared to the equivalent quarter in 2023:



Inherent Jurisdiction (under 18s)

During this quarter there were 371 applications to the High Court to authorise deprivations of liberty. Almost all of these children were teenagers; 58% aged between 13 and 15 and 31% aged between 16 and 18 years. There were 278 orders issued, of which 129 were a final order.

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Conferences

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

Alex also does a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in March. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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