

# The CoP Guide

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## 1. HOW TO USE THIS GUIDE

This is a reference guide to the Court of Protection and the Mental Capacity Act 2005, providing over 650 links to cases and over 175 to statutes, rules or policies. They are organised by topic, so that readers can quickly find the material needed in each area. The guide is not intended to be read from start to finish but jumped around by using the hyperlinks or with “control-F”. So, for example, searching for ‘experts’ leads to the role of experts and how to instruct experts etc and entering ‘urgent’ leads to interim relief, urgent authorisations, guidance on out of hours applications etc. There are hyperlinks from the index to each section and from each case to BAILII and legislation.gov.uk.

The guide is designed to be a starting point for further research. The aim is to collect the key principles together for speed and ease of access.

This guide covers medical treatment issues only briefly. The fourth edition of *Medical Treatment Decisions and the Law*, written by the 29 members of the team at Serjeants’ Inn Chambers was published by Bloomsbury Professional in 2022 and is available as an ebook [here](#).

The intention is to be up to date as of 1 January 2024.

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**Do please contact us [here](#) if you have comments or suggestions for an updated third edition.**

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## 2. CAPACITY

### FIRST PRINCIPLES

- What is capacity?

“Mental capacity is the ability to make a decision” ([Code para 4.1](#)). It is time and decision/ issue specific - [Code para 4.5](#) and [CC v. KK \[2012\] COPLR 627](#) para 20

- Core principles of the MCA

The MCA defines lack of capacity as [\(s. 2\(1\) MCA\)](#):

- Unable to make a decision
- “...because of an impairment of, or a disturbance in the functioning of, the mind or brain”

“[Section 2\(1\)](#) is the single test, albeit that it falls to be interpreted by applying the more detailed description given around it in [sections 2 and 3](#)”, [A Local Authority v. JB \[2021\] 3 WLR 1381](#) para 65

#### Statutory principles for applying those provisions:

- P is assumed to have capacity unless it is established that he/she does not [\(s.1\(2\) MCA\)](#)
- P not treated as unable to make a decision “unless all practicable steps” to help him decide have been taken without success [\(s.1\(3\) MCA\)](#)
- P is not treated as lacking capacity because they make an unwise decision [\(s.1\(4\) MCA\)](#)
- Lack of capacity can’t be established by age, appearance or assumptions based on behaviour [\(s.2\(3\) MCA\)](#)

For a summary of the case law see [A local authority v. RS \(Capacity\) \[2020\] EWCOP 29 para 30](#)

- Breadth and application of the MCA

### Breadth and application of the MCA

The MCA is a new statutory code which is clear and should be applied to every question:

*“But all decisions, whatever their nature, fall to be evaluated within the straightforward and clear structure of MCA 2005, ss 1 to 3 which requires the court to have regard to ‘a matter’ requiring ‘a decision’. There is neither need nor justification for the plain words of the statute to be embellished ... The central provisions of the MCA 2005 have been widely welcomed as an example of plain and clear statutory language. I would, therefore, deprecate any attempt to add any embellishment or gloss to the statutory wording unless to do so is plainly necessary”*

**PC v. City of York Council**, CA [\[2013\] COPLR 409](#) para 35 approved in **A Local Authority v. JB** [\[2021\] 3 WLR 1381](#) para 63

*“The 2005 Act marks a radical change in the treatment of persons lacking capacity”*, **Re: P (Statutory Will)** [\[2009\] COPLR Con Vol 906](#) para 36, Lewison J –

- i) common framework for all decisions, inc property and personal welfare;
- ii) applies to decisions by court and all other people (doctors, carers etc);
- iii) capacity is issue specific; and
- iv) based on best interests and not what P might have been expected to do.

*“The same structured decision- making process applies to all decisions to be made on P’s behalf, whether great or small”* (para 38).

MCA requires that a diagnostic and functional test are met (**CC v. KK** [\[2012\] COPLR 627](#) para 19). See MCA [Section 2](#) (diagnostic test) and [s.3](#) (functional test).

## HOW TO IDENTIFY INABILITY TO MAKE A DECISION

For a recent summary of the principles see **A Local Authority v. RS (Capacity)** [\[2020\] COPLR 705](#) MacDonald J at para 30

## FUNCTIONAL TEST

Capacity involves being able to carry out 3 operations on “the information relevant to the decision” [\(s.3 MCA\)](#)

- Understanding
- Retaining
- Using or weighing

And then communicating the decision, by any means.

A person must believe information in order to understand it or use or weight it, **University Hospitals Birmingham NHS Foundation Trust v. Thirumalesh** [\[2023\] EWCOP 40](#) para 83-84 where ST could not accept that she had only days or weeks to live. See also **Nottingham University Hospitals NHS Trust v JM** [\[2023\] EWCOP 38](#), where Hayden J found JM “does not understand his kidney failure is permanent, that his kidneys will not recover” (para 11) and that his “belief system in respect of dialysis is so plainly distorted as to manifestly rebut the presumption of capacity” (para 44), though his views should still be “afforded weight”.

If asserting a lack of capacity, it is an inability to fulfil any of the components which is required; an impaired ability is not enough to show incapacity: **King’s College Hospital v. C and V** [\[2015\] EWCOP 80](#).

The question of what is “the decision” to be made is therefore central to all steps under MCA. In considering the functional question one must identify (1) the precise matter on which a decision is required (2) the information relevant to the decision, **A local authority v. JB** [\[2021\] UKSC 52](#) paras 68/69.

- Retain

An appeal was allowed where the first-instance court determined that P lacked capacity to consent to discharge from hospital to live at her bungalow and thus elided two distinct questions, i.e. whether P had capacity to 1) consent to discharge; 2) make decisions about discharge arrangements **Wiltshire County Council v. RB and An NHS Foundation Trust** [\[2023\] EWCOP 26](#)

These questions must be applied to every decision:

*“For the avoidance of doubt, every single issue of capacity which falls to be determined under Part 1 of the Act must be evaluated by applying section 3(1) in full and considering each of the four elements of the decision making process that are set out at (a) to (d) in that subsection”*

**In Re: M (An adult) (Capacity to consent to sexual relations)** [\[2014\] 3 WLR 409](#) para 73.

These four operations are not cumulative, if any one of them is absent the person lacks capacity, RT v. LT [\[2010\] COPLR Con Vol 1061](#).

Retaining – For how long must P be able to retain information? [s.3\(3\)](#) says this can be for a ‘short period only’. But where P could not remember information for more than 10 minutes in clinical interviews, the name of visitors for more than 15 minutes or remember after a few days that he had visited his wife [s.3\(3\)](#):

*“...cannot seriously be interpreted to mean, in the context of the lifetime commitment of marriage, for so short a period as AK is able to recall whether he is married at all, or reliably (when he does remember) to whom...”*

**A Local Authority v. AK** [\[2013\] COPLR 163 para 51](#).

Compare, **B v. A Local Authority** [\[2019\] COPLR 347](#) where CA held that P need not be “permanently aware” of STI and condom use:

*“The assessment is not a general knowledge test” but P needed the “ability to understand those matters when explained to him or her and to retain the information for a period of time and to use or weigh it in deciding whether or not to consent to sexual relations.”* (para 57)

Does that mean that a care plan has to include repeated re-teaching of STIs and condom use each time P has to make a decision about sexual relations? The MCA requires work with P to assist them to exercise capacity but there must be some practical limits to the duties on the state.

- Use or weigh

Using / weighing – this will not have equal importance in every decision – in some circumstances an ability to use information is key; in others it is necessary to weigh competing considerations:

*“It is important to emphasise that s. 3(1)(c) of the Act refers to the ability to use or weigh information as part of the process of making the decision. In some circumstances, having understood and retained relevant information, an ability to use it will be what is critical; in others, it will be necessary to be able to weigh competing considerations.”*

In Re: M [\[2014\] 3 WLR 409](#), CA, para 52

The question of using and weighing information leads to the “really difficult cases” (Hedley J). In order to use/ weigh information P must “engage in the decision-making process itself and to be able to see the various parts of the argument and to relate the one to another” **PCT v. P, AH and The Local Authority** [\[2009\] COPLR Con Vol 956](#) at para 35. Note if ‘able’ to use and weigh the relevant information, how much weight to accord each factor is a matter for P – who may decide to give information no weight at all, **King’s College Hospital v. C and V** [\[2015\] EWCOP 80](#), para 38 “a person cannot be considered to be unable to use and weigh information simply on the basis that her own values or outlook to that information in making the decision and chosen to attach no weight to that information”.

For examples of people lacking capacity on the basis of not being able to use / weigh see the temporary loss of capacity driven by needle phobia, see pre-MCA case of **Bolton Hospitals NHS Trust v. O** [2003] 1 FLR 824, Butler-Sloss P or **Re: MB (Caesarean Section)** [\[1997\] 2 FLR 426](#).

- Communicate

Communicate – complex systems of communication should be put in place if required – eg squeezing hands and blinking. Using a system of blinking Hayden J found P:

*“to be clear, eloquent, and entirely unambiguous in the communication of his wishes” for example indicating the word “hare” in a communication book (which was used to show something should be done fast) and “he is sanguine, determined and fighting heroically to go home where he knows that time is likely to be short.”*

**Imperial College v. MB** [\[2019\] EWCOP 30](#) paras 6, 8 and 19.

### DIAGNOSTIC TEST

To lack capacity P must be “unable to make a decision ... because of an impairment of, or a disturbance in the functioning of, the mind or brain” [\(s. 2\(1\) MCA 2005\)](#)

This requires evidence of the impairment and its link to being unable to make a decision. See capacity assessments below for the evidence required.

In **North Bristol NHS Trust v. R** [\[2023\] EWCOP 5](#) para 47 MacDonald J reached the same conclusion:

*“In this context, the question of whether any inability of R to make a decision in relation to the matter in issue is because of an impairment of, or a disturbance in, the functioning of the mind or brain is a question of fact for the court to answer based on the evidence before it. In this context, the wording of s.2(1) itself does not require a formal diagnosis”*

This was relied on by Roberts J in **University Hospitals Birmingham NHS Foundation Trust v. Thirumalesh** [\[2023\] EWCOP 40](#) where ST did “not suffer from any recognised psychiatric or psychological illness” (para 98) and “I need no persuading that she has been adversely impacted by the trauma of her initial admission to hospital. That trauma is likely to have been exacerbated by the length of her stay in the ITU unit” (para 103). The Court rejected the OS’ argument that it was circular to rely on the same beliefs to show impaired decision making and impairment of the mind / brain (para 104)

### CAUSAL LINK

There has to be a causal link between mental impairment (['the diagnostic element' s 2 MCA](#)) and the inability of the person to take the relevant decision (['the functional element' s 3 MCA](#)):

*“If the court concludes that P is unable to make a decision for himself in relation to the matter, then the second question that the court is required to address under section 2(1) is whether that inability is “because of” an impairment of, or a disturbance in the functioning of, the mind or brain. The second question looks to whether there is a clear causative nexus between P’s inability to make a decision for himself in relation to the matter and an impairment of, or a disturbance in the functioning of, P’s mind or brain.” (para 78)*

*“The two questions under section 2(1) are to be approached in that sequence.” (para 79)*

**A Local Authority v. JB** [\[2021\] 3 WLR1381](#)

The same point was made by the CA in City of York, warning that the statutory language ‘because of’ should not be replaced by “referable to” or “significantly relates to” (para 58):

*“for the court to have jurisdiction to make a best interests determination, the statute requires there to be a clear causative nexus between mental impairment and any lack of capacity that may be found to exist (s 2(1)) ”*

**PC and NC v City of York Council** CA, [\[2013\] COPLR 409](#) para 52

Incapacity does not require any established diagnosis **Re: TM; Pennine Acute Hospitals Trust** [\[2021\] COPLR 472](#) paras 16 and 35-38:

*“It is clear therefore that there are a number of identified pathologies which separately or in combination are likely to explain the disturbance or functioning in TM’s mind or brain... It is a misunderstanding of section 3 MCA 2005 to read it as requiring the identification of a precise causal link when there are various, entirely viable causes. Insistence on identifying the precise pathology as necessary to establish the causal link is misconceived.”*

For examples of how to apply that causative test see:

*“Whilst it is accepted by all parties that C has an impairment of, or a disturbance in the functioning of, the mind or brain, the evidence as to the precise nature of that impairment or disturbance was far from conclusive. ... what was being seen might be the operation of a personality disorder or simply the thought processes of a strong willed, stubborn individual with unpalatable and highly egocentric views the evidence was likewise somewhat equivocal”*

**King’s College v C** [\[2016\] COPLR 50](#) MacDonald J, where P refused dialysis because she could no longer live a life that ‘sparkled’.

*“... the question is whether the 'impairment of, or a disturbance in the functioning of, the mind or brain' is operative on P's decision making. Does it cause the incapacity, even if other factors come into play? ... Within this context, the court must be astute to be alive to other factors that may be more significant in this respect ... The order in which the tests are in fact applied must be carefully considered.”*

**A Local Authority v. RS (Capacity)** [\[2020\] EWCOP 29](#) para 31 MacDonald J.

Other factors might include P’s age: **Re Z & Ors** [\[2016\] EWCOP 4](#).

## SUMMARY

**Generally, there are four issues for most cases on capacity**

1. What is the actual decision which P has to make?

An appeal was allowed where the first-instance court determined that P lacked capacity to consent to discharge from hospital to live at her bungalow and thus elided two distinct questions, i.e. whether P had capacity to 1) consent to discharge; 2) make decisions about discharge arrangements **Wiltshire County Council v. RB and An NHS Foundation Trust** [2023] EW COP 26

2. What is the information relevant to that decision?

- The only relevant provision in MCA is that “the information” includes the reasonably foreseeable consequences of deciding one way or another or failing to make the decision [\(s.3 \(4\) MCA\)](#).

- The information and an assessment of P may be contextual:

*“... tailoring of relevant information to accommodate the individual characteristics of [P]”*

**B v. A Local Authority** [2019] EWCA Civ 913.

- If the decision is general in nature that will affect the information required:

*“...if the matter for decision relates to sexual relations, but does not relate to a particular partner, time or place, so that it is non-specific, as in this case, because JB wishes to “engage in” or “consent to” sexual relations with any woman, then the non- specificity of the matter will inform the information which is relevant to the decision”*

**A Local Authority v. JB** [2021] 3 WLR 1381 para 70.

3. Is P unable to manipulate that information, carrying out the four operations required by MCA, ie unable to understand, retain or weigh and communicate a decision?

4. Is that inability is caused by a disturbance in the functioning of their mind or brain?

It is useful in considering the above issues to identify the 3 approaches that could be taken to capacity (**A Local Authority v. JB** [\[2021\] 3 WLR 1381](#) para 58). An outcome approach judges the quality of the decision. A status approach looks at issues such as age or diagnosis. A function or understanding approach focuses on the ability of the individual. The MCA takes that “broad approach” (JB para 61).

### 3. DOMAINS OF CAPACITY AND SUBSTANTIVE CAPACITY

#### CAPACITY TO CONDUCT PROCEEDINGS

- |  |  |
|--|--|
| <ul style="list-style-type: none"> <li>• Conduct proceedings</li> <li>• Taking instructions</li> <li>• Impact on civil claims</li> </ul> | <p>Capacity affects how solicitors take instructions, the conduct of civil proceedings under CPR and the role of COP</p> <p><b>Solicitor's duties</b><br/> A solicitor with a reasonable doubt about their client's capacity is under a legal duty to satisfy themselves whether the person can give instruction, <b>RP v Nottingham City Council and Official Solicitor</b> [2008] EWCA Civ 462 para 47:<br/> <i>...it would have been a serious breach of her professional and ethical code were SC to have continued to take instructions from a person whom she had reason to believe did not have the capacity to instruct her</i></p> <p>Law Society guidance about capacity and vulnerable clients (June 2020):<br/> <a href="https://www.lawsociety.org.uk/topics/client-care/working-with-clients-who-may-lack-mental-capacity">https://www.lawsociety.org.uk/topics/client-care/working-with-clients-who-may-lack-mental-capacity</a></p> <p><b>Impact on civil claims</b><br/> Where a person lacks capacity, proceedings in their name are not properly constituted without a litigation friend and a consent order without the approval of the Court will be set aside where the party lacked capacity <b>Dunhill v. Burgin</b> [2014] 1 WLR 933. Note the power of the Court under CPR r.21.3 to regularise steps taken before the appointment of a litigation friend.</p> <p>The question of capacity for CPR r.21 is decided by applying <a href="#">s.1</a> and <a href="#">2</a> MCA and CPR r.21(ii)(c) - the CPR use the MCA definition for when a party without capacity requires a litigation friend <b>Baker Tilly v. Makar</b> [2013] COPLR 245.</p> |
|--|--|

- Impact on family cases

Note **Hinduja v. Hinduja** [\[2020\] COPLR 528](#) where Falk J held that medical evidence is not always required to appoint a litigation friend (para 37) and that the purpose was to protect P and not to create satellite litigation:

*“the purpose of the application to appoint a litigation friend was to protect the position of the protected party and those advising him, rather than to create additional litigation which would have minimal effect on the main action”* (para 34).

The Court accepted in Hinduja that P had “age-related disease” with a diagnosis additionally given in a statement by P’s solicitor.

**Impact on family cases**

Note para 1.1 of Practice Direction 15B to the FPR: “The court will investigate as soon as possible any issue as to whether an adult party or intended party to family proceedings lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings”.

See **Z v. Kent County Council** [\[2019\] COPLR 79](#). No evidence had been obtained about P’s capacity but a placement order had been made by consent, a situation described by the judge as a ‘car crash’. HHJ Lazarus thoroughly reviews the law, noting the contradiction over a need for medical evidence, the inability to progress proceedings and the risk to article 6 rights. Ultimately if there is no medical evidence the Court must make “pragmatic evidence-based decisions”.

The Court has also been willing to make an interim declaration so that the OS can be appointed and obtain proper capacity evidence eg **CS v. FB** [\[2020\] COPLR 762](#), a case under the Family Procedure Rules.

- Applying the test

The question is whether:

*“the party to legal proceedings was capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case might require, the issues on which his consent or decision was likely to be necessary in the course of those proceedings”*

**Masterman-Lister v Brutton & Co** [\[2003\] 3 All ER 162](#), headnote.

- Applies to the particular litigation in mind

This is decided in relation to the particular litigation in mind **Sheffield City Council v E** [\[2005\] Fam 326](#), para 38:

*"... the question of capacity to litigate is not something to be determined in the abstract. One has to focus on the particular piece of litigation in relation to which the issue arises..."*

- Subject matter and litigation capacity

You can have subject matter capacity and lack litigation capacity but it is very unlikely that you have litigation capacity if you lack subject matter capacity:

*"Whilst it is not difficult to think of situations where someone has subject-matter capacity whilst lacking litigation capacity, and such cases may not be that rare, I suspect that cases where someone has litigation capacity whilst lacking subject-matter capacity are likely to be very much more infrequent, indeed pretty rare. Indeed, I would go so far as to say that only in unusual circumstances will it be possible to conclude that someone who lacks subject-matter capacity can nonetheless have litigation capacity."*

**Sheffield City Council v E** [\[2005\] Fam 326](#) para 49:

Note Hayden J's warning that similar dicta from 2021 should not have too much reliance put on them and the tests were not synonymous, **Re: Q** [\[2022\] EWCOP 6](#) paras 21-22

- Depth of understanding

P needs a basic understanding of the nature of the claim, of the legal issues involved and the circumstances giving rise to the claim – **In the Matter of S, D v. R and S** [\[2010\] COPLR Con Vol 1112](#)

For a description of the complexity and demands of litigation:

*"Conducting litigation is not simply a question of providing instructions to a lawyer and then sitting back and watching the case unfold. Litigation is a heavy-duty, dynamic transactional process, both prior to and in court, with information to be recalled, instructions to be given, advice to be received and decisions to be taken, on many occasions, on a number of issues, over the span of the proceedings as they develop."*

**Re: P** [\[2021\] COPLR 450](#) para 27.

Litigation capacity can be decided on an interim basis so that OS can be appointed as litigation friend and seek further evidence, **CS v. FB** [\[2020\] EWHC 1474](#)

## CAPACITY AND RESIDENCE

### • Relevant information for s.3 MCA

Likely relevant information was listed in **LBX v K and Others** [\[2013\] EWHC 3230 \(Fam\)](#) para 43, Theis J:

- (i) what the options are, including the sort of property and the facilities they have
- (ii) what sort of area the properties are in
- (iii) the difference between living somewhere and visiting it
- (iv) what activities P would be able to do if he lived in each place
- (v) whether and how P would be able to see family and friends if living in each place
- (vi) the need to pay money to live there and to pay bills, that there would be an agreement about use of the property
- (vii) who P would be living with at each placement
- (viii) what sort of care P would receive in each placement in broad terms
- (ix) the impact on contact

Note cases warning against use of lists eg

*“no principled problem with the list provided that it is treated and applied as no more than guidance to be expanded or contracted or otherwise adapted to the facts of the particular case”*

**B v. A Local Authority** [\[2019\] COPLR 347](#), CA para 62, in relation to Theis J’s list.

### • Interim orders

Obviously, every case depends on its facts but return home on a trial basis is common usually with a care package / an agreement of family members to co-operate, eg **Re GC** [2008] COPLR Con Vol 422.

- Avoid over-protecting P

A common argument in favour of a return home is:

*“The fact is that all life involves risk, and the young, the elderly and the vulnerable are exposed to additional risks and to risks they are less well equipped than others to cope with ... Physical health and safety can sometimes be brought at too high a price in happiness and emotional welfare. The emphasis must be on sensible risk appraisal ... What good is it making someone safer if it merely makes them miserable?”*

**Re MM; Local Authority X v MM and KM** [\[2009\] 1 FLR 443](#)

- Residence and care are separate but related

Relationship between residence and care:

*“It does not follow from such approach, however, that residence and care are decisions which are made in separate 'silos'. There are differences in the information relevant to making each decision but there is also overlap. Again, comparison of Theis J's two lists immediately illustrates the point – item (8) in respect of a decision about residence is 'what sort of care [P] would receive in each placement in broad terms ...’ (para 64)*

*“Overlap does not however imply that a decision in respect of residence somehow incorporates a decision in respect of care...” (para 65)*

**Tower Hamlets v. A** [\[2020\] COPLR 609](#)

## CAPACITY AND CARE

### • Relevant information for s.3 MCA

Likely relevant information was listed in **LBX v K and Others** [\[2013\] EWHC 3230 \(Fam\)](#) para 48, Theis J:

- (i) what areas P needs support with;
- (ii) what sort of support P needs;
- (iii) who will be providing P with support;
- (iv) what would happen if P did not have any support or refused it; and
- (v) carers might not always treat people properly and that complaints can be brought.

P need not understand the funding of care, and the arrangements for monitoring and appointing care staff.

**LBX v K and Others** [\[2013\] EWHC 3230 \(Fam\)](#) para 48 Theis J.

Note the caution about lists, **B v. A Local Authority** [\[2019\] COPLR 347](#), CA para 62.

Note the comments under residence (above) about the relationship between residence and care, **Tower Hamlets v. A** [\[2020\] COPLR 609](#).

HHJ Dodd decided it was wrong to go beyond Theis J's list to include factors such as the importance of structure and support or accessing the community. These are "*nebulous value judgments*" allowing the tail of welfare to wag the dog of capacity **A local authority v. GP (Capacity: Care, Support and Education)** [\[2020\] EWCOP 56](#) paras 25-27.

### • Refusing an assessment under Care Act 2014

The information relevant to a decision to refuse an assessment under Care Act 2014 includes: (1) a local authority has a duty to meet a person's eligible care needs; (2) the assessor may speak to other people involved in P's care and P can refuse consent to this; (3) the LA will assess how P's well-being can be promoted **A local authority v. GP (Capacity: Care, Support and Education)** [\[2020\] EWCOP 56](#) para 20.

## CAPACITY AND CONTACT

- **Significance**

Contact is person specific, **PC and NC v City of York Council, CA** [\[2013\] COPLR 409](#).

Article 8 includes right to establish relationships with other people, **Niemietz v Germany** [\(1993\) 16 EHRR 97](#).

Contact is important and can affect best interests decisions in other areas:

*“Contact, for example, is an issue capable of going to the heart of whether being detained is in a person's best interests...”*

**Director of Legal Aid Casework v. Briggs** [\[2017\] COPLR 370](#) para 95.

- **Relevant information for s.3 MCA**

Likely relevant information was listed in **LBX v K and Others** [\[2013\] EWHC 3230 \(Fam\)](#) para 45, Thisis J:

- (i) who the people are, and in broad terms the nature of P’s relationship with them;
- (ii) what sort of contact P could have with each of them, including locations, durations and arrangements regarding presence of support workers;
- (iii) the positive and negative aspects of having contact with each person;
- (iv) what might be the impact of deciding to have / not to have contact with a particular person;
- (v) that family are in a different category; what a family relationship is.

P needs to understand the risk that someone may pose, **Re: BU** [\[2022\] COPLR 46 para 41](#)

For a case considering capacity for contact with family separately from contact with others see **Re: EOA** [\[2021\] COPLR 564](#) paras 50 and 51.

## CAPACITY AND SEXUAL RELATIONS

### Limit to the power of the Court

The Court cannot supply consent to marriage / civil partnership or sexual relations on behalf of someone who lacks capacity, [s.27 MCA](#).

Note that carers who arrange contact with a sex worker for P could be at risk of prosecution under s.39 Sexual Offences Act 2003, **Secretary of State for Justice v. C** [\[2021\] EWCA Civ 1527](#) para 49. Baker LJ said obiter that the same reasoning meant s.39 required consideration in cases where a care plan for contact was being arranged if that care plan might lead P to have sexual relations with another person (ie not only with a sex worker).

### Significance

- Emotional significance

*"...profound aspect of civil liberties and person autonomy"* (**D Borough Council v. AB** [\[2011\] EWCOP 101](#))

*"... these issues are integral to the couple's most basic human rights"* (**LBTH v. NB** [\[2019\] EWCOP 17](#))

- Possible long term supervision of personal relationships

Supervision of P: a local authority *"must undertake the very closest supervision of that individual to ensure, to such extent as is possible, that the opportunity for sexual relations is removed"* **In Re: M (an Adult)** [\[2015\] Fam 61](#)

If P has capacity over sexual relations but not contact with other people *"there may be – indeed, are likely to be – circumstances in which her relationships need to be supported, managed and, if necessary, controlled by the court"* **Re: P (Sexual Relations and Capacity)** [\[2019\] COPLR 44](#) para 34 Baker J. Where P could decide whether to consent to sexual relations but not *"whether a person with whom he may wish to have sexual relations is safe"* the Court called for a care plan based on education and empowerment and balancing protection and autonomy, **A Local Authority v. TZ (No 2)** [\[2014\] COPLR 159](#) paras 37, 52, 55. Note the comments of Baker LJ in **Secretary of State for Justice v. C** [\[2021\] EWCA Civ 1527](#) para 49 about the risk of prosecution.

- Criminal consequences for P's partners
- Need to respect rights of disabled people
- Consent to sexual relations or engaging in sexual relations?

Intentional sexual touching of another person is an offence if that person lacks capacity to choose whether to agree to the touching for a reason related to a 'mental disorder' (s.30 Sexual Offences Act 2003)

Policy says the bar must not be too high or sexual contact prohibited for too many, **XCC v. MB** [\[2006\] 2 FLR 968](#)

**Re: SK, A London Borough Council v. KS and LU** [\[2008\] 2 FLR](#) where P was found to have fluctuating capacity and the conclusion was that P's carers needed "a clear list of the indicators of a possible loss of capacity to make decisions about sexual intercourse' or other sexual contacts" (paras 133 and 149).

The cases all have to be seen in the light of the CA and Supreme Court decisions in JB.

Until the CA decision in JB the question was whether P had capacity to consent to sexual relations. Under this test it was clear P had to understand and be able to apply their own need to consent but what about the necessity of their partner's consent? This question was before the Supreme Court in **A Local Authority v. JB** [\[2021\] 3 WLR 1381](#) which concluded that the question is not P's consent but P's decision to engage in sexual relations:

*"The evaluation of JB's capacity to make a decision for himself is in relation to 'the matter' of his 'engaging in' sexual relations. Information relevant to that decision includes the fact that the other person must have the ability to consent to the sexual activity and must in fact consent before and throughout the sexual activity. Under section 3(1)(a) MCA JB should be able to understand that information and under section 3(1)(c) MCA JB he should be able to use or to weigh it as part of the decision-making process..." (para 121)*

There is a longer discussion in the CA judgment in the same case. Baker LJ pointed out that in considering capacity to consent to sexual relations the emphasis had come to be on consent but it was also necessary to consider what the person is consenting to – generally that would be sexual relations:

*"...The word 'consent' implies agreeing to sexual relations proposed by someone else. But in the present case, it is JB who wishes to initiate sexual relations with women. The capacity in issue in the present case is therefore JB's capacity to decide to engage in sexual relations. In my judgment, this is how the question of capacity with regard to sexual relations should normally be assessed in most cases." (para 93)*

- Issue or partner specific?

*“When the 'decision' is expressed in those terms, it becomes clear that the 'information relevant to the decision' inevitably includes the fact that any person with whom P engages in sexual activity must be able to consent to such activity and does in fact consent to it...”*

**Re: JB (capacity: sexual relations)** [\[2020\] EWCA Civ 735](#) para 93-94 and a summary of factors at para 100

Is the question P’s capacity to consent to sex with a particular person or to sex in general? People with capacity give consent to sex with particular people and criminal courts focus on that question

*It is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place*

**R v. Cooper** [\[2009\] 1 WLR 1786](#) para 27 Baroness Hale

but the COP is dealing with the future and (until Tower Hamlets, below) not usually one person:

*a court assessing capacity to engage in sexual relations under the MCA ordinarily needs to make a general, prospective evaluation which is not tied down to a particular time*

**JB** in the Supreme Court para 101

- Criminal law

In **JB** the Supreme Court decided that the civil and criminal tests might differ, leaving the matter for determination in a case where the point arose (para 108). Principles include that the civil test can’t be less stringent than the criminal test (ie it can’t be lawful to do something criminal, para 105) but could be stricter (para 106). The civil and criminal tests have different purposes (para 107). The Court accepted the decision in JB does create a difference between the MCA and the criminal law under s.30-33 SOA but that was permissible (para 111)

In **Re: M (An adult) (Capacity to consent to sexual relations)** [\[2014\] 3 WLR 409](#) the Court of Appeal explained that the criminal law focusses on consent given or withheld in a place, time and person specific context but it would be unworkable for LA or COP to conduct a capacity assessment each time someone might have sex – capacity can only be assessed on general basis (para 77). The approach in COP is “*general and issue specific*” (para 79)

- Relevant information for s.3 MCA

The relevant information will depend on the particular decision and P's circumstances and characteristics and "may include", **Re: JB (capacity: sexual relations)** [2020] EWCA Civ 735, CA para 100 (approved by Lord Stephens para 84):

- The sexual nature and character of the act, including its mechanics
- The fact the other person must have capacity to consent and must in fact consent before and throughout
- The fact that P themselves can say yes or no and is able to decide to give or withhold consent
- That a consequence of sex between a man and woman is the woman may become pregnant
- That there are health risks, including STIs, and that these can be reduced by condom use

- Using or weighing

Decision-making for capacitous people is "*largely visceral rather than cerebral, owing more to instinct and emotion than to analysis*" – therefore the "using and weighing" part of the functional test is unlikely to "*loom large*" paras 80/81. Note the comment on this in **Re: JB (Capacity: sexual relations)** [2020] COPLR 550

*"...it has never been suggested that decisions are exclusively visceral or instinctive. It is, of course, true that sexual desire is emotional rather than intellectual, but for human beings the decision whether or not to engage in sexual relations obviously includes a cerebral element. It involves thought as well as instinct"*

- Possibility of person specific decisions

There is a crucial – and perhaps developing – caveat to this: the assessment should depend on the particular decision that P has to make: "*At risk of labouring the point further, I am emphasising that the tests require the incorporation of P's circumstances and characteristics*" – finding that P had capacity to decide to consent to sexual relations with her husband **Tower Hamlets v. NB** [2019] COPLR 398 paras 45, 48, 65. These proceedings are referred to positively by the Court of Appeal in JB (paras 101-103), subject to final decision in future cases. This seems to have been accepted by Lord Stephens in the Supreme Court in JB, **A Local Authority v. JB** [2021] 3 WLR 1381 para 72

- Specific practices

The same approach was taken by Poole J in **Hull CC v. KF** [\[2022\] EWCOP 33](#). In that case KF had been sexually assaulted by her partner, KW and he was likely to be imprisoned within days for the offence. She wished to see him overnight and was assessed, generally, to have capacity in relation to sex but not to capacity to decide if sexual relations with KW are safe because she could not retain information about the assaults:

*24 ... In the present case, KF does not want to make decisions about having sexual relations in general, she wants to have (the opportunity for) sexual relations with KW and for that to occur within the next few days, prior to his likely incarceration. Information relevant to that specific decision includes information about the history and nature of the relationship between KF and KW ... In cases in which it has been determined that P lacks capacity to make decisions about contact with a past or potential partner because of the risk of harm to P or by P, and it has been determined that P has capacity to decide to engage in sexual relations, consideration should be given to P's capacity to decide to engage in sexual relations with that partner. Failure to do so could result in incoherent capacity decisions*

- The information may depend on the decision

Decisions about different sexual practices would require the manipulation of different information, **Re: AA (Court of Protection)** [\[2021\] COPLR 14](#) where P was interested in autoerotic asphyxiation and advertised on social media his wish to be submissive to others. P was found to have capacity to consent to sexual relations but not autoerotic asphyxiation. The Court sets out the information relevant to decisions about autoerotic stimulation, the structure of which will be useful for other specific areas (paras 18 and 49). They are: what it is, how one does it, the risks and how to reduce those risks.

How much can the information be affected by the context? See JB paras 101-103 and for particular “foreseeable consequences”:

- Same sex relations - need not understand pregnancy possible, **A Local Authority v. TZ** [\[2013\] COPLR 477](#)
- Post-menopausal women need not understand pregnancy **B v. A Local Authority** [\[2019\] COPLR 347](#) para 49
- People in a monogamous relationship, possibly, need not understand STI, **Tower Hamlets v. NB** [\[2019\] EWCOP 17](#) para 13

The relevant information does not include any moral or emotional aspect **Re: DY** [\[2021\] COPLR 415](#) para 15

P needs to understand condom use as a way to respond to the risk of STIs, **B v. A Local Authority** [\[2019\] COPLR 347](#), CA para 58.

### CAPACITY AND MARRIAGE (AND DIVORCE)

- **Limit to the power of the Court**

The Court cannot supply consent to marriage / civil partnership or sexual relations on behalf of someone who lacks capacity, [s.27 MCA](#)

- **Capacity**

*“Status or act specific”*

**York City Council v C** [\[2014\] Fam 10](#) para 35 McFarlane LJ

It is hard to identify the information someone has to understand to get married. The cases show lots of things you don't have to understand. For example, in **NB v. MI** [\[2021\] COPLR 207](#) Mostyn J excludes “*a shared economy*”, having sexual relations, having children and living together (paras 20-26). Each of those seems right but if marriage is not about money, sex, children or cohabitation what is it about? Mostyn J gave the following:

*vi) Marriage bestows on the spouses a particular status. It creates a union of mutual and reciprocal expectations of which the foremost is the enjoyment of each other's society, comfort and assistance. The general end of the institution of marriage is the solace and satisfaction of man and woman.*

Relevant information might be identified case by case but it has been held that capacity to marry is about understanding the contract, ie something common to every marriage.

- **Low test**

Low test based on the simple marriage contract

Policy issue – capacity to marry must not be set too high to deny disabled people the enjoyment of married life **Re DMM; EJ (As Attorney for DMM) v SD** – [\[2018\] COPLR 137](#)

*‘... for most people marriage is to be regarded as a fairly straightforward concept (compared for example with litigating, or with many medical procedures)...’* **A Local Authority v AK** [2012] EWHC B29 (COP).

It is not enough to understand the ceremony – P must understand the marriage contract, ie agreement to live together, to love one another, to the exclusion of all others, providing society, comfort and assistance.

- Sexual relations

It is a test about the marriage contract and not about marriage to that particular person, **Re E v. Sheffield City Council** [2005] 1 FLR 965. Note that arguably not all these things have survived, eg in NB Mostyn J says cohabitation is not required:

*“Therefore, the irreducible mental requirement is that a putative spouse must have the capacity to understand, in broad terms, that marriage confers on the couple the status of a recognised union which gives rise to an expectation to share each other's society, comfort and assistance.”*

**NB v. MI** [2021] COPLR 207 para 27.

Marriage generally requires capacity to consent to sexual relations because that is implicit in marriage **X City Council v MB, NB and MAB** [2006] 2 FLR 968 per Munby J

BUT note that Mostyn J emphasised that this was not expressed in absolute terms and that marriages of those who are unable to have sexual intercourse or choose not to, say in relation to their age, *“are all perfectly valid marriages”* **NB v. MI** [2021] COPLR 207 para 15 expressly disagreeing with **Southwark v. KA (Capacity to Marry)** [2016] EWCOP 20 on this point

- Financial issues

P must have capacity to understand that marriage revokes any existing will **Re DMM** above para 10 – but need not understand what happens on intestacy (P in DMM lacked capacity to make a new will and needed to understand his marriage would make it impossible to implement what he had wanted to happen – eventually held that he knew his will would be revoked and that he might not be able to make a new will [2018] COPLR 144).

P must be able to understand that marriage may bring about a financial claim **Mundell v. A** [2020] COPLR 140 para 31 Munby J, again compare this with Mostyn J in NB v. MI who considered that “knowledge and understanding” of the financial consequences of divorce was not required (para 20) in a case where a person with a large damages award, but largely recovered from the injury, sought a declaration of non-recognition.

- Significance of marriage

Any conduct carried out for the purpose of causing someone who lacks capacity to marry to enter into a marriage is an offence (s.121 **Anti-social Behaviour, Crime and Policing Act 2014**).

Marriage will affect (1) ownership and residency rights in property; (2) validity of wills and inheritance on intestacy; (3) tax; (4) access to welfare support; (5) legitimacy of children; (6) claims on divorce; and (7) applications for residence in the UK and other countries.

- Divorce

**D v. S** [2023] EWCOP 8 essentially finds that capacity to divorce relates to the same information as capacity to marry (paras 16 and 23)

- Forced marriage

**Part IVA Family Law Act 1996**

Forced Marriage Protection Order (FMPO)

[s.63A\(1\)](#) – Court may make an order “for the purposes of protecting” a person from being forced into marriage or who has been forced into marriage - by [s.63M](#) extends to the High Court or the Family Court

[s.63A \(4\)](#) - forced marriage means someone forces A to enter into a marriage “without A's free and full consent” including using threats or psychological means

[s.63CA](#) – breaching FMPO is an offence punishable by up to 5 years imprisonment

For the four stages to be followed when considering an FMPO see **Re: K (Forced Marriage: passport order)** [2020] EWCA Civ 190 paras 45- including (1) establish the facts on evidence to the civil standard; (2) decide whether it is necessary to protect the person from a forced marriage re: s.63(A)(1); (3) assess the risks and protective factors; (4) if the facts show a risk of a breach of art 3 the court needs to take a balancing exercise with art 8

A detailed consideration of the evidence required for a forced marriage order, **Re: BU** [2022] COPLR 46

- Ending a marriage entered into without capacity

See **Family Law Act 1986** but in summary:

Five declarations as to marital status available under FLA where one of the parties to the marriage is domiciled in England and Wales on the date of the application ([s.55 FLA 1986](#))

- Expressly prohibits any court making a declaration that a marriage was “at its inception void” ([s.58 \(5\) FLA 1986](#))
- Instead FLA allows application for a decree of nullity ([s.58 \(6\) FLA 1986](#)). This would entitle the parties to bring ancillary relief proceedings (**Hudson v. Leigh (Status of Non-Marriage)** [2009] 2 FLR 1129 para 2)

- **Declarations of non-recognition**

- Marriage entered into without capacity usually voidable for lack of capacity and hence of no effect from the date of any decree absolute of nullity

Despite the lack of a statutory declaration that a marriage is void, the court can make a declaration under the inherent jurisdiction that marriage is not to be recognised. This may be “*an extremely fine distinction and may not be thought to be wholly logical*” but “*it is eminently fair to provide such a declaration ... More importantly, it is not outwith s 58(5) ...*” (**B v. I (Forced Marriage)** [2010] 1 FLR 1721 paras 17-18). See CA, **City of Westminster v. IC** [2008] 2 FLR 267.

The inherent jurisdiction has been used to declare that a religious marriage in the UK was a non-marriage (**A Local Authority v. SY** [2014] COPLR 1) and to make declarations of non-recognition of marriages conducted abroad (**XCC v. AA** [2012] COPLR 730 per Parker J, seeing the jurisdiction as founded on a gap in the law, para 52).

For the application of this, compare:

- “*In most cases an overseas marriage, entered into by an individual who lacks capacity to consent to either sexual relations or marriage, is likely to require the court to make a declaration of non-recognition*”  
**Re: RS (An adult) (Capacity: non-recognition of Foreign Marriage)** [2017] 4 WLR 61
- **Sandwell MBC v. RG** [2013] COPLR 643 which discussed whether P obtained some benefit from the marriage

## CAPACITY AND REPRODUCTION

### BIRTH / CONTRACEPTION / STERILISATION / ABORTION / FERTILITY TREATMENT / PATERNITY TESTING

- Birth

Cobb J listed 8 pieces of information relevant to a decision on birth including ante-natal care, mode of delivery, pain relief and risk of complications in **Re: DD** [\[2014\] EWCOP 11](#) para 69. Also approving giving P only partial information about the procedure, in particular not sharing the date, para 144

MacDonald J listed the information relevant to having a Caesarean as “why do you [the Dr] want to do a Caesarean section, what are the alternatives, what will happen when it is done, is it safe for me, is it safe for my unborn child, how long will I take to recover and what will happen if I decide not to do it” **North Bristol NHS Trust v. R** [\[2023\] EWCOP 5](#).

- Contraception

*“...contraception is properly described as a form of medical treatment”*

**A local authority v. Mrs A (test for capacity as to contraception)** [\[2010\] COPLR Con Col 138](#) para 58.

P must be able to understand and weigh up the *“proximate medical issues”*

- the reason for contraception and what it does (including the likelihood of pregnancy if not used)
- the types available and how they are used
- the advantages and disadvantages of each type
- The possible side effects and how they can be dealt with
- How easily each type can be changed
- The generally accepted effectiveness of each

But P need not understand bringing up a child or whether the child would be removed from her care (which would risk bringing in best interests and paternalistic approach, para 61), **A Local Authority v. Mrs A** [\[2010\] COPLR Con Col 138](#) para 64

- Best Interests

Covert contraception was approved where knowledge of it would cause P distress and possibly harm her relationship with her family but *“in all probability this state of affairs cannot continue indefinitely. Covert treatment should only be countenanced in exceptional circumstances”* **Re: P (Sexual Relations and Contraception)** [\[2019\] COPLR 44](#) para 63.

**Best interests**

[S.1\(6\) MCA](#) requires that any decision is the least restrictive possible. Consider risk management, contraception and care plans **A local authority v. K** [\[2013\] COPLR 194](#) para 33

Should aim to achieve the purpose of the contraception in the least restrictive way, **The Hospital Trust v. Miss V** [\[2018\] COPLR 56](#)

- Sterilisation

Article 8 includes respect for decisions to become and not to become a parent, **Evans v United Kingdom** [\[2006\] 2 FLR 172](#)

Risk management is less restrictive in general than sterilisation, **A Local Authority v. K** [\[2014\] 1 FCR 209](#)

*“an order permitting the lifelong removal of a person's fertility for non-medical reasons requires strong justification”*, **An NHS Trust v. DE** [\[2013\] COPLR 531](#)

*“...it will be a rare case, in my view, in which the more radical alternative of sterilisation will be found to be in the best interests of an incapacitous woman of child-bearing age”* **Re: DD (No.4)(Sterilisation)** [\[2015\] EWCOP 4](#), para 11, pointing out that an IUD is long term and effective. Sterilisation was approved in that case along with force to carry out the procedure, with P not being told the date of the operation paras 136-138.

**Re: A (Male sterilisation)** [2000] 1 FLR 549 suggesting the issues differ for men and women as STI is the only direct consequence of sexual intercourse for a man – but it could still be in the man’s best interests for social reasons, see **An NHS Trust v. DE** [\[2013\] COPLR 531](#)

- **Abortion**

*“It is of course a profound and grave decision, but it does not necessarily involve complex issues”* **Re: SB (Capacity to consent to termination)** [\[2013\] COPLR 445](#) para 44. Holman J found P had capacity

*“... even if aspects of the decision making are influenced by paranoid thoughts in relation to her husband and her mother, she is nevertheless able to describe, and genuinely holds, a range of rational reasons for her decision. When I say rational, I do not necessarily say they are good reasons [but] it would be a total affront to the autonomy of this patient to conclude that she lacks capacity to the level required to make this decision”*.

See also **S v. Birmingham Women and Children’s Trust** [\[2022\] EWCOP 10](#) where the Court identified the information to be understood as (1) what the procedures involve; (2) the effect of the procedure; (3) the risks; and (4) the possibility of safeguarding measures for the baby. The first 3 were usefully summarised as what it is, what it does, what it risks.

Note the need to consider lawfulness under Abortion Act 1967 as well as MCA issues.

- **Fertility treatment**

**Y v. A Healthcare Trust** [\[2018\] COPLR 534](#) – P had started fertility treatment with his wife to have a second child – Court declared it lawful to retrieve and use his sperm – largely on the basis of his wishes and feelings

- **Paternity testing**

**B v. E** [\[2020\] COPLR 211](#) for a case on consent to take DNA from someone with end stage dementia, begun as an urgent application, and considering interaction with [Human Tissue Act 2004](#)

## OTHER AREAS OF CAPACITY

### • Making a will

See sections [s.16 MCA](#) and [s.18MCA](#) for the power to allow the execution of a will.

**Schedule 2 MCA** makes specific provision about a will:

- A will executed for P “by virtue of s.18” (sched 2 para 1) “may make any provision ... which could be made by a will executed by P if he had capacity to make it”, sched 2 para 2
- For provisions for executing a will, see sched 2 para 3(2)
- A will executed according to sched 2 para 3 “*has the same effect for all purposes as if — (a) P had had the capacity to make a valid will...*” see sched 2 para 4

See **In Re: P (Statutory Will)** [\[2010\] Ch 33](#)

### **Capacity**

In assessing the validity of a will executed by a deceased person the common law tests in **Banks v. Goodfellow** (1869-70) LR 5 QB 549 continue to apply and the MCA does not apply, **Re: Walker (deceased)** [2015] COPLR 348 and **James v. James** [\[2018\] COPLR 147](#):

*“the traditional threshold for testamentary capacity has been low, so as not to deprive elderly persons of the particular ability to make wills in their declining years”* para 80. The reason for the apparent discrepancy is that the MCA applies to prospectively to people who are living and it does not follow it reforms the common law for a different question.

Confirmed in **Clitheroe v. Bond** [\[2021\] EWHC 1102](#) paras 54-56.

The Law Society [guidance note](#) summarises the Banks and Goodfellow principles, in modern language, as:

- understand the nature of their act (of making a will) and its effects
- understand the extent of the property in their estate
- comprehend and appreciate the claims to which they ought to give effect, and

- Lasting power of attorney

- no disorder of their mind “*shall poison his affections, perverse his sense of right, or his will in disposing of his property*”

Where capacity may be in doubt through age or ill-health the will should be witnessed by a medical practitioner **Kenward v. Adams** [1975] CLY 359

**Public Guardian v. RI** [2022] EWCOP 22 para 16 sets out the information relevant to a decision to execute an LPA:

- (a) The effect of the LPA
- (b) Who the attorneys are
- (c) The scope of the attorneys' powers and that the MCA 2005 restricts the exercise of their powers
- (d) When the attorneys can exercise those powers, including the need for the LPA to be executed before it is effective
- (e) The scope of the assets the attorneys can deal with under the LPA
- (f) The power of the donor to revoke the LPA when he has capacity to do so.
- (g) The pros and cons of executing the particular LPA and of not doing so.

- Education

Education raises broad issues of best interests affecting all areas of a child’s life including relationships with parents and community identity, equality, aspiration and maximising opportunity “*our objective must be to maximise the child's opportunities in every sphere of life as they enter adulthood*” **Re: G (Education: Religious Upbringing)** [2013] 1 FLR 677 para 80 – a family law case under Part II Children Act 1989

**A local authority v. GP (Capacity: Care, Support and Education)** [2021] COPLR 1 paras 29 and 34 considers the information relevant to decisions about:

- Education, suggesting: (1) the type of provision; (2) the type of qualifications; (3) the cohort of pupils and if P would match that cohort; (4) that P has additional rights to age 25 by virtue of having SEN
- Decisions about EHC assessments, suggesting: (1) an EHC plan is a document which identifies support for

- **Possessions**

SEN; (2) other people will be consulted during assessment; (3) a plan creates an enforceable right to provision; (4) an EHC plan is available to age 25

- It is not necessary to understand all the details within a statement of SEN: **LBL v. RYJ** [\[2010\] COPLR Con Vol 795](#) para 58

In the context of hoarding, the relevant information is (1) volume of possessions and impact on the use of rooms; (2) safe access and use; (3) creation of hazards; (4) safety of the building; (5) removal of hazardous levels of belongings, **Re: AC (Capacity: hoarding: best interests)** [\[2022\] EWCOP 39](#) para 14

- **Social media**

Distinct question from other forms of contact. The relevant information is:

- (1) words and images widely shared
- (2) this can be limited
- (3) you can offend people
- (4) people might not be who they said they were
- (5) some people might be a risk
- (6) you can commit a crime through what you look at or share

**Re A (Capacity: Social Media and Internet Use: Best Interests)** [\[2019\] COPLR 137](#) para 28

## 4. BEST INTERESTS

- |  |   |
|--|---|
| <ul style="list-style-type: none"> <li>• Statutory starting point</li> <li>• Least restrictive option</li> </ul> | <p>Any decision taken by the court must be taken in P's best interests, <a href="#">s 1(5) MCA 2005</a></p> <p>Before an act is done or a decision is made consider if the purpose for which the act is needed:<br/> <i>"...can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action"</i><br/> <a href="#">s.1(6) MCA 2005</a></p> |
|--|---|

### SECTION 4 MCA

- |   |   |
|---|---|
| <ul style="list-style-type: none"> <li>•</li> </ul> | <p><a href="#">Section 4 MCA</a> – <i>"In determining for the purposes of this Act what is in a person's best interests the person making the determination..."</i> must:</p> <ul style="list-style-type: none"> <li>• Not make the decision on the basis of age, appearance or unjustified assumptions based on P's condition /behaviour <a href="#">s.4(1)</a></li> <li>• Consider all the relevant circumstances including <a href="#">s.4(2)</a> and <a href="#">4(6) MCA</a></li> <li>• P's past and present wishes and feelings</li> <li>• P's beliefs and values</li> <li>• Consider if it is likely that P will regain capacity and if so when <a href="#">s.4(3) MCA</a></li> <li>• Permit P to participate / improve P's ability to participate <a href="#">s.4(4) MCA</a></li> <li>• In any life sustaining treatment not be motivated by a wish to bring about P's death <a href="#">s.4(5) MCA</a></li> </ul> <p>Consider views of anyone named by P; anyone caring for P or interested in his welfare; donee of lasting power of attorney and any deputy <a href="#">s.4(7) MCA</a></p> |
|---|---|

#### APPLYING SECTION 4

- **Welfare in the widest sense**

Wide test, considering all the circumstances:

*“The most that can be said, therefore, is that in considering the best interests of this particular patient at this particular time, decision-makers must look at his welfare in the widest sense, not just medical but social and psychological“*

**Aintree v. James** [\[2013\] COPLR 492](#), SC para 39.

Go through steps in MCA and then form value judgment:

*“...the overarching principle is that any decision made on behalf of P must be made in P's best interests. This is not (necessarily) the same as inquiring what P would have decided if he or she had had capacity ... having gone through these steps [as set out in MCA], the decision-maker must then form a value judgment of his own giving effect to the paramount statutory instruction that any decision must be made in P's best interests”*

In **Re: P (Statutory Will)** [\[2010\] Ch 33](#) paras 37 and 39, Lewison J.

- **No hierarchy but sometimes an issue of magnetic importance**

*“the statute lays down no hierarchy as between the various factors which have to be borne in mind, beyond the overarching principle that what is determinative is the judicial evaluation of what is in P's 'best interests' ” (para 32), Munby J agreeing with Lewison J above and noting that the significance of factors would vary from case to case, with some factors having “magnetic importance.”*

**ITW v. Z** [\[2009\] COPLR Con Vol 828](#)

- **No presumptions**

There is no set starting point –

*“... overall it is neither desirable nor appropriate that there be set 'presumptions' or 'practical and evidential burdens' or something like that in undertaking the exercise required by the MCA 2005...”*

**K v. LBX** [\[2012\] COPLR 411](#) para 66

- **Proper assessment is compliant with Convention**

*“A best interests assessment, properly conducted under English law in accordance with established principles, is fully compliant with the Convention...”*

In re: **M (Adult Patient) (MCS: Withdrawal of Treatment)** [\[2012\] 1 WLR 1653](#) para 96

### WISHES AND FEELINGS

- Cases emphasising importance/ weight

*“In setting out the requirements for working out a person’s ‘best interests’, section 4 of the Act puts the person who lacks capacity at the centre of the decision to be made. Even if they cannot make the decision, their wishes and feelings, beliefs and values should be taken fully into account – whether expressed in the past or now”.*

[Code of Practice, para 5.38](#)

For the weight to attach to wishes and feelings consider: extent and duration of the incapacity; strength and duration of views; perhaps whether views deliverable and reasonable; impact on P of views being over-ridden

- **Wye Valley NHS Trust v B** [2015] COPLR 843 , paras 10–15 and 42–46, Peter Jackson J finding that enforced amputation would not be in P’s interests:

*“As the Act and the European Convention make clear, a conclusion that a person lacks decision-making capacity is not an ‘off-switch’ for his rights and freedoms. To state the obvious, the wishes and feelings, beliefs and values of people with a mental disability are as important to them as they are to anyone else, and may even be more important. It would therefore be wrong in principle to apply any automatic discount to their point of view”*

- **In Re: AB (Termination of Pregnancy)** [\[2020\] COPLR 42](#) the Court of Appeal allowed a challenge to a decision that P should have an abortion:

*“71. Part of the underlying ethos of the MCA is that those making decisions for people who may be lacking capacity must respect and maximise that person’s individuality and autonomy to the greatest possible extent. In order to achieve this aim, a person’s wishes and feelings not only require consideration, but can be determinative, even if they lack capacity. Similarly, it is in order to safeguard autonomy that section 1(4) provides that “a person is not to be treated as unable to make a decision merely because he makes an unwise decision”*

*72 It may be that, on any objective view, it would be regarded as being an unwise choice for AB to have her baby, a baby which she will never be able to look after herself and who will be taken away from her. However, in as much as she understands the situation, AB wants her baby.”*

- Not determinative

*“That is not to say that his wishes must prevail, any more than those of a fully capable patient must prevail. We cannot always have what we want. Nor will it always be possible to ascertain what an incapable patient’s wishes are. Even if it is possible to determine what his views were in the past, they might well have changed in the light of the stresses and strains of his current predicament”*

**Aintree v. James** [\[2013\] COPLR 492](#) para 45.

- Cases on drawing the balance

In **Barnsley Hospital NHS Foundation Trust v. MSP** [\[2020\] EWCOP 26](#) Hayden J reviews the cases on weight, approving ITW below

Munby J suggested the following are relevant to assessing wishes and feelings:

- (a) *“The degree of P's incapacity, for the nearer to the borderline the more weight must in principle be attached to P's wishes and feelings*
- (b) *The strength and consistency of the views being expressed by P*
- (c) *The possible impact on P of knowledge that their wishes and feelings are not being given effect to*
- (d) *The extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of sensible implementation in the particular circumstances*
- (e) *The extent to which P's wishes and feelings, if given effect to, can properly be accommodated within the court's overall assessment of what is in their best interests”*

**ITW v. Z** [\[2009\] COPLR Con Vol 828](#) para 35.

- Earlier cases

Rational and realistic wishes and feelings carry great weight, **Re: S and S (Protected Persons)** [2008] COPLR Con Vol 1074 para 57 but the closer P is to having capacity the greater the weight of their views; consider also the impact on P of their views not being followed **PCT v P, AH and the Local Authority** [\[2009\] COPLR Con Vol 956](#)

## BELIEFS AND VALUES

MCA Code of Practice para 5.46:

*5.46 Everybody's values and beliefs influence the decisions they make. They may become especially important for someone who lacks capacity to make a decision because of a progressive illness such as dementia, for example. Evidence of a person's beliefs and values can be found in things like their:*

- *cultural background*
- *religious beliefs*
- *political convictions, or*
- *past behaviour or habits.*

*Some people set out their values and beliefs in a written statement while they still have capacity.*

Beliefs and values include religious beliefs, **Re: IH (Observance of Muslim Practice)** [\[2017\] COPLR 281](#)

For a case considering Islam in the context of end of life care see **Cambridge University Hospitals NHS Foundation Trust v. AH** [\[2021\] COPLR 519](#) para 93 (upheld on appeal [2021] EWCA Civ 1768 para 48); and Christianity, **King's College Hospital NHS Foundation Trust v. Haastrup** [\[2018\] 2 FLR 1028](#) para 104

In **London Borough of X v. MR** [\[2022\] EWCOP 1](#) the Court moved P to a Jewish care home:

*"Because those wishes, beliefs and values were life-long, I find that it is likely that, notwithstanding the risks, he would now wish to move to a Jewish care home if he still had capacity..."*

It is not a substituted judgment test, it is best interests taking account of P's wishes and feelings **Re:P** [\[2009\] COPLR Con Vol 906](#) para 37-40. This refers to the [Explanatory Memorandum](#) to the MCA, which states (at para 28) that:

*"Best interests is not a test of "substituted judgement" (what the person would have wanted), but rather it requires a determination to be made by applying an objective test as to what would be in the person's best interests. All the relevant circumstances... must be considered, but none carries any more weight or priority than another ... The factors in this section do not provide a definition of best interests and are not exhaustive"*

- Not a substituted judgment test

- P may not have considered the circumstances
- No benefit in being safe but miserable

The Court considers best interests from P's point of view, not what a reasonable patient would want:

*"This is ... still a 'best interests' rather than a 'substituted judgment' test, but one which accepts that the preferences of the person concerned are an important component in deciding where his best interests lie"*  
**Aintree University Hospital v. James** [\[2014\] 1 All ER 573](#), SC para 24, Baroness Hale

However the prominence of P's perspective in the test means an element of substituted judgment:

*"Under the law of England and Wales, the test to be applied in cases about medical treatment of both children and mentally incapacitated adults is called the best interests test but in each case contains an element of substituted judgment"*

**Manchester University Hospital v. Fixsler** [2021] 4 WLR 123 para 12

*"The goal of the inquiry is not what P "might be expected" to have done; but what is in P's best interests. This is more akin to the "balance sheet" approach than to the "substituted judgment" approach"*

**In Re: P (Statutory Will)** [\[2010\] Ch 33](#) Lewison J

P's wishes and feelings may, on analysis, not be followed, if it is not clear P had considered the circumstances applying - for example where someone in MCS expressed views against extensive medical intervention but without considering the circumstances which were before the court **In re M (Adult Patient) (Minimally Conscious State: Withdrawal of Treatment)** [\[2012\] 1 WLR 1653](#) para 230

No benefit in being safe but miserable:

*In the end, if M remains confined in a home she is entitled to ask 'What for?' The only answer that could be provided at the moment is 'To keep you alive as long as possible'. In my view that is not a sufficient answer. ... the court must surely have regard to the person's own assessment of her quality of life ... there is little to be said for ... a daily life without meaning or happiness and which she, with some justification, regards as insupportable*

**Re: M (Best Interests)** [\[2013\] EWHC 3456](#)

In assessing a return home:

- *“several last months of freedom in one's own home at the end of one's life is worth having for many people with serious progressive illnesses, even if it comes at a cost of some distress”*
- *“although there is a significant risk that a home care package at home will “fail”, there is also a significant risk that institutional care will “fail” ...”* (that it, produces an outcome that is less than ideal and does not resolve all significant existing concerns)  
**Westminster Council v. Sykes** [\[2014\] EWHC B9](#)
- Lewison J endorsed dicta about *“the detriment to an adult of having one's wishes overruled, and the sense of impotence, and the frustration and anger, which living with that awareness”* (para 40-41).  
In **Re: P (Statutory Will)** [\[2010\] Ch 33](#)

For an example of moving someone home even though the risks of P disengaging from services were “very serious and quite possibly fatal” (para 45) and the litigation friend “did not advance a positive case in support of AH's wishes and feelings” (para 49) see **Re: AH (by her accredited legal representative)** [\[2023\] EWCOP 1](#)

## THE COURT'S APPROACH

- Balance sheet

### Balance sheet – now out of date?

Balance sheets were strongly endorsed.

*The decision maker draws up a notional balance sheet of welfare factors describing the benefits and detriments of the available courses of action having encouraged the person concerned to participate in the process and having ascertained wishes and feelings, beliefs and values and other considerations particular to the person including consulting with relevant third parties*

**R (C) v. A Local Authority** [\[2011\] COPLR 972](#) para 58 reflecting **In re: A (Male Sterilisation)** [2000] 1 FLR 549 at 560 (Thorpe LJ)

For an example balance sheet see **An NHS Trust v. MB (A Child)** [\[2006\] 2 FLR 319](#) paras 58-62

But more recent cases warn against this becoming mechanistic:

*“Too heavy a focus on a balance sheet may... lead to a loss of attribution of weight”* (para 57) quoting a family law case where McFarlane LJ said *“If a balance sheet is used it should be a route to judgment and not a substitution for the judgment itself”* (para 56)

**Re A (a child) (withdrawal of medical treatment)** [\[2016\] EWCA Civ 759](#)

*“whilst there is some utility in [a balance sheet] it can be misleading. Manifestly, some factors will attract greater weight than others... In those circumstances a balance sheet approach can be misleading. It risks, as Sir Andrew MacFarlane (P) has described it, becoming “a map without contours...”*

**Re: UR** [\[2021\] COPLR 314](#) para 49

*“rarely productive”* because conceptually different issues cannot be weighed against each other  
**Cambridge University Hospitals NHS Foundation Trust v. AH** [\[2021\] COPLR 519](#) para 66.

- Taking risk

### Relevance of risk

Beware the “*protection imperative*”, that is the tendency for those working with P to put safety above other goals, **CC v. KK and STCC** [\[2012\] COPLR 627](#) para 25

Don't over-protect:

*“The intention of the Act is not to dress an incapacitous person in forensic cotton wool but to allow them as far as possible to make the same mistakes that all other human beings are at liberty to make and not infrequently do”* **Re: P (Abortion)** [2013] COPLR 405 para 10

*“The emphasis must be on sensible risk appraisal, not striving to avoid all risk, whatever the price ... being willing to tolerate management of acceptable risks as the price appropriately to be paid in order to achieve some other good ... What good is it making someone safer if it merely makes them miserable?”* **Re: MM (An Adult)** [\[2009\] 1 FLR 443](#) para 120

- No presumptions

### No presumptions

*“... overall it is neither desirable nor appropriate that there be set 'presumptions' or 'practical and evidential burdens' or something like that in undertaking the exercise required by the MCA 2005...”* **K v. LBX** [\[2012\] COPLR 411](#) para 66.

- Magnetic factors

### Magnetic factors

*“the weight to be attached to the various factors will, inevitably, differ depending upon the individual circumstances of the particular case. A feature or factor which in one case may carry great, possibly even preponderant, weight may in another, superficially similar, case carry much less, or even very little, weight...”*

*... there may ... be one or more features or factors which ... are of 'magnetic importance' in influencing or even determining the outcome...”*

**Re: M; ITW v. Z** [\[2009\] COPLR Con Vol 828](#) para 32

## ARTICLE 8 & FAMILY LIFE

A court should find P's best interests using [s.4 MCA](#) and decide if that conclusion interfered with article 8 and, if so, if it was necessary and proportionate, **K v. LBX** [\[2012\] EWCA Civ 79](#) [\[2012\] COPLR 411](#) CA where P, aged 28, was living with his father and brother and the question arose of a trial period in supported living:

*"...I conclude that the safe approach of the trial judge in Mental Capacity Act cases is to ascertain the best interests of the incapacitated adult on the application of the s 4 checklist. The judge should then ask whether the resulting conclusion amounts to a violation of Art 8 rights and whether that violation is nonetheless necessary and proportionate" para 35.*

Baker J said that

*"a best interests assessment, properly conducted under English law in accordance with established principles, is fully compliant with ECHR"*

**W v. M** [\[2012\] COPLR 222](#) para 96.

Note that article 8 does not include all relationships between a family but "involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case" cited with approval by Baker LJ in **Re: P (Discharge of Party)** [\[2022\] COPLR 173](#) para 34

For a recent application of article 8 by the CoA (in the context of abortion) see **In Re: AB (Termination of Pregnancy)** [\[2020\] COPLR 42](#)

Is this a false dichotomy or the border of social control or paternalism?

It was in P's interests not to commit offences or be at risk of recall under MHA **Birmingham CC v. Lancashire CC v JTA** [\[2020\] COPLR 62](#) applying **Y County Council v. ZZ** [\[2013\] COPLR 463](#). *Birmingham* concerned SR, a man with autism and learning difficulties who needed supervision to avoid alcohol and offending, Lieven J para 41:

*"In those circumstances the provisions of the care plan in terms of supervision and ultimately deprivation of liberty is, as Moor J put it, 'to keep him out of mischief' and thereby assist in keeping him out of psychiatric hospital. This is strongly in his best interests, as well as being important for reasons of public protection."*

- The interests of P or the interests of the public?

- Examples

In JB the Supreme Court had to consider whether the “*information*” to be understood, retained and used/weighed by P included information about the reasonably foreseeable consequences of a decision for others, in that case a decision to engage in sexual relations. The Court held that it did, partly because of the effects on P which “*would include anxiety, depression, self-harm and retaliatory harm requiring hospitalisation*” (paras 73-74). However the Court went further and held that the MCA is not “*solely confined to the protection of P*” (para 92). See **A Local Authority v. JB** [\[2021\] 3 WLR 1381](#)

Contact – it is generally wrong to require P to have contact with someone against their wishes:

*“It is contrary to the philosophy of best interests under s 4 of the Act to require an incapacitous person to have contact with someone she does not want to unless to accede to her views is in itself at variance with her best interests because, for example, her expression of views are not in fact a reflection of her genuine thoughts”*

**LBB v. JM, BK and CM** [2010] COPLR Con Vol 779

## 5. CAPACITY ASSESSMENTS

### PRINCIPLES FOR ASSESSING CAPACITY

- Assist P to show / gain capacity

Assessment should take place after making attempts for P to regain / show capacity: see [s.1 \(3\) MCA](#): a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success:

*“This principle establishes a statutory condition that all practicable steps are taken to enable a person to make a decision for himself or herself. If the person seeking to challenge capacity cannot show that the condition is satisfied, then the challenge will fail. This statutory condition facilitates freedom of choice and enables the maximisation of potential for those who are potentially incapacitous”*

**A Local Authority v. JB** [\[2021\] 3 WLR 1381](#) para 50

- Capacity is decision specific

Decision specific: capacity is assessed in relation to a particular decision at the time the decision needs to be made and not in relation to capacity to make decisions generally:

*“Competence is decision-specific so that capacity is judged in relation to the particular decision, transaction or activity involved. P may be capable of making some decisions, but not others”*

**A Local Authority v. JB** [\[2021\] 3 WLR 1381](#) para 49

JB explains that phrases such as “person specific” or “act specific” may be useful but should not be permitted to detract from the statutory test. Examples of this terminology in use are:

*“The determination of capacity under MCA 2005, Part 1 is decision-specific. Some decisions, for example agreeing to marry or consenting to divorce, are status or act specific. Some other decisions, for example whether P should have contact with a particular individual, may be person-specific”*

**York City Council v C** [\[2014\] 2 WLR 1](#) para 35.

Defining the decision is important. See **Tower Hamlets v. NB** [\[2019\] COPLR 398](#) @ 48 on whether capacity to consent to sexual relations generally differs from capacity to consent with a partner of many years.

- Understand salient features
- Wisdom of decision making irrelevant

P only needs to understand the salient features – *“it is not always necessary for a person to comprehend all peripheral details ...”* **LBL v. RYJ and VJ** [2010] COPLR Con Vol 795 para 24.

An unwise decision cannot itself lead to a conclusion of a lack of capacity (**s.1(4) MCA**) – this *“is absolutely to be avoided”* and would allow the welfare tail to *“wag the dog of capacity”* (**Heart of England NHS Foundation Trust v. JB** [2014] EWHC 342). The Supreme Court regarded s.1(4) as embodying the principle of autonomy: *“an important purpose of the MCA is to promote autonomy”* (**A Local Authority v. JB** [2021] 3 WLR 1381, para 51).

There are many clear statements that the two are not linked:

*“It is of course important to remember that possession of capacity [to consent to sex] is quite distinct from the exercise of it by the giving or withholding of consent. Experience in the family courts tends to suggest that in the exercise of capacity humanity is all too often capable of misguided decision-making and even downright folly. That of itself tells one nothing of capacity itself which requires a quite separate consideration”*

**A local authority v. H** [2012] 1 FCR 590 para 21

*“... repeatedly engaging in behaviour that is unwise or risky will not be evidence of lack of capacity per se. Repeated risk taking behaviour may simply mean that the risk has been understood, weighed up and a decision made to take the risk again. Even where the same unwise or risky decision is made over and over again, the question for the court still remains whether the relevant information can be understood, retained, and used or weighed by the person repeatedly making that decision”*

**A local authority v. RS (Capacity)** [2020] EWCOP 29

However, there may be cases where the quality of the decision and capacity are linked. In some early cases the court suggested poor decision-making is relevant, particularly if it represents a change for P – **Re S, D v R and S** [2010] COPLR Con Vol 1112. Also, there are issues where a decision can be inexplicable other than by reference to incapacity, eg the first CDM case considering capacity to make decisions about diabetes management, where CDM’s personality disorder could explain poor decisions about diabetes management leading the Court to conclude *“I therefore accept Dr Series’ evidence that when making appropriate decisions she has capacity but when making manifestly inappropriate decisions she lacks capacity”* **Greenwich v. CDM** [2018] COPLR 511. This is perhaps an unusual case to be approached with care

### HOW TO ASSESS

- |   |  |
|---|--|
| <ul style="list-style-type: none"> <li>• <b>Identify the decision and the relevant information</b></li> <li>• <b>P must be involved in the assessment</b></li> <li>• <b>P must be given options to choose between</b></li> <li>• <b>Must try to find out P's wishes and feelings</b></li> </ul> | <p>The starting point is to identify (1) the decision to be made and (2) the relevant information that P has to understand, retain and use/ weigh (see below)</p> <p>A change in the question can, of course, change the answer. See <b>Wiltshire County Council v. RB and An NHS Foundation Trust</b> <a href="#">[2023] EWCOP 26</a> for an example. An appeal was allowed where the first-instance court determined that P lacked capacity to consent to discharge from hospital to live at her bungalow and thus elided two distinct questions, i.e. whether P had capacity to 1) consent to discharge; 2) make decisions about discharge arrangements.</p> <p><i>"At the very least ... the purpose and extent"</i> of an assessment must be explained to P, <b>London Borough of Wandsworth v. M, A, C and J</b> <a href="#">[2018] COPLR 71</a> para 49.</p> <p>P should be presented with detailed <i>options</i>: <b>CC v KK and STCC</b> <a href="#">[2012] COPLR 627</a>. For example in a choice between a care home and returning home P needs to be told about the possible home care package: <i>"...removing the specific factual context from some decisions leaves nothing for the evaluation of capacity to bite upon"</i> York <b>CC v. C</b> <a href="#">[2014] 2 WLR 1</a>, <a href="#">[2013] COPLR 409</a> para 35</p> <p><i>"All reasonable efforts must be made to find out whether the person has expressed views in the past that will shape the decision to be made"</i><br/><a href="#">Code of Practice para 5.41</a></p> |
|---|--|

## MEDICAL EVIDENCE

- With few exceptions medical evidence is required

Medical evidence of diagnosis/ condition:

- In practice this is required in all cases. Exceptionally, it might be possible to proceed where P refuses to co- operate, **Baker Tilly v. Makar** [2013] COPLR 245, a case about appointing a litigation friend under CPR, not COP: “*The absence of medical evidence cannot be a bar to a finding of lack of capacity but where most unusually circumstances arise in which medical evidence cannot be obtained, the court should be most cautious before concluding that the probability is that there is a disturbance of the mind*” (para 19)
- See also **Z v. Kent CC** above
- Medical evidence is required for art 5 purposes for a DOL to be lawfully approved, **Winterwerp** para 39 and **MS v. Croatia** 75450/12 para 143

- Specialist diagnosis

Evidence of diagnosis should come from a specialist (usu a consultant psychologist or psychiatrist), at least where the point is not beyond dispute:

*...far from satisfactory in matters of such profound importance to JP for the evidence of the impairment or disturbance in the functioning of the mind or brain to come from a clinician other than a consultant psychiatrist or psychologist*

**NHS Trust v. JP** [2019] COPLR 298 para 25.

- Show how that condition causes an impairment

Evidence any impairment is caused by the diagnosed condition is required if capacity is disputed or borderline. You should not simply rely on P’s inability to carry out certain mental tasks. For example, where microcephaly caused a learning disability the microcephaly should be established on evidence, it is not enough where there is a specific condition to say P has a learning difficulty relying only on the fact they cannot do certain things, **NHS Trust v. JP** [2019] COPLR 298. However note that Hayden J accepted incapacity without any established diagnosis in **Re: TM; Pennine Acute Hospitals Trust** [2021] COPLR 472 paras 16 and 35-38 and was critical of the idea there had to be a “precise pathology”:

*It is clear therefore that there are a number of identified pathologies which separately or in combination are likely to explain the disturbance or functioning in TM's mind or brain. Insistence on identifying the precise pathology as necessary to establish the causal link is misconceived*

- Expert must also be familiar with MCA
- Significance of expert assessment in reaching a conclusion on capacity

In **North Bristol NHS Trust v. R** [\[2023\] EWCOP 5](#) para 47 MacDonald J reached the same conclusion

*In this context, the question of whether any inability of R to make a decision in relation to the matter in issue is because of an impairment of, or a disturbance in, the functioning of the mind or brain is a question of fact for the court to answer based on the evidence before it. In this context, the wording of s.2(1) itself does not require a formal diagnosis*

An expert needs to be expert in applying capacity tests in the context of COP litigation, not just on considering capacity in medical practice **SC v. BS and A Local Authority** [2012] COPLR 567

Expert evidence is not determinative – the court decides on capacity drawing on all sources including treating clinicians, P and people who know P:

*In assessing the question of capacity, the court must consider all the relevant evidence. Clearly, the opinion of an independently instructed expert will be likely to be of very considerable importance, but in many cases the evidence of other clinicians and professionals who have experience of treating and working with P will be just as important and in some cases more important*

**PH v. A Local Authority** [\[2012\] COPLR 128](#) para 16

See Lieven J accepting evidence of lack of capacity “*with considerable reluctance*”, given P’s insight and apparent engagement with the issues because the treating psychiatrist thought so, the independent expert had particular experience with anorexia, there was some evidence of disordered thinking and she did not always act rationally **A Mental Health Trust v. ER** [\[2021\] COPLR 353](#) para 33

## REPEATED DECISIONS

### **Repeated decisions**

Some decisions need to be made repeatedly - eg sexual relations – but others do not, eg residence.

In **IM v LM (Capacity to Consent to Sexual Relations)** [\[2014\] COPLR 246](#) para 84 the CA noted:

*Where a decision is of a kind which falls to be made on a daily or at any rate repeated basis, it is inevitable that the inquiry required by the Act is as to the capacity to make a decision of that kind, not as to the capacity to make any particular decision of that kind which it may be forecast may confront the protected person*

The problem of repeated decisions has been approached in two ways, either by regarding each individual decision as part of a wider package of decisions (eg managing money or controlling diabetes) or by making declarations in anticipation of the person losing capacity. This perhaps broadly reflects whether P's challenge with repeated decisions comes from changes in their presentation (fluctuating capacity) or an ability to make particular decisions but not to put them in context (micro and macro decisions). Relevant issues are how often the issue occurs, making a 'workable' order and whether it is in controlled situations **A local authority v. PG** [\[2023\] EWCOP 9](#) paras 36-44.

- **Macro and Micro capacity**

### **Macro and Micro decisions**

This approach divides issues into “*micro*”, specific day to day decisions, and “*macro*” ie “*where each decision was inescapably related to each other decision*” (CDM 2, below para 32)

In the two CDM cases the Court moved from fluctuating capacity to macro/micro capacity. In *CDM 1* Cohen J found:

*“management of her diabetes ... covers a wide range of different situations which may arise frequently or infrequently. The treatment required may be of very different natures. I cannot see that this particular form of fluctuating capacity can properly be managed other than by a decision being taken at the time that the issue arises” Greenwich v. CDM* [\[2018\] COPLR 511](#)

- Fluctuating capacity

The next question was how to determine if P's decisions were affected by her EUPD or lack of blood glucose or both? In CDM2 the psychologist advised that all decisions in diabetes were part of a chain of decisions, where, eg, eating a carrot had a past context and a future consequence. Newton J found that while on occasion P had capacity to take individual micro decisions the issue was:

*a global decision, arising from the inter dependence of diet; testing her blood glucose and ketone levels; administration of insulin; and, admission to hospital...* (para 48) therefore, "CDM lacks capacity to take the macro-decision [ie diabetes management], the issue of fluctuating capacity simply does not arise  
**Greenwich v. CDM** [\[2019\] COPLR 465](#), para 51, Newton J

This was referred to "taking a longitudinal view" in **Cheshire West v PWK** [\[2019\] EWCOP 57](#) where the example given was "managing affairs" which "relates to a continuous state of affairs whose demands may be unpredictable and may occasionally be urgent".

#### Fluctuating capacity

Alternatively P may have capacity and then lose it, either predictably or unpredictably. It is difficult for the Court to act under MCA in this situation as MCA is predicated on P not having capacity.

There are early cases on fluctuating capacity, eg **Re: SK A London Borough Council v. KS and LU** [\[2008\] 2 FLR](#) where the conclusion was that P's carers needed "a clear list of the indicators of a possible loss of capacity to make decisions about sexual intercourse or other sexual contacts" (para 133 and 149)

In **United Lincolnshire NHS Trust v. CD** [\[2019\] COPLR 518](#) Francis J had two answers (1) "in exceptional circumstances, the court has the power to make an anticipatory declaration of lawfulness, contingent on CD losing capacity, pursuant to s 15(1)(c)" but note an order could not be made under [s.16](#) because P had capacity and s.16(1) MCA states "This section applies if a person ("P") lacks capacity" ; (2) the Court could use the inherent jurisdiction.

In **Wakefield MBC v. DN** [\[2019\] COPLR 525](#), Cobb J made an anticipatory declaration under MCA (para 51). The Court declined to use the inherent jurisdiction (para 50). DN had an ASD and generalised anxiety disorder, causing him to have 'meltdowns' and become dysregulated. The draft order as at para 51.

Hayden J held in **Guy's and St Thomas' NHS Trust v. R** [\[2020\] COPLR 471](#) that a contingent declaration under [s.15\(1\)\(c\) MCA](#) would have to be supported by an order under the inherent jurisdiction if authorisation for a DOL is sought, as MCA does not allow this for someone currently capacitous.

Clarity is required before a prospective declaration will be made, **Re: DY** [\[2021\] COPLR 415](#) para 27 where the court held a declaration could not be made that DY lacked capacity re: sexual relations *when "distressed or unsettled"* since these are not well-defined and it could not be assumed they would impair decision-making without an analysis at the relevant time. Conversely the Court has found fluctuating capacity where P has "capacity [when] lucid ... but which she loses in what has been described in this hearing as "the heat of the moment", when stress and anxiety overwhelms her" **Wrightington, Wigan and Leigh Teaching Hospitals v. SM** [\[2022\] EWCOP 56](#)

For decision holding that the appropriate test is whether there is a 'real risk' that P will lack capacity at the relevant time see **North Middlesex University Hospital NHS Trust v. SR** [\[2021\] EWCOP 58](#) para 37 per DHCJ Gollop QC

Note Lieven J's suggestions that hospitals consider a statement of wishes and feelings made when capacitous or relying on the doctrine of necessity, **Shrewsbury and Telford NHS Trust v. T** [\[2023\] EWCOP 20](#) para 25. Mostyn J has commented obiter that there is no power to make anticipatory declarations, albeit the power has been relied on in multiple judgments, **An NHS Foundation Trust v. Amira** [\[2023\] EWCOP 25](#).

### CONFLICTING CAPACITY ASSESSMENTS

- Differing capacity assessments in related areas

#### Differing capacity assessments in related areas

Capacity is decision specific with relatively higher and lower hurdles in different areas. This raises the possibility of apparently contradictory decisions, eg that someone has capacity to have sex with someone but not to have contact with them. The problem recognised - but not resolved – in **City of York v. PC** [2013] COPLR 409 - capacity to marry and capacity to cohabit will “*involve consideration of factors that are very closely related*” para 42

Where P was found to have capacity over residence (inc to live with her partner) but not over contact or (in the interim) sexual relations the CA allowed an appeal on the basis that (1) the conclusion failed to take into account consequences of those decisions; (2) there is an irreconcilable conflict between the decisions; and (3) the conclusion made the LA’s plan for care and treatment impossible, **B v. A Local Authority** [2019] EWCA Civ 913 [2019] COPLR para 65. In that case P wanted to live with her partner in order to have his baby – those capacity assessments could not be combined, ie she could not then have capacity over residence but not sexual relations

Note **Re: BU** [2022] COPLR 46 where it seems P had capacity to marry (para 101) but not over contact (para 89). Also **PN v. Durham CC** [2023] EWCOP 44 where PN had capacity over sexual relations but not contact: “*PN understands sexual boundaries but he does not understand social boundaries*” para 28.

However differing conclusions are well established in some areas, including capacity to consent to sexual intercourse but not contact. This might be resolved by a care plan which tries to balance protection and autonomy, **A Local Authority v. TZ (No 2)** [2014] COPLR 159 and **Re: P (Sexual Relations and Contraception)** [2018] EWCOP 10. BUT note that carers who arrange contact with a sex worker for P could be at risk of prosecution under s.39 Sexual Offences Act 2003, **Secretary of State for Justice v. C** [2021] EWCA Civ 1527 para 49 and the resultant need to consider s.39 when dealing with care plans that might involve sexual relations, see obiter comments of Baker LJ. Consider also the issues for arranging contact between people in relationships, discussed in the same case.

- Can limit freedom in areas where someone has capacity as part of care plan for areas where they do not
- Retrospective capacity assessment

It is possible to have subject matter capacity but lack capacity to litigate that subject but it is unlikely someone could have litigation capacity but lack subject matter capacity:

*Whilst it is not difficult to think of situations where someone has subject-matter capacity whilst lacking litigation capacity, and such cases may not be that rare, I suspect that cases where someone has litigation capacity whilst lacking subject-matter capacity are likely to be very much more infrequent, indeed pretty rare. Indeed, I would go so far as to say that only in unusual circumstances will it be possible to conclude that someone who lacks subject-matter capacity can nonetheless have litigation capacity*

**Re E v. Sheffield City Council** [\[2005\] 1 FLR 965](#) para 49 but note Hayden J's warning that similar dicta from 2021 should not have too much reliance put on them and the tests were not synonymous, **Re: Q** [\[2022\] EWCOP 6](#) paras 21-22

Note that it might be possible to make orders restricting freedom of action where someone has capacity in order to have a care plan in areas where they do not:

*[24] There has been a legal argument as to whether the MCA, by collateral declarations, is apt to limit the autonomy of individuals in spheres where they are capacitous. In simple terms, whether the measures put in place to protect LC in those areas where she lacks capacity may legitimately impinge on her autonomy in those areas where her capacity is established... Happily, it is unnecessary for me to resolve that issue today*

**Manchester City Council v. LC and KR** [\[2019\] COPLR 38](#)

For assessing past capacity see the evidence identified by Poole J in the particular context of an LPA, **Public Guardian v. RI** [\[2022\] EWCOP 22](#) para 27 – (i) evidence from someone who reached views on capacity in the past (ii) evidence from carers and family about past capacity and changes over time (iii) past assessments: medical, benefits, care assessments and other records (iv) an expert opinion based on current capacity and past records

## 6. THE COURT OF PROTECTION

- |   |   |
|---|---|
| <ul style="list-style-type: none"> <li>• Establishment</li> </ul>                 | <p>A superior Court of record (<a href="#">s.45 (1) MCA</a>); can sit anywhere in England and Wales at any time (<a href="#">s.45(3) MCA</a>). “... <i>the same powers, rights, privileges and authority as the High Court</i>” (<a href="#">s.47 MCA</a>)</p> <p>Three tiers of Judges: District Judges (tier 1), Circuit Judges (tier 2), High Court Judges (tier 3) with some Circuit Judges approved to sit as tier 3 Judges under s.9 Senior Courts Act 1981</p>   |
| <ul style="list-style-type: none"> <li>• Rules and Practice Directions</li> </ul> | <p><a href="#">Court of Protection Rules 2017, SI 2017/1035</a> made under <a href="#">s.51 MCA</a></p> <ul style="list-style-type: none"> <li>• Participation of P – see part 1.2 and Practice Directions 1A and 7A</li> <li>• Case management – see part 3 and Practice Direction 3B</li> <li>• Statements of truth – see Practice Direction 5B</li> <li>• Applications within proceedings – see part 10 and Practice Directions 10A and 10B</li> <li>• Expert evidence - parts 14 and 15 and Practice Directions 14E (section 49 reports) and 15A</li> <li>• Costs - part 19 and Practice Directions 19A and 19B</li> <li>• Appeals – part 20 and Practice Directions 20A and 20B</li> </ul> <p>Decisions on procedural matters should apply the over-riding objective <b>Re: D</b> <a href="#">[2016] COPLR 432</a></p> |
| <ul style="list-style-type: none"> <li>• Whether to apply</li> </ul>              | <p>This is a fraught question, and applicants are frequently criticised for delay. See medical treatment below for specific guidance in health cases</p> <p>For a finding that it was too early to make a welfare application where discharge from the MHA was not imminent see <b>PH v. A CCG</b> <a href="#">[2022] EWCOP 12</a></p>  |

<u>PERMISSION</u>	
<ul style="list-style-type: none"> <li>• <b>The rules require consideration of how P will be involved – there is a wide range of options</b></li> <li>• <b>The degree of involvement required varies – consider P&amp;A applications and DoL applications</b></li> </ul>	<p><a href="#">s.50 MCA</a> and <a href="#">Part 8 COPR</a></p> <p>Permission is not required for applications (1) by the OS or Public Guardian; or (2) about P’s property and affairs and lasting or enduring powers of attorney; or (3) under s.21A or 16(2)(a) MCA ie about deprivations of liberty</p> <p>Where permission is required the Court should consider (a) the applicant's connection with P; (b) the reasons for the application; (c) the benefit to P; and (d) whether the benefit can be achieved in any other way, <b>NK v. VW</b> [2012] COPLR 105, Macur J refusing permission for an application to move someone from a care home where it had no prospect of success. Compare with the cases on summary consideration below</p>
<u>P’S PARTICIPATION</u>	
<ul style="list-style-type: none"> <li>• <b>The rules require consideration of how P will be involved – there is a wide range of options</b></li> <li>• <b>The degree of involvement required varies – consider P&amp;A applications and DoL applications</b></li> </ul>	<p><b>Rule 1.2</b> The Court <u>must in each case</u> consider how to involve P. Options include (1) joining P as a party; (2) appointing an accredited legal representative; (3) appointing a person to provide the court with information about matters in <a href="#">s.4(6) MCA</a>; (4) P addressing the judge. Relevant factors include information before the court, the issues, whether the matter is contentious and whether P was notified and what P said.</p> <p><b>Practice Direction 1A</b> – most cases are non-contentious P&amp;A applications where P need not be a party. In other cases factors relevant to deciding whether to make P a party or use an accredited legal representative include whether expert evidence will be needed, the nature and complexity of the case and the likely range of issues.</p> <p>Article 5 procedural obligation may require representation where DOL in issue –</p> <ul style="list-style-type: none"> <li>• <i>“the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation”</i> (para 152)</li> <li>• Enhanced supervision by the court of lawyers for disabled people (para 154)</li> <li>• <i>“contact between the representative and the applicant was necessary”</i> (para 155)</li> </ul> <p><b>MS v. Croatia</b> 75450/12</p>

<ul style="list-style-type: none"> <li>• Possible not to tell P of proceedings in exceptional situation</li> <li>• Judicial visits to P</li> </ul>	<p>That does not necessitate party status, <b>Re NRA and others</b> <a href="#">[2015] COPLR 690</a> found that P does not have to be a party to all welfare applications authorising a DOL</p> <p>Consider also <b>NHS Trust v. FG</b> <a href="#">[2014] COPLR 598</a> where order made that P not to be told of proceedings “<i>It is at the extremity of what is permissible under the European Convention</i>” para 55 – but made until after P had given birth</p> <p>See guidance from Hayden J on Judicial Visits to P, February 2022, appending Charles J’s guidance on facilitating P’s participation, November 2016.</p> <p><b>P, Official Judicial Visits to (Guidance)</b> <a href="#">[2022] EWCOP 5</a></p> <p>This follows the finding of the CA in <b>Re: AH</b> <a href="#">[2021] EWCA Civ 1768</a> that guidance was required and a judicial visit in that case had led to unfairness because (1) AH’s complex condition meant the Judge was “not qualified to make any ... assessment” of her wishes and feelings; and (2) the parties were not given the opportunity to make submissions, paras 71-72.</p>
<p><b><u>P’s REPRESENTATION</u></b></p>	
<ul style="list-style-type: none"> <li>• Litigation friends</li> </ul>	<p><b>Litigation friends</b></p> <p><a href="#">COPR r.17.1</a>. –</p> <p><i>(1) A person may act as a litigation friend on behalf of a person mentioned in paragraph (2) if that person—</i></p> <p><i>(a) can fairly and competently conduct proceedings on behalf of that person; and</i></p> <p><i>(b) has no interests adverse to those of that person.</i></p> <p>The Court has a power to dismiss a litigation friend, <b>A County Council v AB</b> <a href="#">[2016] COPLR 576</a> para 49. And see below on litigation capacity</p>

- Official solicitor as litigation friend of last resort

### The Official Solicitor and CAFCASS

Litigation friend of last resort, generally requiring payment through legal aid or by assessing P's means. In health cases this is by an undertaking from the applicant health body to pay 50% of the OS' costs.

Note the OS has a Practice Note on appointing the OS as litigation friend in welfare proceedings which sets out the OS' position on costs at paras 14-16:

[Appointment of the Official Solicitor in welfare proceedings: practice note - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/614447/OS_Practice_Note_on_appointing_the_OS_as_litigation_friend_in_welfare_proceedings.pdf)

Cafcass can be approached in cases concerning children but will often take no role unless invited by the court following a decision that a child should be joined as a party under FLPR 2010 r16.4. CAFCASS does not require that applicants in medical cases pay half its costs.

- Family as litigation friend

### Family

Family members can be litigation friends **Re NRA and Others** [\[2015\] COPLR 690](#) para 173:

*So the issue whether a family member or friend should be appointed as a litigation friend is fact and case sensitive and will turn on whether ... the family member satisfies the relevant Rules ... and so in a balanced way consider and properly promote P's best interests. [going on to state this is unlikely where there is a family dispute, para 175]*

See also **Re UF** [\[2014\] COPLR 93](#) para 23: setting a test for a family member to “*demonstrate that he or she can, as P's litigation friend, take a balanced and even-handed approach to the relevant issues*” applied by Hayden J in **BP v. Surrey CC** [\[2020\] COPLR 741](#) paras 39-41 . See **Raqeeb v. Barts** [\[2019\] EWHC 2976](#) MacDonald J for a discussion in the context of a medical treatment case and whether strong religious views made someone inappropriate at a litigation friend.

See **Hinduja v. Hinduja** [\[2020\] EWHC 1533](#) for a discussion of appointing a family member as litigation friend in a Part 8 financial dispute: “*Whether the existence of a financial interest on the part of the litigation friend should debar them from acting will depend on the nature of the interest, and whether it is in fact adverse or whether it otherwise prevents the litigation friend conducting the proceedings fairly and competently ...*” (para 62).

- RPR as litigation friend

**RPR**

The RPR can be litigation friend, **AB v. LCC (a local authority)** [2012] COPLR 314 and will receive legal aid to challenge a standard authorisation on P's behalf. Note it is not clear that the RPR is entitled to non-means tested legal aid where P also has representation **Re: AB** [2021] COPLR 30 para 59.

- Accredited legal representatives

**Accredited legal representative (aka rule 1.2 representatives)**

Law Society has set up an accreditation scheme and the practice note (now rather old) says:

- Open to: solicitor, barrister and legal exec
- There is a training course and assessment and a fee of c.£900 to register; currently about 100 registered
- Steps to take: meet P; establish wishes and feelings; obtain health and social care records; decide how to represent P
- ALR must attend P personally: identify wishes, meet Judge, consider how to involve P and whether to give evidence

<https://www.lawsociety.org.uk/topics/advocacy/accredited-legal-representatives-in-the-court-of-protection>

### ROLE OF LITIGATION FRIEND

- A litigation friend must communicate P's wishes and feelings but not necessarily argue the case as P requests

**A litigation friend has: (1) duty to advance P's case; (2) discretion as to how**

The litigation friend's approach will depend on the issue, on P's interests and on P's wishes and feelings

In respect of a DoL a representative should bring cases to the Court or P loses their article 5 rights, see **AJ v. A Local Authority** [2015] COPLR 167 a case considering P's residence in a care home where P's RPR was a family member who felt unable any longer to provide care. The Court held that relative should not have been appointed RPR. In many areas an application should be made where P's wishes and feelings are significantly over-ridden. **RD & Ors (Duties and Powers of Relevant Person's Representatives and Section 39D IMCAS)** [2016] EWCOP 49

Where a case is before the Court the OS does not have to advance an unarguable case but P has to have an effective way to challenge the OS' appointment, see **RP v. United Kingdom** [2013] 1 FLR 744 finding no breach of art 6 where the OS did not oppose care or placement orders on behalf of an incapacitous mother but did voice the mother's wishes and feelings to the Court and her opposition to the orders.

The same conclusion applies to other litigation friends: Charles J confirmed that a litigation friend or RPR may advance a case which differs from P's position **Re NRA and Others** [2015] COPLR 690 para 170 but where the OS and family disagreed about P attending Court and possibly giving evidence or information to the Judge this was found to be a matter for the litigation friend:

*Both as a matter of general principle and looking at those Rules, in my judgment a litigation friend therefore has a wide breadth of discretion as to the conduct of litigation and the court should only intervene in extremis, A County Council v. AB, BB and CB* [2016] COPLR 576.

See **MS v. Croatia** 75459/12 for over-sight of lawyers representing someone subject to a DoL.

### PARTY STATUS

On issuing, an applicant must identify “*as a respondent, any person (other than P) whom the applicant reasonably believes to have an interest which means that that person ought to be heard*” (COPR r.9.3) and serve them (ROPR r.9.6) and notify other persons of the application (COPR r.9.10).

The parties will be (1) the applicant; (2) any person named as a respondent who files an acknowledgment of service; (3) and anyone else where the Court considers “that it is desirable to do so for the purpose of dealing with the application” (COPR r.9.13). See COPR r.9.15 for applications to be joined as a party.

For the application of this rule and the issues on deciding whether a carer should be a party where there was a history of allegations involving members of their family see **KK v. Leeds City Council and DK** [\[2021\] COPLR 96](#).

The Court of Appeal discussed whether and how someone should be removed as a party in **Re: P (Discharge of Party)** [\[2021\] EWCA Civ 512](#). In that case a party had been removed without notice or the opportunity to make representations following disclosures about them by P. Note the discussion at para 51 of the alternatives to removing someone as a party. On remittal the person was again removed as a party, **Southwark v. P** [\[2021\] EWCOP 46](#)

## CASE MANAGEMENT

<ul style="list-style-type: none"> <li>• Case Pathways:</li>   <li>• Over-riding objective</li>   <li>• Focus on the central issues</li>   <li>• Avoid cost and delay</li> </ul>	<p><b>COPR r.1.3 –</b>  <i>“The court must further the overriding objective by actively managing cases”</i></p> <p>Case pathways – Practice Direction 3B.  A dispute resolution hearing is a one off event. It is still ‘effective’ even if it is not successful and in that situation the court should go on to give directions <b>EG, DG v. AP, IP, SB</b> <a href="#">[2023] EWCOP 15</a> paras 59-64.</p> <p><a href="#">CPR r 1.1</a> These Rules have the overriding objective of enabling the court to deal with a case justly and at proportionate cost, having regard to the principles contained in the Act:</p> <p style="padding-left: 40px;"><i>The Court of Protection has extensive case management powers. ... Dealing with a case justly includes dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues and allocating to it an appropriate share of the court's resources ... The court will further the overriding objective by actively managing cases ... identifying the issues at an early stage, deciding promptly which issues need a full investigation and hearing and which do not, and encouraging the parties to use [ADR] ... The court's general powers of case management include a power to exclude any issue from consideration ...”</i> (para 40) and so, <i>“the court was entitled to conclude that, in the exercise of its case management powers, no useful purpose would be served by continuing the hearing</i> (para 44).</p> <p><b>N v. ACCG</b> <a href="#">[2017] COPLR 200</a></p> <p>The task of COP is to <i>“concentrate on the issues that really need to be resolved rather than addressing every conceivable legal or factual issue”</i> <b>Re AG</b> <a href="#">[2016] COPLR 13</a>, Munby P para 17.</p> <p>For criticism of delay and costs see <b>A and B (Court of Protection: Delay and Costs)</b> <a href="#">[2015] COPLR 1</a> – two cases, one with costs of £140k and one of £530k:</p> <p style="padding-left: 40px;"><i>“too many hearings before too many judges, too much documentation, and too many lengthy adjournments with excessive time estimates for hearings”</i> and <i>“Another common driver of delay and expense is the search for the ideal solution, leading to decent but imperfect outcomes being rejected. People with mental capacity do not expect perfect solutions in life...”</i> (paras 10 and 14).</p>
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- Consolidate proceedings

Delay is inimical to P’s interests and a facet of art 6 and the over-riding objective **Sherwood Forest v. H** [\[2020\] COPLR 324](#) (and see [\[2020\] COPLR 696](#) for an explanation of the delay in that case) and NP below.

- Parties should monitor the case and apply to court when directions are needed

[COPR r 3.1](#) (f)(g) allow cases to be consolidated or for two or more cases to be heard together. The Court used this to hear together the cases of a husband and wife who were both in residential care but with different public bodies funding on account of their differing needs, **HH v. Hywel Dda University Health Board** [\[2023\] EWCOP 18](#).

The parties – esp the applicant and OS – are under “*an ongoing obligation vigilantly to monitor the development of the case and to return to the Court for a Directions Hearing*” when it appears further evidence is required **A local authority v. NP** [\[2020\] COPLR 30](#) Hayden J.

- There must be proper consideration of the substantive point

Case management does not mean perfunctory consideration of the substantive issues – even an apparently obvious s.21A application needs proper consideration **DL v. Enfield** [\[2020\] COPLR 128](#). Note that in N v. ACCG above the court had investigated the circumstances and the public body was not willing to provide the service sought by the family.

For a reported example of direct case management on disclosure, lay and expert evidence see **AVS v. NHS Foundation Trust** [\[2010\] COPLR Con Vol 237](#).

The High Court can sit with a joint COP, Admin Court and Family Court jurisdiction, eg **Re X, Y and Z** [2014] COPLR 364

- Closed procedure

For the use of closed hearings and special advocates see **Re: P (Discharge of Party)** [\[2022\] COPLR 173](#)

For an example in covert medication where a family member was excluded from hearings see **Re: A (Covert Medication: Closed Proceedings)** [\[2022\] EWCOP 44](#)

For guidance on closed procedure hearings see ‘[CLOSED HEARINGS’ AND ‘CLOSED MATERIAL’](#)’: GUIDANCE [2023] EWCOP 6, a practice note issued by Hayden J as Vice-President in February 2023. An application for a closed hearing should always set out the alternatives considered. The Court should consider whether the excluded party can be told of the hearing and what can be said at future, open, hearings. If possible there should be an open judgment at some point.

- Procedural fairness

Decisions are often needed urgently, most obviously in medical treatment cases but also where someone's welfare is at stake. Orders may involve use of the coercive power of the state in relation to P but also other parties. Some parties have difficulties obtaining funding for representation. For all these reasons questions of procedural fairness can be difficult, balancing urgency, limited evidence and fairness. The following cases will assist with how to approach questions of procedural fairness in some common situations:

- Discharge of a party from the proceedings out of concern that disclosure of information to the party would cause harm to P

**Re: P (Discharge of Party)** [\[2022\] COPLR 173](#): *"51 ... What was unprecedented, however, was to discharge her as a party without notice, without disclosure of any evidence, and without giving any reasons for the decision"*

On remittal the person was again removed as a party, **Southwark v. P** [\[2022\] EWCOP 46](#)

- Injunction against a family member who was not party to proceedings until the hearing which made the injunction and who had only 1 week's notice, where there was (accepted by the CA) a need to make an injunction against one party and their "associates":

**Re: G (Court of Protection: Injunction)** [\[2022\] EWCA Civ 1312](#) : *"105. Ground 3 of the grandmother's appeal is that she was not, in those circumstances, given proper notice of the case against her. In our judgment that is an understatement. We consider that it was obviously unjust and inappropriate to proceed with a full trial as against the grandmother and to have granted a final injunction endorsed with a penal notice against her. Basic principles of fairness required that she be given proper notice of the relief sought against her and the grounds for it. The proper course, in such circumstances, would have been to adjourn the hearing as against the grandmother and, if appropriate, to grant an interim injunction against her, on a without notice basis, with a return date specified..."*

- Loss of legal representation days before a final hearing

**Re: A (a child) (Withdrawal of Treatment: Legal Representation)** [\[2022\] EWCACiv1221](#): Finding that the refusal to grant an adjournment was unfair under common law, noting (1) the life and death importance of the issue; (2) the short notice that the parents lost their representation; (3) the difficulty of representing oneself in medical cases. Rejecting the idea that the proceedings as a whole were fair or that the appeal should be dismissed because the evidence all pointed one way.

- **Streamlined procedure** In response to the large number of DOL applications there is a streamlined procedure set out in Practice Direction 11A.
- **COPDOL11 for non-contentious approval of a DOL** This has a duty of full and frank disclosure and of consultation with anyone involved in caring for P, see **Re: JDO; Barnet v. JDO** [\[2020\] COPLR 226](#) for an example of failure to operate that system. The streamlined procedure could be inappropriate, even where it applies, see **Re: KL (A Minor: Deprivation of Liberty)** [\[2022\] EWCOP 24](#) where HHJ Hilder held that the procedure was probably not appropriate for 16/17 year olds or where there was an extant care order or where a minor did not have contact with family.

### SUMMARY CONSIDERATION

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| <ul style="list-style-type: none"> <li>• There is no process in the rules for summary judgment but it has occasionally been suggested</li> <li>• Funding decisions are outside COP jurisdiction and may make a hearing seem pointless – but the Court must not let this be a trump card</li> <li>• Avoid speculation or lack of enquiry</li> </ul> | <p>The rules do not have a summary judgment procedure as such but do allow the Court to make an order of its own motion (<a href="#">COPR r.3.4</a>). Under the 2007 rules it was held that not every case had to go to a full hearing <b>KD and LD v. Havering</b> <a href="#">[2010] FLR 2393</a> suggesting summary determination might be an option in an emergency or a “plain case” – referring to the case management powers in what is now <a href="#">r.3.1(2)</a> - but exercised with a modicum of restraint (positively referred to by Baroness Hale in <b>N v. ACCG</b> <a href="#">[2017] COPLR 200</a> para 40, suggesting that the strike out or summary judgment provisions of the CPR might be applied). Poole J envisaged that “<i>appropriate case management might involve the court summarily determining the new application</i>” where questions arose twice in quick succession about the same person if there was no change of circumstances or new evidence (but when considering how likely the Court is to make a summary determination, note that Poole J heard 1 day of evidence where a PEG tube came out 7 months after a decision that P should have CANH, <b>An NHS Trust v. AF</b> <a href="#">[2020] EWCOP 55</a>).</p> <p>However, that does not mean that providers or funders have a trump card:</p> <p style="padding-left: 40px;"><i>“Case management along these lines does not mean that a care provider or funder can pre-empt the court's proceedings by refusing to contemplate changes to the care plan. The court can always ask itself what useful purpose continuing the proceedings, or taking a particular step in them, will serve but that is for the court, not the parties, to decide”</i></p> <p style="padding-left: 40px;"><b>N v. ACCG</b> para 43</p> <p>Where a judge dismissed a case deciding not to enquire further into a return home (P had been in a care home for 18 months and needed 24 hour care) an appeal was allowed not because dismissing the application was a breach of arts 5 or 6 but because:</p> <p style="padding-left: 40px;"><i>“Curtailing, restricting or depriving any adult of such a fundamental freedom will always require cogent evidence and proper enquiry. I cannot envisage any circumstances where it would be right to determine such issues on the basis of speculation and general experience in other cases”</i></p> <p style="padding-left: 40px;"><b>CB v. Medway Council</b> <a href="#">[2019] COPLR 180</a></p> |
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- **Determination on the papers**
- **Article 5 requires practical access to the Court**

The Court can determine applications on the papers, including for serious matters, at least where there is agreement: **NHS Windsor and Maidenhead CCG v. SP (Withdrawal of CANH)** [2018] COPLR 334, Williams J para 19 noting that in *“an application made by agreement there are always more investigations that can be made, questions that can be asked, stones that can be turned”* but finding the order should be made.

For Article 5 purposes the Court has a duty to examine the issues:

*“Court must be satisfied that they have assessed and scrutinised the pertinent issues thoroughly. This means that the domestic courts must subject deprivations of liberty to thorough scrutiny so that the detained persons enjoy effective procedural safeguards against arbitrary detention in practice ...”*

**MS v. Croatia** 75459/12 para 146.

Note that permission can be refused to bring some welfare applications, see **NK v. VW** [2012] COPLR 105 above.

## INTERIM RELIEF

- Section 48

The COP jurisdiction is founded on P lacking capacity – exercising a conditional jurisdiction urgently faces the problem that it is not always possible to prove lack of capacity at the start of a case.

[s.48 MCA](#) empowers the Court to “make an order or give directions” where “there is reason to believe that P lacks capacity” and it is in P’s best interests to act “without delay”.

*“is a different test [from s.15] with a different and interim objective rather than a lesser one”* and must be based on *“solid and well-reasoned assessment in which P’s voice can be heard clearly and in circumstances where his own powers of reasoning have been given the most propitious opportunity to assert themselves”* **London Borough of Wandsworth v. M, A, C and J** [\[2018\] COPLR 71](#), Hayden J

The test to show there is a “reason to believe”. In **Re: F (interim declarations)** [2009] COPLR Con Vol 390 HHJ Marshall QC held *“...There are various phrases which might be used to describe this, such as 'good' or 'serious cause for concern' or 'a real possibility' that P lacks capacity, but the concept behind each of them is the same...”* (para 36). In that case it was said that for [s.48](#) the evidence does not have to come from specialist doctors. In **Wandsworth Hayden J** doubted aspects of **Re: F**. In **DA v DJ** [\[2017\] EWHC 3904 \(Fam\)](#) Parker J considers both cases and sides with **Re F** (see paras 66-70).

This does not arise on a [s.21A](#) application where the question for the Court is whether to vary or discharge a statutory authorisation. The Court’s role is to determine that question and the authorisation remains in force until the Court does so, **DP v. A Local Authority** [\[2020\] EWCOP 45](#)

- Interim declaration

Can the COP grant an interim declaration? It was said (without hearing argument) that [s.48](#) is not a basis to make an interim declaration in a [s.21A](#) case, **DP v. A Local Authority** [\[2020\] EWCOP 45](#) para 40. Hayden J commented that more generally interim declarations were “almost universally the practice”. [COPR r. 10.10](#) expressly allows for it. The counter argument is that [s.48 MCA](#) only extends to orders and directions but not interim declarations. Note that [CPR 20.2](#) allows interim declarations and [COPR r.2.5](#) applies the CPR for situations not covered by the rules (presumably it is said [COPR r.10.10](#) is ultra vires). Also [s.47 MCA](#) gives COP the powers of the High Court. The point has not been fully argued at the time of writing but Mr McKendrick KC (sitting as deputy) held that interim declarations are available, relying on some of the points set out above, **Barnet Enfield and Haringey Mental Health NHS Trust v. Mr K** [\[2023\] EWCOP 35](#) paras 94-104.

- **Proceed with caution**

For discussion of interim declarations under CPR in a medical case in **NHS Trust v. T** [\[2005\] 1 All ER 387](#).

Interim relief applications should be approached with caution and generally on notice – see **Re: JBN; Public Guardian v. DJN** [\[2020\] COPLR 587](#) paras 50-55 for criticism of a without notice application to suspend an LPA and appoint an interim deputy. Also see below for urgent applications

### URGENT APPLICATIONS

<ul style="list-style-type: none"> <li>• <b>Must establish that matter is urgent</b></li>   <li>• <b>Court can make a decision in principle and approve a plan when drawn up</b></li>   <li>• <b>Need to explain the basis of the application</b></li> </ul>	<p><u>Practice Direction 10B</u> and <b>Applications Relating to Medical Treatment</b> <a href="#">[2020] COPLR 205</a> Guidance of Hayden J</p> <p>Urgency must be established (and often, apologised for):</p> <p><i>“What does, however, require to be signalled, in clear and entirely unambiguous terms, is that where an application is brought before the Court of Protection, on what is said to be ‘an urgent basis’, evidence of urgency must be presented which is both clear and cogent”</i></p> <p><b>B v. E</b> <a href="#">[2020] COPLR 211</a> para 44.</p> <p><i>“Urgent applications to the out of hours judge must be limited to those rare and few cases where a genuine medical emergency has arisen and an immediate court order is necessary. I do not consider a failure to plan ... constitutes a genuine medical emergency”</i></p> <p><b>NHS Trust v. FG</b> <a href="#">[2014] COPLR 598</a></p> <p><i>“The absence of [a restraint] plan is a direct consequence of my decision to cause the case to be heard quickly. I am able to make the best interest declarations I have indicated but they are not to be given effect until the plan has been put together and approved initially by the Official Solicitor and subsequently by this court.”</i></p> <p><b>Sherwood Forest Hospitals v. C</b> (by her litigation friend the OS) <a href="#">[2020] COPLR 696</a>:</p> <p>The Court of Appeal reviewed urgent applications under the inherent jurisdiction in <b>Mazhar v. Birmingham Community Healthcare NHS Foundation Trust</b> <a href="#">[2020] EWCA Civ 1377</a>. There is an additional reason for caution under the inherent jurisdiction: P is not said to be incapacitous and the basis for over-riding their decisions is perhaps more nebulous. The points in Mazhar have some general application to urgency. P had physical disabilities and an application was made to move him to a local hospital for the weekend when his family asked that certain carers stopped working with P. There was no basis for that order but P was removed to hospital by the police. See para 74:</p> <ol style="list-style-type: none"> <li>1. Save in exceptional circumstances and for clear reasons, orders under the inherent jurisdiction in</li> </ol>
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- Should explain the test to be satisfied and the evidence which does so

- General out of hours guidance

respect of vulnerable adults should not be made without notice to the individual.

2. The court must be given clear reasons if the application is without notice.
3. If the order is without notice that fact must be recorded on the order together with a recital summarising the reasons.
4. The applicant for an order under the inherent jurisdiction must give reasons for taking that course and the circumstances empowering the court.
5. The fact the order is made under the inherent jurisdiction with regard to vulnerable adults should be recorded in the order along with a recital of the reasons for invoking the jurisdiction.
6. The order should include a recital of the basis on which the court has found circumstances empowering the order
7. It is essential that the matter should return to court at the earliest opportunity, suggesting 2 pm on the next working day.

See also paras 54/55 for comments which apply more generally:

*“... a judge sitting out of hours is sometimes in a very difficult position. He or she is not infrequently required to make a decision on an important issue in less than optimal circumstances with incomplete evidence. ... It is essential that any party seeking to invoke the court's jurisdiction in these circumstances spells out as far as possible in the evidence or written submissions the reasons for applying without notice, the jurisdiction they are seeking to invoke, the test to be satisfied in order to exercise the jurisdiction, and the basis on which it is said the test is satisfied in the case in question. In the present case, the information given to the judge was woefully inadequate. As a result, he was placed in an invidious position.”*

For useful guidelines for out of hours applications see **Sandwell and West Birmingham Hospitals NHS Trust v CD [2014] COPLR 650**, Theis J: suitable arrangements for the parents to participate in the hearing; alerting the OS with sufficient time; notifying the Clerk of the Rules; providing a Word version of the draft order; the statement in support should have information regarding the history or quality of P's life (para 39).

Note the OS now has an out of hours service, para 25 of the Practice Note on appointing the OS explains, [here](#).



### WITNESS EVIDENCE

<ul style="list-style-type: none"> <li>• Oral evidence at the final hearing; statement before</li> <li>• Hearsay is admissible</li> <li>• Information from witnesses not competent</li> <li>• Flexibility</li> <li>• Good practice example</li> </ul>	<p><a href="#">COPR r.14.2</a> – the court controls the evidence through directions as to the issues, the nature of the evidence required and the way evidence is to be taken.</p> <p>General rule is that any fact to be proved by a witness is proved by oral evidence in a final hearing and written evidence otherwise <a href="#">COPR r.14.3(1)</a> but the written evidence must be filed in accordance with the rules <a href="#">r.14.4</a>.</p> <p>Hearsay is admissible – COP proceedings are civil proceedings under Civil Evidence Act 1995, <b>Enfield v. SA</b> [2010] COPLR 362 para 36 “<i>Admissibility is one thing, and the weight to be attached to any particular piece of hearsay evidence will be a matter for specific evaluation in each individual case...</i>”. (Note SA also said that the Court should be asked about Achieving Best Evidence interviews and that this could be done without the other party present). See <a href="#">Civil Evidence Act 1995 s.4</a> for considerations relevant to weighing hearsay evidence. See <b>Re: G (Court of Protection: Injunction)</b> [2022] EWCA Civ 1312 paras 86-96 for an analysis of anonymous hearsay evidence being used to obtain an injunction.</p> <p>“Information” can be taken from a person not competent to take an oath - now under <a href="#">COPR r.14.2(e)</a> allowing the court to admit “<i>information, whether oral or written, from P, any protected party or any person who lacks competence to give evidence</i>” even if not on oath and not otherwise admissible. In <i>R v Hayes</i> [1977] 1 WLR 234, Bridge LJ concluded that the key ingredients for competence to give evidence in civil proceedings are that the witness would understand the solemnity of the occasion and the responsibility to tell the truth; if so, that witness could be sworn to give evidence. COP rules give flexibility about how information / evidence is taken.</p> <p>For examples of procedural flexibility see <b>TW v. Sandwell and West Birmingham Hospitals NHS Trust</b> [2021] COPLR 304, paras 25 &amp; 29 where (1) three factual witnesses were heard together, called ‘hot tubbing’ when adopted with experts and (2) doctors were recalled to have put to them the option of a last chance for a family to spend time together.</p> <p>For an example of the sort of detailed evidence that assists see the “beacon of good practice” in <b>Re: UR</b> [2021] COPLR 314 para 57, setting out a checklist of evidence for a travel application. For the admissibility of similar fact evidence to prove coercive and controlling behaviour <b>Re: BU</b> [2022] COPLR 46 para 96.</p>
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- Section 49 reports

COP may “require a report” from Public Guardian, a visitor, an NHS body or a local authority [s.49 MCA](#).

[Practice Direction 14E](#) sets out the procedure:

- Factors to take into account in making order PD 14E para 3 – include what representation P has, whether public body has recent knowledge and its role in the matter before the court
- “use best endeavours” to inform the public body of the application, identify a named person, and ask about time scales
- Should submit a draft letter of instruction when applying
- Report should contain 4 sections (1) details of person preparing report; (2) details of P; (3) matters material to report; and (4) conclusions reached
- Include standard form order

Trusts have objected to s.49 reports as a burden, particularly where they have no recent contact with P. The issues were considered (and rejected) in **Re: RS** [\[2015\] EWCOP 56](#) noting that there is no basis for charging a fee

See **Re: KT, DR, KH and DC** [\[2018\] COPLR 185](#) para 29 for use of a COP visitor to obtain the information needed in a DOL application.

In January 2023 the Vice-President published a [letter](#) following a meeting with NHS Mental Health Directors noting their concerns and stating that “There was a strong feeling that some of the Section 49 requests are disproportionate, overly burdensome, and wrongly authorised... Instructions under Section 49 should be clearly focused with tight identification of the issues”.

## EXPERT EVIDENCE

- When an expert is necessary

**COPR r15.3** *“Expert evidence shall be restricted to that which is necessary to assist the court to resolve the issues in the proceedings.”* The meaning of “necessary” has been considered for a very similar rule in the FPR:

*has a meaning lying somewhere between 'indispensable' on the one hand and 'useful', 'reasonable' or 'desirable' on the other hand, having 'the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable*

**Re: H-L (Expert Evidence: Test for Permission)** [\[2013\] 2 FLR 1434](#) para 2, Munby P

- Process of applying for expert evidence

**COPR r.15.5(2)** – when applying for expert evidence a party must identify the discipline and if possible the expert and provide a draft letter of instruction.

- Practice Direction

**Practice Direction 15A** is intended to limit the use of expert evidence to that which is necessary to assist the court to resolve the issues in the proceedings:

- It is the duty of an expert to help the court on matters within the expert's own expertise
- Expert evidence should be the independent product of the expert uninfluenced by the pressures of the proceedings
- Providing objective, unbiased opinion on matters within the expert's expertise, not assuming the role of an advocate
- Consider all material facts, including those which might detract from the expert's opinion
- Make it clear: when a question or issue falls outside the expert's expertise; and when the expert is not able to reach a definite opinion, for example because the expert has insufficient information
- Any change of view on any material matter should be communicated to all the parties without delay, and when appropriate to the court
- Form of report and statement of truth also set out

- Letter of instruction

A letter of instruction for an expert, **AMDC v. AG** [\[2020\] 4 WLR 166](#):

*... should, as it did in this case, identify the decisions under consideration, the relevant information for each decision, the need to consider the diagnostic and functional elements of capacity, and the causal relationship between any impairment and the inability to decide. It will assist the court if the expert structures their report accordingly*

- Expert reports

For guidance on how experts should present reports, see **AMDC v. AG** [\[2020\] 4 WLR 166](#) para 28 Poole J, including (1) provide specific conclusions for capacity on each decision; (2) make opinions consistent and coherent; and (3) explain the basis of each decision. On return to Court the Judge endorsed the new report noting it set out instructions and the principles of MCA; looks at each area separately; considered the diagnostic and functional tests and causation separately; looked at the coherence of the decision and quoted from his interview with P [\[2021\] EWCOP 5](#) para 9.

- Court does not defer to the expert

The Judge must not defer to the expert but make his/ her own decision. The Court and expert have distinct roles and the court can weigh the expert evidence against all other evidence:

*properly reasoned expert medical evidence carries considerable weight, but in assessing and applying it the judge must always remember that he or she is the person who makes the final decision*

**A County Council v. K, D and L** [\[2005\] 1 FLR 851](#) paras 39 and 44 applied to COP in **Re: P (Sexual Relations and Contraception)** [\[2019\] COPLR 44](#)

*The roles of the court and the experts are distinct. It is the court that is in the position to weigh up expert evidence against the other evidence (para 87)*

*the court must be careful to ensure that each expert keeps within the bounds of their own expertise and defers where appropriate to the expertise of others (para 88)*

**A Local Authority v. M** [\[2015\] COPLR 6](#), Baker J:

- Experts must keep within the boundary of their expertise

For example an expert in a family case who spent 15 minutes on key topics, included in speech marks words which were not direct quotations and presented material for maximum impact **Re: F (Care Proceedings: failure of expert)** [\[2017\] 1 FLR 1304](#)

- **Role of professionals working with / treating P**

The instructed expert has an important role but treating professionals may be more persuasive:

*... the opinion of an independently-instructed expert will be likely to be of very considerable importance, but in many cases the evidence of other clinicians and professionals who have experience of treating and working with P will be just as important and in some cases more important. In assessing that evidence, the court must be aware of the difficulties which may arise as a result of the close professional relationship between the clinicians treating, and the key professionals working with, P ...*

**PH v A Local Authority** [\[2012\] COPLR 128](#), Baker J para 16.

Treating clinicians are subject to the same duties as independent experts and should be given all relevant material:

*... these will be individuals of experience and expertise who in other cases might easily find themselves instructed independently as experts. Treating clinicians have precisely the same obligations and duties upon them, when preparing reports and giving evidence as those independently instructed. Further, it is the obligation of the lawyers to ensure that these witnesses are furnished with all relevant material ...*

**A local authority v. NP** [\[2020\] COPLR 30](#) para 31(vi)

### FACT FINDING

- Emphasis in COP is on the future

For recent CoA in domestic abuse family cases (esp patterns of control) see **In re: H-N** [\[2021\] EWCA Civ 448](#) from para 35. This was applied in **MB v. PB** [\[2022\] EWCOP 14](#) making findings of fact necessary for contact orders

See **LBX v. TT** [\[2014\] COPLR 561](#), Cobb J para 48. P was a 19 year old woman with learning difficulties who reported abuse by her step-father. The question was whether supervised contact was in her interests. List of factors re: whether to hold a fact finding hearing: (a) the interests of P; (b) the time the investigation will take; (c) the likely cost to public funds; (d) the evidential result; (e) the necessity or otherwise of the investigation; (f) the relevance of the result to future care plans; (g) the impact of any fact finding process on other parties; (h) the prospects of a fair trial on the issue; (i) the justice of the case.

**A local Authority v. M** [\[2015\] COPLR 6](#) – the legal principles to be applied are broadly similar to children’s proceedings, Baker J para 82.

The Court is not bound by the cases put forward by the parties **Reading BC v. P** [\[2023\] EWCOP 16](#) para 14, where the Court summarises cases on how to approach fact finding, including that there are many reasons why people lie.

The focus is on future care plans and a lengthy and costly fact finding hearing may be disproportionate **Re AG** [\[2016\] COPLR 13](#), Munby J considering an appeal from a Circuit Judge who

*was looking at the present position and looking to the future. ... A lengthy and costly finding of fact hearing would ... have been entirely disproportionate* para 34

- May be required to justify interference with Convention rights

Where the proceedings / orders sought may interfere with article 8 rights the local authority may have to prove on a factual basis why the court’s jurisdiction should be exercised **LBB v. JM** [2010] COPLR Con Vol 779

- Scott schedule

The party seeking to establish factual matters should usually set them out in a specific Scott schedule, with each allegation set out clearly by reference to a date and the evidence relied on. Other parties are often asked to respond in the same format, admitting or denying allegations (as to which see [COPR r.14.1](#)). However see **In re: H-N**, above

For disclosure orders in relation to fact finding hearings, **Enfield v. SA** [2010] COPLR 362 para 58.

## STANDARD OF PROOF

Balance of probabilities

- For deciding whether P lacks capacity, [s.2\(4\) MCA](#)
- For findings of fact, **PL v. Sutton CCG** [\[2018\] COPLR 100](#)

For a summary of what this means, following the long debate about heightened standards see **Re: B (Children) (Care proceedings: standard of proof)** [\[2009\] AC 11:](#)

*“If a legal rule requires a fact to be proved (a “fact in issue”), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof”* Lord Hoffman

Lady Hale noted that the criminal standard might apply to some proceedings “civil in form” but otherwise:

*“Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies”*

## POWERS

- **Section 15 declarations**

[Section 15 MCA](#): allows declarations about capacity and any act done or yet to be done in relation to P. Note the use of this to make declarations where people do have capacity (1) in the fluctuating capacity cases, **Guy's and St Thomas' Trust v. R** [\[2020\] COPLR 471](#) above; (2) to express failings of a public body, eg failure to comply with Children Act 1989 and Care Act 2014 in **Re: ND (Court of Protection: Costs and Declarations) Shropshire CC** [\[2020\] EWCOP 42](#) paras 65 and 68.

For a discussion of the need for clarity before a prospective declaration would be made see **Re: DY** [\[2021\] COPLR 415](#) para 27 where the court held a declaration could not be made that DY lacked capacity re: sexual relations when *"distressed or unsettled"*

- **Sections 16 - 18 decisions on behalf of P**
- **Appoint deputy**

[Section 16 MCA](#): allows the court to make decisions on P's behalf or appoint a deputy to make decisions (s.16(2) MCA). By [s.17 MCA](#) those decisions can extend to where P lives, contact with others, consenting to medical treatment. [Section 18 MCA](#) gives a long list of possible decisions which can be made under s.16 in relation to property and affairs including buying, selling and charging property, carrying on a business, creating a trust, executing a will, giving property and conducting legal proceedings

[Section 16\(5\)](#) grants a broad power to make further orders to give effect to decisions or deputy appointments made under [s.16\(2\)](#):

*The court may make such further orders or give such directions, and confer on a deputy such powers or impose on him such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2)*

The Court relied on the breadth of s.16(5) to find that it has the power to grant an injunction to restrain contact in support of a decision under s.16(2), **SF (Injunctive Relief)** [\[2020\] EWCOP 19](#), below

- Section 21A consider an authorisation of a DoL

[Section 21A MCA](#) – where there is a standard or urgent authorisation Court can determine whether P meets the qualifying requirements, the period a SA is in force, the purpose for which SA given and the conditions. See **Director of Legal Aid Casework v. Briggs** [\[2017\] COPLR 370](#) para 108 relating to what sort of application is appropriate. Note that Court can go on to use its s.15/16 powers on s.21A application **CC v. KK and STCC** [\[2012\] COPLR 627](#) para 16 eg declaring that P has been deprived on their liberty:

*The Court's approach to a section 21A application is different to and distinct from its role in a standard welfare application. The section 21A application is intended to either vary or discharge a Deprivation of Liberty authorisation. In such applications, the task of the court is to evaluate the relevant qualifying requirements and to come to a view ... as to whether those requirements continue to be met ... That said, once an application is made under section 21A, the court's power is not constrained to determining the question of whether P meets one or more of the qualifying requirements. The court also has power to make declarations pursuant to section 15 as to whether P lacks capacity to make 'any' decision. Once such a declaration is made, the court has power pursuant to section 16 to make decisions on P's behalf concerning his personal welfare or property and affairs*

**Re: UR** [\[2021\] COPLR 314](#) paras 16 & 17

- Section 26 Advance decisions
- Section 47, same powers as High Court
- Powers re: human rights breaches
- Limits on consent

[Section 26\(4\) MCA](#) – the Court may make a declaration as to whether an advance decision (i) exists (ii) is valid or (iii) is applicable to a treatment

[Section 47 MCA](#) – “The court has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court”. Note the relevance of this to interim declarations and injunctions. For example, Keehan J relied on s.47 MCA to find that COP has “power to grant injunctive relief in support of and to ensure compliance with its best interests decisions and its orders” (**Re: SF (Injunctive Relief)** [\[2020\] EWCOP 19](#) para 32)

COP can issue declarations and award damages in respect of a breach of P’s human rights **YA (F) v. A Local Authority** [\[2010\] COPLR Con Vol 1226](#)

Limits on the Court giving consent – the Court cannot consent to marriage, divorce or dissolution of marriage on the basis of 2 years separation, adoption or sexual relations, [s.27 MCA](#)

- **Limits to requiring use of resources**

No power to order services to be provided – (1) **N v. ACCG** [\[2017\] COPLR 200](#) – where care home not prepared to support visits home and CCG not willing to pay for alternative carers – held court could only choose between available options – note this is not a question of jurisdiction but power to make a particular order; (2) **Re: JB (Costs)** [\[2021\] COPLR 88](#), where a local authority applied for an injunction against a private body to continue to provide for P the application was totally without merit and costs ordered

## ORDERS AVAILABLE

- Precedent

For an example of an order made under sections 4, 15,16 and 21A see **Re: UR** [\[2021\] COPLR 314](#) para 58

- Accuracy and drafting

*“We do not overlook the pressure under which urgent orders are drafted, but it is essential that orders of this importance accurately reflect the court's decision”* noting that (1) contrary to the order P had capacity and the order was in the inherent jurisdiction for children (2) the order said blood could be given if clinically indicated but the Judge had decided only if there was a risk of ‘serious injury or death’, **E v. Northern Care Alliance** [\[2022\] EWCA Civ 1888](#), para 19

- Declarations

### Declarations:

- [Section 15](#) gives precise powers to make declarations about capacity and acts done or yet to be done. There is no power to make bare declarations as to best interests and orders are better framed as relief under [s.16](#), **Re MN (adult)** [\[2015\] COPLR 505](#) para 89
- For an example of making declarations about failings of a public body to fulfil its statutory duties under Children Act 1989 and Care Act 2014 see **Re: ND (Court of Protection: Costs and Declarations) Shropshire CC** [\[2020\] EWCOP 42](#). Note that P had capacity.
- A declaration is not a court order and cannot be enforced as if it was. Where possible issues should be drafted into orders under s.16 with a declaration under s.15 stating that removing P without Court order would be unlawful. The OS and local authority should consider asking for undertakings where a party might disobey an order and bring any breach to the attention of the court, **MASM v. MMAM** [\[2015\] COPLR 239](#)
- “Open-ended” declarations should be avoided as it is *“not the function of the court to oversee the treatment plan for a gravely ill child”* **Wyatt v. Portsmouth NHS Trust** [\[2006\] 1 FLR 554](#) para 117
- Anticipatory declarations: **United Lincolnshire NHS Trust v. CD** [\[2019\] COPLR 518](#) where P has fluctuating capacity *“in exceptional circumstances, the court has the power to make an anticipatory declaration of lawfulness, contingent on CD losing capacity, pursuant to [s 15\(1\)\(c\)](#)”*

- Injunctions

### Interim declarations

See [s.48](#) and interim relief above. This was doubted in **DP v. A Local Authority** [\[2020\] EWCOP 45](#) para 40 but [COPR r. 10.10](#) expressly allows for it, [CPR 20.2](#) allows interim declarations and COPR r.2.5 applies the CPR for situations not covered by the rules. Also [s.47 MCA](#) gives COP the powers of the High Court. For discussion of interim declarations under CPR in a medical case in **NHS Trust v. T** [\[2005\] 1 All ER 387](#)

### Injunctions

The Court has power under [s.16\(5\) MCA](#) to grant injunctions in support of its orders, **Re: G (Court of Protection: Injunction)** [\[2022\] EWCA Civ 1312](#) para 82. When it does so, it is using injunctive powers it has by virtue of [s.47\(1\) MCA](#), therefore, the test in [s.37 \(1\)](#) Senior Courts Act 1981 applies and the granting of the injunction must be ‘just and convenient’, on the following basis:

*55. This identifies two requirements before an injunction can be granted: (i) an interest of the claimant which merits protection and (ii) a legal or equitable principle which justifies exercising the power to order the defendant to do or not do something*

Just and convenient requires an interest of the claimant which merits protection and a legal or equitable principle which justifies use of the power (para 55).

The CoA expressly approved the reasoning of Keehan J in **Re: SF (Injunctive Relief)** [\[2020\] COPLR 683](#). Keehan J also relied on [s.47\(1\) MCA](#) and [s.37 \(1\)](#) Senior Courts Act 1981, noting the broad terms of [s.16\(5\)](#). The injunction is made to give effect to the decision under s.16 MCA.

For contempt proceedings following an injunction see **Re: Whiting** [\[2014\] COPLR 107](#); for an example of an injunction to restrain communication with the Court office see **Re: TA (recording of hearings; communication with Court office)** [\[2021\] EWCOP 3](#)

- Undertakings

### Undertakings

The Court can accept undertakings. Consider by analogy that, in children cases, while an undertaking can go beyond what could be directly ordered it must “*further the central objectives of the relevant litigation*” **Redbridge v. SNA** [\[2016\] 1 FLR 994](#) para 51. The Court would not accept the undertakings in that case as they were too far beyond the jurisdiction

- **In principle decisions**

The Court can make ‘in principle’ decisions based on the information available – see for example **Re: QD (Habitual Residence) (No.2)** [\[2020\] COPLR 646](#) para 17, declining to do so, in essence because the matter should be dealt with when it arose and the circumstances were known (the argument for the making the decision being its necessity for others to make progress). See also **Sherwood Forest** [\[2020\] COPLR 696](#) above.

### CASE AUTHORITY (PRECEDENT & ISSUE ESTOPPEL)

This has a limited role in a best interest jurisdiction:

*It is an almost irresistible temptation to lawyers, schooled in common law tradition, to seek to bring a case within other decided cases. In my view, at least, it is generally a temptation to be resisted. Each human being is unique and, thus, best interests decisions are unique to that human being. In almost every case, it should be enough to test the facts of the case against the relevant statutory provisions in order to ascertain the unique solution to that particular case*

**Re GC and Another** [2008] COPLR Con Vol 422 para 15, Hedley J.

Hedley J returned to the same point in **A Local Authority v FG and Others (No 1)** [2012] COPLR 473 “*but debates in proceedings about saying the same thing in many different ways does not seem helpful*” para 21.

*“The courts have been most reluctant to lay down general principles which might guide the decision. Every patient, and every case, is different and must be decided on its own facts.”*

**Aintree v. James** [2013] UKSC 67 para 36, Lady Hale.

What about decisions concerning the same person and the same course of treatment? In **An NHS Trust v. AF and SJ** [2021] COPLR 63 the Court faced an application about inserting a PEG 7 months after a deciding P should continue to receive CANH (which required the insertion of a PEG). The Trust argued effect “should be loyally given” to earlier Court decisions relying on Von Brandenburg (where the HofL considered the basis for re-detention of someone released from MHA detention by a Tribunal, [2003] 3 WLR 1265). A relative relied on children’s proceedings to say there was no issue estoppel. The OS relied on COPR and the over-riding objective to say the Court should take a proportionate approach in the context of the recent relevant decision. Poole J combined these arguments finding that the earlier conclusions “*are highly material to my evaluation of best interests in relation to these new decisions*” and that it would be wrong to re-open points where there was no change of circumstances, eg P’s capacity years earlier when making statements about his preferences or that he derived pleasure from his life.

In **VA (Medical Treatment)** [\[2023\] EWCA Civ 1190](#) a decision had been made by one Judge on 5 July that P should have a tracheostomy and by another Judge on 24 August that she should have palliative extubation. The CA upheld the second judgment on the basis that the reason for the first decision was clear evidence of P's wishes and feelings. That evidence was no longer clear by the time of the second order.

However, the application of principle is common to most cases:

*striking a balance between the principle that vulnerable people in society must be protected and the principle of autonomy is often the most important aspect of decision-making in the Court of Protection*

**Re: JB (Capacity: sexual relations)** [\[2020\] COPLR 550](#)

### REPORTING RESTRICTIONS AND TRANSPARENCY

The general rule is that a hearing is held in private [COPR r.4.1](#) but cases are in fact likely to be heard in public, eg **A Local Authority v. K** [\[2013\] COPLR 194](#) para 36. Where a hearing is in public the court can impose limits on what information is published, [COPR r.4.3 \(2\)](#). *“Practice Direction 4C (entitled 'Transparency') provides at para 2.1 that, unless it appears to the court that there is a good reason not to, the court will 'ordinarily' deploy its power under r 4.3 and order that 'any attended hearing shall be in public' ”* see **Kent CC v. P** [\[2022\] EWCOP 3](#).

This is done by way of a *“Transparency order”*. The standard form allows reporting but injuncts naming people as set out in that order. Generally, protects P and his/ her family but not the name of the public bodies or their staff.

However the CA has recognised the case for protecting the identity of people other than P in a high profile case if proper application is made because *“the world has changed”* through social media: *“child’s father had made serious unsubstantiated accusations against the treating clinicians and the trust”* **In Re: M (Declaration of Child Death)** [\[2020\] 4 WLR 52](#) para 102

This issue came back to the CA in **Abbasi v. Newcastle upon Tyne** [\[2023\] EWCA Civ 331](#) where families challenged the protection for clinicians involved in two cases concerning children. The CA found there is jurisdiction to make orders to protect the integrity of the proceedings. However, it was concerned at the breadth of the orders, especially their duration, noting that the art 8 rights of the clinicians were (by the time of the CA hearing) diminished but the families’ art 10 rights were strong. Orders protecting the identity of third parties should be for a limited period or subject to review. If possible, they should focus on a limited group whose identities need protection.

See **University Hospitals Birmingham NHS Foundation Trust v. Thirumalesh** [\[2023\] EWCOP 43](#) where naming of P, the hospital trust and experts was allowed but the hospitals and staff were not to be named, given the nature of social media. It was not necessary for there to be evidence about each clinician and the Court was willing to make an order expressed generally, rather than naming dozens of staff individually. **Abassi** therefore should not be seen as making protection impossible.

Reporting restrictions can be imposed in the face of opposition from P’s family, **PW v. Chelsea and Westminster Hospital** [\[2020\] COPLR 346](#) para 99 Peter Jackson LJ

For the balance between arts 8 and 10 (now to be read subject to Abassi):

- **Re S (A Child) (Identification: Restrictions on Publication)** [\[2005\] 1 FLR 591](#) where the House of Lords considered whether to prevent the naming of a 5 year old during the trial of his mother for the alleged murder of his brother
- **Manchester University NHS Foundation Trust v Verden & Anor** [\[2022\] EWCOP 4](#), note P's wish to draw attention to his position and find a live kidney donor
- **Re: A (Covert Medication: Closed Proceedings)** [\[2022\] EWCOP 44](#) paras 64-84 where Poole J decided to publish a judgment in a long running case with closed proceedings authorising covert treatment

Examples of application of the principles:

- in **Hinduja v. Hinduja** [\[2022\] EWCA Civ 1492](#) the CA upheld a decision removing anonymity in a long running dispute between family members controlling billions of pounds of assets. It held the case was unique and there was no way to report it without allowing naming
- maintaining reporting restrictions so that a family campaign would not undermine a care home placement see **LF v. NHS Trust** [\[2022\] EWCOP 8](#), note that this dispute continued through to **Re G (Court of Protection: Injunction)** [\[2022\] EWCA Civ 1312](#)
- lifting restrictions so that the public could learn of the extreme state of neglect in which P was found:
 

*29. The justification for such interference [with P's article 8 rights] is the media's Art 10 rights and the public's legitimate interest in knowing what has happened in this case. There is a strong public interest in knowing how the criminal justice system, including the police and the CPS are operating. That is even more the case at the present time when it is known that there are very long delays in getting cases to trial, or even to reach charging decisions...*

**Kent CC v. P** [\[2022\] EWCOP 3](#)
- admitting only accredited press and legal bloggers to a hearing where P was a natal male, self-identifying as female and an assessed risk to children, **A local authority v. H** [\[2023\] EWCOP 4](#)
- lifting reporting restrictions so that the press could report personal details about a man detained for years after it was considered necessary see **PH v. Brighton and Hove CC** [\[2021\] EWCOP 63](#)

There are particular issues in contempt proceedings. Standard transparency orders do not “extend to committal proceedings” (para 49). COPR r.21.8(4)(5) list circumstances in which a contempt hearing will be held in private or the identity of a party or witness not disclosed. The Court must order the identity of a defendant in contempt proceedings should not be disclosed if, and only if, it considers non-disclosure necessary (i) to secure the proper administration of justice and (ii) in order to protect the interests of the defendant. This would always be ‘rare’ and it would be ‘extremely rare’ where the person was sent to prison. The Court must always sit in public and give judgment but need only ensure it was published if the defendant was imprisoned, **Esper v. NHS North West London Integrated Care Board** [\[2023\] EWCOP 29](#)

For a dispute about publicity relating to “*musical prodigy*” with severe learning difficulties **Independent News and Media v. A** [\[2010\] COPLR 686](#)

The case for using names is made in **Re Guardian News; HM Treasury v Ahmed** [\[2010\] 2 AC 697](#) in a case about identifying alleged terrorists, “*What's in a name? 'A lot', the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people*”

## APPEALS

<ul style="list-style-type: none"> <li>• <b>Note possibility of review</b></li> <li>• <b>Test for permission</b></li> <li>• <b>Test for allowing an appeal</b></li> </ul>	<p><i>“Any person bound by an order of the court”</i> may seek permission to appeal <a href="#">COPR r.20.3(3)</a>.</p> <p>Destination of appeals – <a href="#">COPR r.20.4</a></p> <p>The Court may review an earlier best interests decision “on the grounds of compelling new evidence” <b>Z v. RS and University Hospitals Plymouth NHS Trust</b> <a href="#">[2021] COPLR 342</a> para 31.</p> <p>Test for permission is <i>“real prospect of success”</i> or <i>“some other compelling reason”</i> <a href="#">COPR r.20.8</a> and note that real prospect does not mean 50%+ but <i>“realistic as opposed to fanciful”</i>  <b>Tanfern v Cameron-MacDonald (Practice Note)</b> [2001] 1 WLR 1311, CA</p> <p>Test for allowing the appeal is whether the decision was “wrong” or “unjust because of a serious procedural irregularity” <a href="#">COPR r.20.14(3)</a>:</p> <p style="padding-left: 40px;"><i>“But if the judge has correctly directed himself as to the law, as in my view this judge did, an appellate court can only interfere with his decision if satisfied that it was wrong: Re B (A Child) (Care Proceedings: Appeal) [2013] UKSC 33... In a case as sensitive and difficult as this, whichever way the judge's decision goes, an appellate court should be very slow to conclude that he was wrong”</i>  <b>Aintree v James</b> <a href="#">[2013] COPLR 492</a> para 42.</p> <p>Most COP decisions are evaluative and</p> <p style="padding-left: 40px;"><i>“In the ordinary course, this court would not disturb such an order unless the court making it had erred in principle or reached a conclusion that was plainly wrong”</i>  <b>Re: AB (Termination of Pregnancy)</b> <a href="#">[2020] COPLR 42</a> para 78 King LJ – over-turning consent to a termination of pregnancy</p> <p>See <b>Hinduja v. Hinduja</b> <a href="#">[2022] EWCA Civ 1492</a> para 47:</p> <p style="padding-left: 40px;"><i>The threshold for appellate interference with an evaluative conclusion of this kind is a high one, particularly in the field of case management</i></p>
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- Costs

Costs in the CA are not governed by COPR but by CPR r.44. However in **VA (Medical Treatment)** [\[2023\] EWCA Civ 1190](#) Baker LJ made no costs order on the basis that it is a best interests jurisdiction and *“I would anticipate that, save in exceptional circumstances, there will usually be no order for costs of an appeal against a decision relating to P’s personal welfare”* para 55

## ENFORCEMENT

- Generally

**MASM v. MMAM** [\[2015\] COPLR 239](#), paras 13-14

*“The Court of Protection's powers of enforcement are extensive. The court has in connection with its jurisdiction the same powers, rights and privileges and authority as the High Court ([MCA2005, s 47](#)) which means that it may find or commit to prison for contempt, grant injunctions where appropriate, summons witnesses when needed and order the production of evidence [or] ... direct the Deputy or some other person to take proceedings of a different kind in another court where the objectives fall outside the remit of the MCA*

*Finally, of course, the court may direct penal notices to be attached to any order... An application for committal of a person for contempt can be made to any judge of the Court of Protection by issuing an application notice stating the grounds of the application supported by affidavit in accordance with practice directions. ...”*

- Injunctions

Generally a party should bring breaches to the attention of the Court **MASM** para 54.

Recently it was re-stated that the Court has power to grant injunctions in support of its orders because of [s.47\(1\)](#) MCA and [s.37 \(1\)](#) Senior Courts Act 1981 **Re: SF (Injunctive Relief)** [\[2020\] COPLR 683](#).

Note that the process of making orders may be incremental and that it is – certainly in practice – common to move to more specific orders/orders focused on particular people and not start with enforcement. So, in **Sunderland v. Macpherson** [\[2023\] EWCOP 3](#) the Court responded to “consistent” breaches of the transparency order by making “more specific and targeted orders” (para 29). This did not succeed and, following an application to commit P’s mother, a suspended prison sentence was passed (see below).

- Committal for contempt

See [COPR r.21](#) – note that the rules changed with effect from 1 January 2023 – to bring consistency with CPR, FPR and COPR - and cases on the earlier rules need to be checked for any changes made in the new rules.

For a useful summary of how to bring an application and 15 “requirements” to observe see **P (by the OS) v. Griffith** [\[2020\] EWCOP 46](#) where an application for committal for forging a court order in order to obtain P’s medical records led to a 12 month sentence of imprisonment.

See **Re: Whiting** [\[2014\] COPLR 107](#). Hayden J considered breaches of an order (eg) not to go within 100 metres of a property or communicate with P noting (1) injunctive orders should be clear; (2) alleged breaches should be particularised to show exactly what, where, when and how it is contended someone is in breach – this will help the alleged contemnor to defend and the applicant to prepare specific evidence. There should be “*forensic precision and the careful identification of evidence.*”

For an application for committal for breach of a transparency order, see **Salter** [\[2018\] EWCOP 27](#) including difficulties showing service of orders and the committal notice. Williams J considered the procedural challenges of contempt proceedings: the order has to be clear on its face, proceedings are criminal in nature, presumption of innocence applies, contempt means deliberate disobedience, the order must have been served and must have a penal notice and the application to commit must be clear. No punishment was imposed in part because the “pragmatic approach” of the contemnor, enabling the applicant to jump some of the procedural hurdles, showed his current (co-operative) attitude to the proceedings.

**Sunderland** [\[2023\] EWCOP 3](#): (1) it is unhelpful to bring a series of applications to commit save where there are allegations of a different or more serious nature, paras 46-47; (2) the applicant should only rely on breaches which it says are contempt, para 49; (3) consider obtaining medical reports for the defendant, para 16; (4) a failure of personal service might be excused under PD 21A, para 25; (5) consider the naming of the defendant, see COPR r.21.8 below and the section of this document on transparency. **Sunderland** also shows a detailed sentencing exercise. “Imprisonment is not the starting point” and should be proportionate but can be imposed for a first contempt (para 51). The Court noted the adverse impact of imprisonment on P and on D’s disabled partner and – significantly because the material was taken off the web at the last minute – suspended a 28 day sentence for 12 months on the basis of no further contempt (para 60). This was upheld on appeal [\[2023\] EWCA Civ 574](#)

COPR r.21.8(4)(5) list circumstances in which a contempt hearing will be held in private or the identity of a party or witness not disclosed. The Court must order the identity of a defendant in committal proceedings should not be disclosed if, and only if, it considered non-disclosure necessary (i) to secure the proper administration of justice and (ii) in order to protect the interests of the defendant. This would always be ‘rare’ and it would be ‘extremely rare’ where the person was sent to prison. The Court must always sit in public and give judgment but need only ensure it was published if the defendant was imprisoned, **Esper v. NHS North West London Integrated Care Board** [\[2023\] EWCOP 29](#)

For a further example of sentencing see **North Yorkshire v. Elliot**, [Case 13281081](#) HHJ Anderson. See **Re: L (A Child)** [\[2016\] EWCA Civ 173](#) for guidance in family cases.

## COSTS

- P & A applications – P’s estate pays

Property and Affairs - P’s estate pays the costs.

- Welfare – no order as to costs

Health and welfare - no order as to costs **COPR [r.19.2](#) and [19.3](#)**

- Exceptions

Where a newspaper applied for joinder to a welfare case the application was an application in welfare proceedings and the usual rule applied **Re: G (An Adult) (Costs)** [\[2015\] COPLR 438](#), CA - approving a decision that the usual order should be departed from and the paper pay 30% of each other party’s costs but holding that the CPR did not apply.

Departure from general rule possible under [COPR r.19.5](#) (where relevant factors are set out). A summary of costs cases follows:

- *“It is a power rarely exercised but one which the court retains”* **A NHS Trust v DU, AO, EB and AU** [2009] COPLR Con Vol 210
- Where P was removed from a long term placement and the LA then resisted return *“blatant disregard of the processes of the MCA and their obligation to respect E’s rights under the European Convention amount to misconduct which justifies departing from the general rule”*. Local authorities need not fear costs *“simply because hindsight demonstrates that it got those judgments wrong”* **G v. E (Costs)** [\[2010\] COPLR Con Vol 454](#) paras 40-41. G v. E was appealed and upheld. Hooper LJ said trial Judge has the feel of the case and must have gone *“seriously wrong”* to change the order [\[2012\] COPLR 95](#)
- Costs cases don’t give guidance; apply the rules; where the rule itself requires departure from a general position it adds nothing to say that the situation must be exceptional. Costs order made for 50% of costs for set period *“substandard practice and a failure by the public bodies to recognise the weakness of their own cases and the strength of the cases against them”* (**Re: AH (Costs)** [\[2012\] COPLR 327](#) paras 10-11, 69)

- Where CCG delayed applying to court forcing a relative to do so the CCG was ordered to pay 50% of her costs to reflect the greater costs she faced as applicant, “*an intuitive art reflecting the judge's feel for the litigation as a whole*” **MR v. SR** [\[2016\] EWCOP 54](#)
- P&A – where it was alleged a paid deputy charged excessive fees and had conflicts of interest and inappropriate arrangements to hold client money an indemnity costs order was made (for costs estimated at £250k), **Public Guardian v. Matrix Deputies** [\[2017\] COPLR 415](#)
- In a case about P moving to Columbia costs were awarded, asking what if proceedings “should have been fundamentally unnecessary, that is to say they should never have been brought? Or what if the conduct of the proceedings been so poor, so incompetent that not only did they take much longer than they should (thus unnecessarily necessitating P remaining for so very much longer in difficult circumstances) and requiring many extra unnecessary hearings?” **Lambeth v. MCS** [\[2018\] EWCOP 20](#)
- Where an LA wanted to dispute the appropriateness of s.21A challenge – questioning its validity without any basis – all costs were awarded from the first directions hearing until that point was resolved **DL v. Enfield** [\[2020\] COPLR 128](#)
- Where local authority failed to apply to review a DOL within 12 months that “*reason sufficient for the court to depart from the general rule as to costs*” **Re: AT Harrow v. AT** [\[2020\] COPLR 412](#) para 24
- Where a local authority applied for an injunction against a private body to continue to make provision for P the application was totally without merit and costs ordered **Re: JB (Costs)** [\[2021\] COPLR 88](#) – but this did not extend to the failure to involve CCGs as early as they should have been
- For a costs order for multiple defaults of court orders relating to providing proper pathway and care plans and breach of Children Act 1989 and Care Act 2014 (and not therefore directly COP issues) **Re: ND (Court of Protection: Costs and Declarations) Shropshire CC** [\[2020\] EWCOP 42](#). (A similar approach was applied in **Somerset County Council v MK & Anor** [2015] EWCOP B1).
- For a costs order against the Public Guardian for 50% of the costs of an attorney where COP dismissed an application to revoke the LPA and held it should not have been made **Re: JBN; Public Guardian v. DJN** [\[2020\] COPLR 587](#)

- Court of Appeal

- No costs were awarded where a birth application was made late and out of hours, when this was not necessary, without properly discussing the birth plan with P and without an assessment of litigation capacity, **West Hertfordshire Hospitals Trust v. AX** [\[2023\] EWCOP 11](#)
- The OS' costs order in a medical application was raised from the usual 50% to 80% where the application was 6 months delayed and then made urgently. This reduced the role of the OS, placed the Court under pressure, reduced open justice and harmed the treatment for the patient **GH (Mastectomy: Best Interests: Costs)** [\[2023\] EWCOP 50](#)

Costs in the CA are not governed by COPR but by CPR r.44. However in **VA (Medical Treatment)** [\[2023\] EWCA Civ 1190](#) Baker LJ made no costs order on the basis that it is a best interests jurisdiction and "I would anticipate that, save in exceptional circumstances, there will usually be no order for costs of an appeal against a decision relating to P's personal welfare" para 55

An LA was ordered to be pay 85% of the costs of a hearing when it should have conceded it 6 days earlier than it did (possibly it would have been saved had the LA served its position statement on time and conceded the application in it, but counsel was not instructed at that point, para 33) - **A Local Authority v. ST** [\[2022\] EWCOP 11](#)

One half of costs of OS are paid by the applicant in medical treatment cases, **NHS Trust v D** [\[2012\] EWHC 886](#), **North Somerset Council v LW & Ors** [\[2014\] EWCOP 3](#).

On appeal to the CA the CPR costs rules apply, **Cheshire West v P** [\[2012\] COPLR 37](#) but the CA can limit the costs

## 7. INHERENT JURISDICTION

### DEFINITION

<ul style="list-style-type: none"> <li>• Different forms of use</li>   <li>• Continuance for vulnerable adults</li>   <li>• For people incapacitated by external forces</li>   <li>• To allow P chance to make decisions</li>   <li>• Common law judicial process</li> </ul>	<p>The inherent jurisdiction can be used</p> <ul style="list-style-type: none"> <li>• Where a lacuna exists in the law eg non-recognition of a marriage or Dr A case (both below)</li> <li>• To protect vulnerable adults who have mental capacity</li> </ul> <p>To protect children (significantly affected by Children Act 1989, see FPR PD 15D)</p> <p>The inherent jurisdiction was found to continue after the MCA in two first instance cases</p> <p>The inherent jurisdiction can be used:</p> <ul style="list-style-type: none"> <li>• for people who have capacity but are incapacitated by external forces, <b>LBL v. RYJ</b> <a href="#">[2010] COPLR Con Vol 795</a> and</li> <li>• as a “<i>protective jurisdiction that extends beyond dealing with issues on mental incapacity</i>” <b>A Local Authority v. DL</b> <a href="#">[2011] COPLR Con Vol 101</a> para 53, Theis J.</li> </ul> <p>The CA upheld DL and endorsed LBL in <b>DL v. A Local Authority</b> <a href="#">[2012] COPLR 504</a> describing the inherent jurisdiction as:</p> <p style="padding-left: 40px;"><i>targeted solely at those adults whose ability to make decisions for themselves has been compromised by matters other than those covered by the MCA 2005”</i> para 53. It has a facilitative role and not dictatorial and “<i>in part aimed at enhancing ... the autonomy of a vulnerable adult</i>” (para 54).</p> <p>“...The process of using the common law to fill gaps is one of the most important duties of the judges ...It is essentially a judicial process and, as such, it has to be undertaken in accordance with principle” <b>Re F (Mental Patient: Sterilisation)</b> <a href="#">[1990] 2 AC 1</a> at 13.</p>
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EXTENT

• **Amorphous but not ubiquitous**

The inherent jurisdiction is amorphous but not unlimited, Hayden J considering the use of the inherent jurisdiction in children proceedings. On refusing an order against an adult abuser to protect children who are “neither known nor subject to any proceedings” (para 37) the Judge noted the statutory scheme now added to Sexual Offences Act 2003 and explained:

*The concept of the 'inherent jurisdiction' is by its nature illusive to definition. Certainly it is 'amorphous' ... and, to the extent that the High Court has repeatedly been able to utilise it to make provision for children and vulnerable adults not otherwise protected by statute, can, I suppose be described as 'pervasive'. But it is not 'ubiquitous' in the sense that its reach is all-pervasive or unlimited. Precisely because its powers are not based either in statute or in the common law it requires to be used sparingly and in a way that is faithful to its evolution*

**Redbridge v. SMA** [\[2016\] 1 FLR 994](#) para 33

Similarly, in a case about returning an adult to the jurisdiction, Lieven J held that:

*32. It is however important that the inherent jurisdiction is not used in an unprincipled and unlimited manner, and in particular one which cuts across a statutory scheme which necessarily reflects Parliamentary intent*

**AB v. XS** [\[2021\] EWCOP 57](#)

• **When does it arise?**

The inherent jurisdiction applies to vulnerable adult who is:

- (i) under constraint;
- (ii) subject to coercion or undue influence; or
- (iii) unable to make a free choice

**Re SA (vulnerable adult with capacity: marriage)** [\[2006\] 1 FLR 867](#) Munby J

**SA** defines a vulnerable adult is someone unable to take care of themselves or protect themselves from harm or exploitation noting that “very little pressure” may be required where arguments are based “*upon personal affection or duty, religious beliefs, powerful social or cultural conventions, or asserted social, familial or domestic obligations*” (para 78).

- **Autonomy compromised**

- **Occluded decision making**

- **Not a general power to act in best interests**

- **Possibility of use to authorise a DoL**

This was endorsed by the CA in **DL v. A Local Authority** [2012] COPLR 504 para 54 adding that *“it is not easy to define and delineate this group of vulnerable adults”* para 65. The MCA is wide ranging but does not deal with people who lack capacity other than because of impairment in functioning of mind or brain **DL v. A Local Authority** [2012] COPLR 504 paras 57 and 58.

The jurisdiction can be exercised:

- *“if I am satisfied that J is a vulnerable adult, at risk of harm, whose autonomy has been compromised in relation to his decision making processes and who may be sufficiently protected”* **London Borough of Wandsworth v. M, A, C and J** [2018] COPLR 71 using the inherent jurisdiction to make an interim order while capacity assessment continued
- Where there was a *“dysfunctional relationship between Mr Meyers and his son that serves to occlude his decision-making processes”* **Southend on Sea v. Myers** [2019] COPLR 202 considering a capacitous man who lived with his son who was addicted to drugs and alcohol and challenged care staff. The inherent jurisdiction was used to restrict the *“scope and ambit of his choices”* to prevent him living at home with his son (para 56)

However, the inherent jurisdiction was not used to order someone who had not taken nutrition for 41 days be given supplements, **PH v Betsi Cadwaladr University Health Board** [2022] EW COP 16:

*The court has no business in telling capacitous individuals what is in their best interests nor any locus from which to compel others to bend to the will either of what capacitous individuals may want or what the court might consider they require. Such a regime would be fundamentally unhealthy in a mature democratic society and would have the collateral impact of undermining the principle of autonomy which is central to the philosophy of the MCA*

Authority is divided on whether the inherent jurisdiction can be used to authorise a DoL for an adult. In Mazhar the Court of Appeal kept this open for consideration in the future:

*The preponderance of authority at first instance supports the existence of this jurisdiction, but there is some authority to the contrary. There is also uncertainty as to whether it is permissible in urgent situations to depart from the Winterwerp criteria, in particular the requirement for medical evidence. The qualification in Winterwerp itself (“except in emergency cases”) suggests that some limited departure may be permissible, although more recent decisions of the European Court have not repeated that qualification* **Mazhar v. Birmingham Community Healthcare** [2020] EWCA Civ 1377, Baker LJ para 52.

- Interim orders

For reasoned refusals to use the inherent jurisdiction to authorise a DoL see **Wakefield Metropolitan BC v. DN** [2019] COPLR 525 paras 48-50 and **Cumbria, Northumberland, Tyne and Wear NHS Foundation Trust v. EG** [2022] COPLR 83 paras 74-93.

*To give the court the power to deprive an individual, with capacity, of their liberty without any clearly stated limitation, solely because the court had determined that it would be in their interests to do so, would be a significant intrusion into the most fundamental principles of liberty of the subject ... the use of the inherent jurisdiction in respect of vulnerable adults is a facilitative rather than a dictatorial one... paras 86 and 92.*

For the use of the inherent jurisdiction to authorise a DoL see **NHS Trust v. Dr A** [2013] COPLR 605, Baker J para 94.

Note if a DoL can be authorised under the inherent jurisdiction it would presumably be necessary for P to be of “unsound mind” in the Winterwerp sense (see below) if detention was to be compliant with Art 5. This is not required in all inherent jurisdiction cases.

The inherent jurisdiction can be exercised on an interim basis, while enquiries are made, **Re SA**, above, para 80, **Wakefield**, above para 47 and the **Meyers** cases.

See **Mazhar v. Birmingham Community Healthcare NHS Foundation Trust** [2020] EWCA Civ 1377 for essential guidance on how to make an urgent application under the inherent jurisdiction.

<u>EXAMPLES OF USE</u>	
<ul style="list-style-type: none"> <li>• Restrain assisted suicide</li> </ul>	To restrain assisted suicide <b>Re: Z (Local Authority: Duty)</b> <a href="#">[2005] 1 FLR 740</a>
<ul style="list-style-type: none"> <li>• Relief beyond MCA</li> </ul>	To offer relief not in the MCA, in particular a declaration of non-compatibility of a marriage <b>XCC v. AA</b> <a href="#">[2012] COPLR 730</a>
<ul style="list-style-type: none"> <li>• Authorise forced feeding</li> </ul>	To authorise force feeding of someone who fell into the lacuna between MCA and MHA (ie “ineligible” to be deprived of his liberty under MCA) in order to protect his article 2 rights <b>NHS Trust v. Dr A</b> <a href="#">[2013] COPLR 605.</a>
<ul style="list-style-type: none"> <li>• Facilitate decision making</li> </ul>	To facilitate unencumbered decision-making by the adult, rather than taking the decision for them: <b>In re L (Vulnerable Adults with Capacity: Court's Jurisdiction) (No 2)</b> <a href="#">[2012] EWCA Civ 253</a>
<ul style="list-style-type: none"> <li>• Interim protection</li> </ul>	As interim protection - Where an inadequate capacity assessment means there is insufficient evidence for an interim order to be made under <a href="#">s.48 MCA</a> the Court used the inherent jurisdiction to protect P pending proper assessment <b>London Borough of Wandsworth v. M, A, C and J</b> <a href="#">[2018] COPLR 71</a>
<ul style="list-style-type: none"> <li>• Order return of an adult to the UK</li> </ul>	<b>Al-Jeffery v. Al-Jeffery</b> <a href="#">[2018] 4 WLR 136</a> where a capacitous adult had gone to Saudi Arabia and become habitually resident the inherent jurisdiction was used to grant a personal order on father to return his daughter to the UK. Note <b>AB v. XS</b> <a href="#">[2021] EWCOP 57</a> where it was held it would be wrong to use the inherent jurisdiction to order the return of an adult to the UK if they were outside the scheme in sched 3 MCA (paras 30-37)
<ul style="list-style-type: none"> <li>• Order person to move out of a house</li> </ul>	Where P was capacitous in terms of MCA <u>and</u> not of “ <i>unsound mind</i> ” in terms of art 5 the Court used the inherent jurisdiction – although the final orders are not clear - to facilitate a plan for the son to move out of the bungalow he shared with his father (and where the father lived in squalor) and to limit contact between them “ <i>To safeguard him, by invoking the inherent jurisdiction of the High Court, it is necessary to restrict the scope and ambit of his choices, not his liberty</i> ” – it was a proportionate interference with article 8 rights and not a breach of article 5, <b>Southend on Sea v. Myers</b> <a href="#">[2019] COPLR 202</a> paras 56-58
<ul style="list-style-type: none"> <li>• Use regarding children</li> </ul>	In medical cases for children applications are made under the inherent jurisdiction and as a specific issue order under s.8 Children Act 1989 (see <b>Re: JM (a Child) (Medical Treatment)</b> <a href="#">[2015] 2 FLR 235</a> ) para 27

Note the cases about using the inherent jurisdiction to authorise the DoL of an older child:

- **D (a child)** [2019] 1 WLR 5403 – parent cannot authorise the DoL of a 16 or 17 year old
- **Re: T (a child)** [2021] UKSC 35[2022] AC 723 – considers s.100 CA 1989 and its effect on wardship; can use the inherent jurisdiction for DoL of child who meets criteria in s.25 CA; discusses placements in unregistered children’s homes
- **Tameside MBC v. AM** [2021] EWHC 2472 – ‘imperative necessity’ required to place under 16 child in unregistered placement; note the President’s Guidance, full reference in the judgment
- **Derby CC v. BA** [2022] 2 WLR 893 on s.22(C)(6) CA

For an example of refusing to approve a DoL in a hospital for a 14 year old in an acute paediatric ward, see **A County Council v. A Mother and Lewisham and Greenwich NHS Trust**, [2021] EWHC 3303. The child had ASD and learning difficulties but no health problems. She was taken to the ward by the police after absconding. Two homes had refused to have her back. Her presence on the ward had a ‘severe impact’ on others, including a child receiving palliative care. The hospital advised it was not in the child’s own best interests to be there.

Holman J:

*37 I do not have a solution to this case. Clearly, it is the duty of the local authority to whose care this child was entrusted over seven years ago to keep her safe. Provided they act in good faith and do the very best they can, the lawfulness of what they do may be justifiable by a doctrine of necessity. I make crystal clear, as I have done many times during the course of this hearing, that I am not in any way whatsoever indicating to the hospital trust that it MUST now discharge this child, still less ordering it to do so. It must make its own decisions. If it does decide to keep her longer, then it also may be able to justify such a decision by a doctrine of necessity. But I am sorry to say that, at the end of this long day, I am simply not willing myself to apply a rubber stamp and to give a bogus veneer of lawfulness to a situation which everybody in the court room knows perfectly well is not justifiable and is not lawful.*

The approach to exercising the inherent jurisdiction in medical cases for children (perhaps more generally applicable) is set out in **E v. Northern Care Alliance** [2022] EWCA Civ 1888 para 45

*When the court is being asked to exercise its inherent jurisdiction, there are in our view three stages. The first is to establish the facts. The second is to decide whether it is necessary to intervene. If it is, the final and decisive stage is the welfare assessment*

## 8. EXTENT OF THE MCA

### AGE

- **People aged under 16**

No power in the MCA is exercisable in relation to someone under 16 ([s.2\(6\) MCA](#)) except property and affairs powers under [s.16 MCA](#) – these can be exercised for someone younger than 16 if they are likely to lack capacity when they reach 18 ([s.18\(3\) MCA](#)).

The offence of ill-treatment/ wilful neglect by a donee of an LPA, deputy or carer for someone who lacks capacity can apply to people under 16 ([s.44 MCA](#)).

- **People aged 17 or 18**

Most of MCA applies to people over 16 but:

- Only people over 18 can make an LPA, [s.9\(2\)\(c\) MCA](#)
- The COP can only make a statutory will for people 18 and over, [s.18\(2\) MCA](#)
- Authorisations under Schedule A1 only apply to people aged 18 and over

Cases can be transferred between COP and courts with jurisdiction under Children Act 1989 and vice versa, [s.21 MCA](#) and **Mental Capacity Act 2005 (Transfer of Proceedings) Order 2007, SI 2007/1899**.

Outside the MCA note that:

- People over 16 can consent to medical treatment, Family Law Reform Act 1969, s.8
- In other cases capacity is assessed on the basis of “sufficient understanding” **Gillick v. West Norfolk and Wisbeach AHA** [\[1986\] 1 AC 112](#))

<u>COUNTRY</u>	
<ul style="list-style-type: none"> <li>• Geographical jurisdiction of the Court of Protection</li> </ul>	<p><a href="#">s.63 MCA</a> and <b>para 7 of schedule 3</b> provide the Court may exercise its functions under MCA in relation to:</p> <ul style="list-style-type: none"> <li>• adults habitually resident in England and Wales,</li> <li>• an adult's property in England and Wales,</li> <li>• an adult present in England and Wales or who has property there, if the matter is urgent, or</li> <li>• an adult present in England and Wales, if a protective measure which is temporary and limited in its effect to England and Wales is proposed in relation to him</li> </ul> <p><a href="#">s.63 MCA</a> and <b>Part 4 of schedule 3 MCA</b> deal with the recognition of protective measures taken in other jurisdictions on the ground that the adult is habitually resident in the other country – the measure “is to be recognised” unless the measure was not urgent, the adult was not given an opportunity to be heard and that amounted to a breach of natural justice.</p> <p>For a case where the court accepted jurisdiction on the basis of urgency see <b>Royal Free London NHS Foundation Trust v AA</b> <a href="#">[2021] EWCOP 68</a>, paras 9 and 10.</p>
<ul style="list-style-type: none"> <li>• Habitual residence</li> </ul>	<p><i>“Habitual residence is an undefined term and in English authorities it is regarded as a question of fact to be determined in the individual circumstances of the case. ... It seems to me that the wrongful removal ... of an incapacitated adult ... should leave the courts of the country from which she was taken free to take protective measures.”</i></p> <p><b>Re: MN</b> [2010] COPLR Con Vol 893 para 22.</p> <p>For an example of habitual residence not moving to England despite someone living there for over 7 years see <b>Aberdeenshire Council v. SF</b> <a href="#">[2023] EWCOP 28</a>.</p> <p><i>“Habitual residence is, in essence, a question of fact to be determined having regard to all the circumstances of the particular case”</i> and at the date of the assessment <b>Re: PO</b> <a href="#">[2014] COPLR 62</a> para 17, stating that it can be changed in a day and that no court order or formal process is required just because a person lacks capacity (paras 17 and 18, Munby P). A change in habitual residence can be brought about under the doctrine of necessity unless “there is bad faith or where what is done is unreasonable or not in the best interests of the</p>

assisted person” (para 20). The Court found a change in habitual residence even though P was moved by 3 of her 4 children, without council or court involvement and contrary to the wishes of the other and with jurisdiction disputed in the subsequent proceedings in Scotland:

*This was not a kidnapping. It was not some high-handed action undertaken for some ulterior motive. It was, on the contrary, something reasonably and sensibly undertaken by, or in agreement with, three of PO's four children in what they saw as her best interests. They had authority – the authority conferred on them by the doctrine of necessity – to act as they did..., paras 25-26.*

“The definition of “habitual residence” under the MCA should be the same as that applied in other family law instruments”

**An English Local Authority v SW** [\[2015\] COPLR 29](#)

“The test of habitual residence promulgated by the European Court (and adopted domestically) is ‘the place which reflects some degree of integration by the [child/adult] in a social and family environment in the country concerned”

**Re: QD (Jurisdiction: Habitual Residence** [\[2020\] COPLR 633, para 10](#)

**AB v. XS** [\[2021\] EWCOP 57](#) concerned an adult who moved from England to Lebanon in 2014 to be near her brother, possibly just on a trial period. After he died his family moved her into a care home in Beirut. The Court summarised the case law as (paras 26-27):

*...if an incapacitated person is moved from one country to another, then they can change their habitual residence once the requisite degree of integration is achieved, regardless of their inability to have exercised any decision making in that choice. The position might be different if the person was removed unlawfully, but that does not arise in this case.*

*... One could have an incapacitated adult who retains strong roots in the original country, such as a home and family, and who had expressed an unequivocal desire to return before s/he lost capacity. That person might remain habitually resident in the original country even after a prolonged stay in the new country. However, it must be the case that after a sufficiently long period in the new country, the sheer fact of physical integration may become overwhelming and habitual residence moves to the new country.*

Further, it was not appropriate to use the inherent jurisdiction to overcome this. For a useful summary of the above see **The Health Service Executive of Ireland v. IM** [\[2021\] COPLR 73](#)

## RELATIONSHIP WITH THE MHA

- **General**

In **AM v. SLAM** [\[2013\] COPLR 510](#) it was held a decision maker under MHA has to decide whether an authorisation under DOLS provides an alternative basis which enables treatment and is the least restrictive way to proceed, paras 28 and 73.

MHA and MCA – “...both regimes afford equally rigorous structures and either one might potentially be suitable on the facts” **Northamptonshire v ML** [\[2014\] COPLR 439](#) para 79.

A guardian acting under s.8 MHA has the power to compel a person to reside at a particular place to the exclusion of any other person including COP - **C v Blackburn with Darwen** [\[2012\] COPLR 350](#)

See **MCA schedule 1A** “Persons ineligible to be Deprived of Liberty” – meaning persons whose deprivation of liberty cannot be authorised under MCA. See further under Deprivation of Liberty, below. The Court has found that someone was unlawfully deprived of their liberty after being held in a hospital after the expiry of their detention under s.2 MHA pending a care plan being put in place in the community. They should have been detained under s.3 MHA until that care was available. Their detention could not be authorised under MCA:

*If the patient has to be detained for treatment for their mental disorder, and there is no alternative outside the hospital setting, and no other treatment plan available, then it seems clear to me the patient should not be detained under the MCA but rather under the MHA.*

**Manchester University Hospitals NHS Trust v. JS** [\[2023\] EWCOP 12](#)

This was upheld by Theis J in **Manchester University Hospitals v. JS** [\[2023\] EWCOP 33](#)

- **Relationship with public law / access to services and resources**

*“This Act is concerned with enabling the court to do for the patient what he could do for himself if of full capacity, but it goes no further. On an application under this Act therefore, the court has no greater powers than the patient would have if he were of full capacity.”*

**Aintree University Hospital v. James** [\[2014\] 1 AC 591](#), SC para 18.

COP can take decisions for P that he/ she cannot take for themselves - the Court can only choose between available options **N v. A CCG** [\[2017\] AC 549](#), SC, Lady Hale:

*“it is axiomatic that the decision-maker can only make a decision which P himself could have made”*

*“[the Court] has no greater power to oblige others to do what is best than P would have for himself. This must mean that, just like P, the court can only choose between the ‘available options’ ”* paras 1 and 24.

Note similar position for a ward of court, **Holmes-Moorhouse v. Richmond upon Thames LBC** [\[2009\] 1 WLR 413](#)

MCA carries no duty to accommodate P, nor is there discrimination between people detained under MHA and under MCA in respect of charging, **DM v. Doncaster MBC** [\[2012\] COPLR 362](#)

## INTERNATIONAL PROTECTION OF ADULTS

**Schedule 3 MCA** deals with the domestic recognition and enforcement of overseas measures – giving effect to measures to implement the **Hague Convention on the International Protection of Adults 2000**, explained as follows:

*recognition by State B of a measure made by State A is intended to be almost automatic unless one of the very limited grounds for non-recognition can be shown. Those limited grounds categorically do not include State B disagreeing with the measure on its merits. However, once a measure has been recognised by State B then the conditions of its implementation are governed by the law of State B (article 14)*

**Health Service Executive of Ireland v. Florence Nightingale Hospitals Ltd** [2022] EWCOP 52, para 5

The judgment provides at Annex A a checklist of 22 questions for the Court to answer when deciding whether to apply a foreign protective measure and sets out 5 questions which are anyway determined under domestic law: (1) the joinder of P; (2) whether P was heard in foreign proceedings; (3) whether P had capacity to make the decision; (4) whether the measure was consistent with mandatory provisions of domestic law; (5) whether the measure entailed a DoL.

The CoP can declare that a foreign measure is recognised in England Wales (para 20) and / or declare that a measure is enforceable in England and Wales (para 22).

**Para 5** – defines “protective measure” as “*directed to the protection of the person or property of an adult*”

**Para 7** – see above under “geographical jurisdiction”

**Re MN (Recognition and Enforcement of Foreign Protective Measures)** [2010] COPLR Con Vol 893, Hedley J:

- Where P is habitually resident in another country the court only has the powers in schedule 3 MCA
- Habitual residence is a matter of fact and cannot be affected by wrongful removal (see below)
- A decision to enforce a protective measure is not a best interests decision but a decision about measures to implement it would involve best interests

Where family moved a man “by stealth” from Spain to England and applied to COP for an order that he enter a care home and not leave England the Court approved a DoL in the care home while the Spanish authorities decided how to proceed because jurisdiction remained in Spain (**Re QD (Jurisdiction: Habitual Residence)** [2020] COPLR 633:

- The family could not rely on necessity as the “doctrine of necessity requires a decision taken by a relative or carer which is reasonable, arrived at in good faith and taken in the best interests of the assisted person” **Re MN (Recognition and Enforcement of Foreign Protective Measures)** [2010] COPLR Con Vol 893
- It was not appropriate to take substantive jurisdiction on the basis of urgency – rather to take protective steps limited in time and effect under para 7(1)(d) of schedule 3 MCA
- The inherent jurisdiction should not be used where there is an applicable statutory scheme
- Nb this judgment led to a stand off – the COP deferred to the Spanish Court but it transpired that Court would only decide what should happen to QD if he was in Spain. The first question however was where QD should live [2020] COPLR 646

In **Re: AB** [2021] COPLR 30 the applicants applied for the court to recognise letters of guardianship granted in New York. The Court found that a move from the US to England did not change habitual residence, apparently accepting the OS’ submission that the guardian’s “removal of AB from the US was not a valid exercise of guardianship powers because it was done ‘in bad faith’ – M knew that there was an investigation underway in the summer of 2019, knew she was at risk of losing guardianship powers, and moved in an attempt to evade that possibility becoming reality” (paras 81-84). In consequence: “AB remains habitually resident in the USA, and this court yields jurisdiction in respect of her welfare to the courts of New York State” (para 108). Compare this to **FT v. MM** [2019] EWHC 935 where habitual residence was found to have changed after 2 years even with wrongful removal.

*While in this case there can be no doubt that RM's initial removal from the jurisdiction of England and Wales was wrongful the development in international law of measures to prevent the wrongful removal or retention of vulnerable/incapacitated adults and/or securing their return is nascent ... the fact is that RM has been living in the USA, where he is a citizen, since late 2016; a period of over 2 years during which time he has reached his majority (paras 12 and 13)*

**Para 13** – identifies law which applies to an LPA depending on where P is habitually resident / the law which P specifies.

**Para 19** - protective measure is to be recognised in England and Wales if made in another country on the ground that P is habitually resident there unless exceptions apply (eg taken in breach of rules of natural justice; contrary to public policy).

For an example of a refusal to recognise US Letters of Guardianship see **Re: AB** where AB was brought to the UK by her mother (who was her guardian in the US) in the context of an investigation in New York state into whether the mother was providing 'stable housing or proper care' (para 33h). Note there was an application in course in the US to discharge the guardianship. The Court refused to recognise the guardianship on grounds of public policy, in particular that of judicial comity "it would be contrary to the requirements of judicial comity to recognise now that very authority which the American court has been asked to review" (para 96) **Re: AB** [\[2021\] COPLR 30](#)

The COP cannot challenge findings of fact made by foreign courts, including as to P's habitual residence **Aberdeenshire Council v. SF** [\[2023\] EWCOP 28](#) paras 11 and 12.

**Para 24** – the Court may not review the merits of a measure taken overseas.

For an application / discussion of these provisions to an order from the Irish High Court moving an Irish citizen between hospitals in England see **Health Service Executive of Ireland v. Ellern Mede Moorgate** [\[2020\] COPLR 501](#)

Protective measures means measures made or recognised by a foreign court, **Re: JMK** [\[2018\] COPLR 179](#). In that case a continuing power of attorney from Canada was not a "protective measure" for the purposes of schedule 3 MCA.

See **SoS for the Home Department v Sergei Skripal and Yulia Skripal** [\[2018\] COPLR 220](#) for the application of schedule 3 in deciding whether to carry out medical tests on victims of alleged poisoning.

See [COPR Part 23](#) for the rules and PD 23A.

## 9. DEPRIVATION OF LIBERTY

### ECHR ORIGIN

#### Article 5 ECHR

*(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*

*(e) the lawful detention of persons ... of unsound mind...*

*(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

*(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation*

There was no legal protection in the UK for people whose treatment amounted to a deprivation but who did not come within the MHA 1983. This “gap” (the Bournemouth Gap, named after the hospital in HL, below) was found contrary to article 5 by ECtHR in a case where autistic man was kept in hospital as a “voluntary patient” – the ECtHR found that the English doctrine of necessity allowed arbitrary detention and procedures to challenge that detention were inadequate, **HL v. United Kingdom 81 BMLR 131**.

The CA has confirmed that the MCA plugs this gap, **G v. E** [\[2010\] COPLR Con Vol 431 para 25](#)

Detention for mental infirmity is only lawful for article 5 purposes if effected in an appropriate clinical environment but article 5(1) is not otherwise concerned with suitability of the treatment or conditions:

*The Court would further accept that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention... However, subject to the foregoing, Article 5(1)(e) is not in principle concerned with suitable treatment or conditions* **Ashingdane v United Kingdom** (1985) 7 EHRR 528, para 44

### DEFINITION

What amounts to a deprivation?

Three elements, **Storck v Germany** [2005] ECHR 61603/00:

- Objective element of confinement in a particular place for a non-negligible time
- Subjective element of lack of valid consent
- Imputable to the state

• Not just a restriction

Not all restrictions on liberty are deprivations of liberty which might breach article 5. The difference is one of degree or intensity, **Guzzardi v Italy** (1980) 3 EHRR 333 para 92.

• Domestic application

The Supreme Court identified an “acid test” of two components: (1) P is not free to leave and (2) is under constant supervision and control **Cheshire West v. P** [2011] COPLR Con Vol 273. Many other possible tests to identify a DoL were put forward and rejected, including: how good the care is, relative normality, compliance and the purpose of the deprivation eg that restrictive care is needed to make the person safe and compliance. “A gilded cage is still a cage” (paras 46 and 50).

This was explained in 2020 in a case about the authorisation of care for children:

*The principal point of Cheshire West was that the living arrangements of the mentally disabled people concerned had to be compared with those of people who did not have the disabilities which they had. They were entitled to the same human rights, including the right to liberty, as any other human being. The fact that the arrangements might be made in their best interests, for the most benign of motives, did not mean that they were not deprived of their liberty*

**Re D (A Child) (Residence Order: Deprivation of Liberty)** [2020] COPLR 73 para 41, Lady Hale.

Imputable to the state – consider the making and funding of the arrangements and the use of statutory powers, see **Re D** above para 43.

An early case post **Cheshire West** identified specific factors which might indicate a DOL: lack of objection, being at home, type, duration, effects and manner of implementation, whether restrictions were continuous, role of the family in setting up arrangements, **W City Council v. Mrs L (Deprivation of Liberty Own Home)** [\[2015\] COPLR 337](#), stressing the need to balance them all out and noting Mrs L had 3 visits per day, para 7.

Complying with Cheshire West challenged local authorities and the Courts, requiring at least tens of thousands of additional DOL authorisations and court orders.

### BOUNDARIES OF A DEPRIVATION OF LIBERTY

A useful application of the principles is **Re: AB (Deprivation of Liberty)** [\[2020\] EWCOP 39](#). AB was 36 years old, had Asperger's and was subject to guardianship under MHA. She lived in supported accommodation with 24 hour staff. She has to live there. In practice staff know when she arrives and leaves. However she can come and go as she wishes and do what she wants. This was found to be borderline but ultimately a deprivation of liberty.

*When considering a deprivation of liberty it is not sufficient just to see what actually happens in practice but to consider what the true powers of control actually are (Re: AB para 13).*

Compare the finding of no DoL where P was not free to leave (there were sensors on the doors) but was not under continuous supervision or control, receiving 3 visits per day **W City Council v. Mrs L** [\[2015\] COPLR 337](#)

Free to leave does not mean free to go out but free to leave permanently to live where and with whom P chooses, **Birmingham CC v. D** [\[2018\] PTSR 1791](#) para 22 relying on JE v. DE.

- Intensive care

A restriction resulting from life-saving treatment for physical illness which would apply to people without mental impairment is not a DoL, **Ferreira v. HM Senior Coroner for Inner South London**, CA [\[2017\] COPLR 172](#) para 10 but where the treatment differs from that given to others an order might be required eg to keep someone in a delivery suite until a baby was delivered, **NHS Trust v FG** [\[2015\] 1 WLR 1984](#)

- Private care

#### **Private care**

An entirely private care package (funded by a damages award and delivered in the person's own home) which amounted to a DoL could require authorisation by the Court even if there was no direct state involvement in the care or support, because of the state's duty to prevent arbitrary DoL, the "positive obligation" in article 5, **SoS for Justice v. Staffordshire CC** [\[2017\] COPLR 120](#).

Compare with **Re: A and C (Equality and Human Rights Commission Intervening)** [\[2010\] COPLR Con Vol 10](#) on care for two people at home, one an adult and one a child and **W City Council v. Mrs L (Deprivation of Liberty Own Home)** [\[2015\] COPLR 337](#) taking into account that care was privately arranged as one of many factors.

<ul style="list-style-type: none"> <li>• <b>Conditions of detention</b></li> </ul>	<p>Conditions of detention rarely or exceptionally affect the lawfulness of a deprivation under art 5(1)(e). Where it was established that return to hospital would cause P harm and a community placement was available, Lieven J found there would be a breach if P was forced to return, <b>Cumbria, Northumberland, Tyne and Wear NHS Foundation Trust v. EG</b> <a href="#">[2022] COPLR 83</a> para 64.</p>
	<p>Two questions to ask (1) is it in P’s best interests to live at a property if, although deprived of liberty, there is no alternative with less restriction; and (2) whether the accommodation was so unsuitable as to be unlawfully in breach of article 5, <b>North Yorks v. MAG</b> <a href="#">[2016] COPLR 346</a> para 23. The Court must consider the relationship between the ground permitting a DoL and the place and conditions of detention</p>
<ul style="list-style-type: none"> <li>• <b>Emergency</b></li> </ul>	<p>Winterwerp states that “except in emergency cases, the individual concerned should not be deprived of his liberty” and so a 4 week order in the UK might on duration basis not be a DOL – <b>Redcar &amp; Cleveland PR, SR, TR</b> <a href="#">[2019] COPLR 446</a> para 41</p>
<ul style="list-style-type: none"> <li>• <b>Minimum conditions before DoL can be lawful for ECHR purposes</b></li> </ul>	<p>Minimum conditions before someone can be considered of “unsound mind” and deprived of their liberty:</p> <ul style="list-style-type: none"> <li>• Reliably shown by objective medical evidence to be of unsound mind</li> <li>• Mental disorder of a kind or degree warranting compulsory confinement</li> <li>• Continued confinement only if disorder persists</li> <li>• Only justified where other, less severe, measures have been considered and found insufficient</li> </ul> <p>See eg <b>Winterwerp</b> para 39 or <b>Stanev v. Bulgaria</b> para 143 – 145 or <b>MS v. Croatia</b> 75450/12 paras 139-147.</p> <p>See <b>Wakefield v. DN</b> <a href="#">[2019] COPLR 525</a> para 26 showing the need for unsoundness of mind domestically</p>
<ul style="list-style-type: none"> <li>• <b>Using deprivations of liberty as a form of detention / to protect the public</b></li> </ul>	<p>Compare the Wakefield and Birmingham cases:</p> <p>In <b>Wakefield MDC v. DN</b> <a href="#">[2019] EWHC 2306</a> a 25 year old man with autism, GAD and EUPD was sentenced to a 2 year community order with a mental health treatment requirement under CJA 2003 s.207. Under CJA those providing accommodation could not deprive someone of their liberty. The Court made orders under MCA in relation to P having meltdowns but would not authorise a DoL under either the inherent jurisdiction or MCA.</p>

In **Birmingham CC v. Lancashire CC v JTA** [\[2020\] COPLR 62](#) it was found to be in P's interests not to commit offences or be at risk of recall under MHA (applying **Y County Council v. ZZ** [\[2013\] COPLR 463](#)). *Birmingham* concerned SR, a man with autism and learning difficulties who needed supervision to avoid alcohol and offending, Lieven J para 41:

*In those circumstances the provisions of the care plan in terms of supervision and ultimately deprivation of liberty is, as Moor J put it, 'to keep him out of mischief' and thereby assist in keeping him out of psychiatric hospital. This is strongly in his best interests, as well as being important for reasons of public protection*

For an example of the Court accepting that someone at high risk of further offending had capacity and so “any further offending is a matter for the Criminal Justice System” see **DY v. A City Council** [\[2022\] EWCOP 51](#)

The consequence of the decision in **Secretary of State for Justice v MM** [2018] UKSC 60 was that restricted patients who are found to be eligible for discharge under s.72 / s.73 MHA cannot be subject to a conditional discharge authorising further detention in the community as it would amount to a deprivation of their liberty.

## AUTHORISATION

- Requirement for authorisation

A DoL needs to be authorised to be lawful: *“Neither the local authority nor the organisation operating the school had any power to deprive C of his liberty. The deprivation which did occur was accordingly unlawful and contrary to Article 5 of the European Convention”* **R (C) v. A Local Authority** [2011] COPR Con Vol 972 para 105.

- Modes of authorisation

There are three lawful ways to authorise a DoL in MCA, **section 4A MCA**:

- A relevant decision of the Court, **s.4A(3) MCA**
- An authorisation under sched A1 MCA in relation to a hospital or care home, **s. 4A(5) MCA**
- Providing vital or life-saving treatment pending application to Court, **s. 4B MCA**. For Article 5 purposes the Court has a duty to examine the issues :*Court must be satisfied that they have assessed and scrutinised the pertinent issues thoroughly. This means that the domestic courts must subject deprivations of liberty to thorough scrutiny so that the detained persons enjoy effective procedural safeguards against arbitrary detention in practice ...”* **MS v. Croatia** 75459/12 para 146.

### **Other ways to authorise a DOL outside the MCA**

In limited circumstances a DOL can be authorised under **s.25 Children Act 1989** (secure accommodation orders) – see **Re: D (a child)** [2020] 2 All ER 399 – *“s 25 is not intended to be widely interpreted”* para 113

Possibly, the High Court can authorise a DoL exercising the inherent jurisdiction eg **NHS Trust v. Dr A** [2013] COPLR 605 – where force feeding was approved to protect art 2 rights where authorisation not possible under s.63 MHA or MCA (note P must be of unsound mind for a DOL to be within article 5). However see **Mazhar v. Birmingham Community Healthcare** [2020] EWCA Civ 1377, Baker LJ para 52 keeping the existence of this power open for consideration in the future.

Parents - There has been a long running dispute about whether parents can authorise the deprivation of liberty of their child (or in article 5 terms give substitute consent for the subjective element limb of *Storck*, above). It is now established that a parent cannot authorise the state to deprive a 16 or 17 year old of their liberty (**Re: D (a child) (Residence Order: Deprivation of Liberty)** [2020] COPLR 73, SC). The Court went on to say *“Logically, this conclusion would also apply to a younger child whose liberty was restricted to an extent which was not normal for a child of his age, but that question does not arise in this case”* (para 50).

- **Authorisation procedure Schedule A1 MCA**

The system was due to be replaced with Liberty Protection Safeguards at some point in 2023 but the date has been put back, effectively indefinitely

- **Qualifying requirements**

**Qualifying requirements** for a DoLs authorisation are (**paras 12 -20 in [Part 3 Sched A1 MCA](#)**):

- The age requirement – being 18 or older
- The mental health requirement – suffering from a mental disorder, including a learning disability. This will require recent medical evidence **KC v. Poland** [\[2014\] ECHR 1322](#)
- The mental capacity requirement – if he *“he lacks capacity in relation to the question whether or not he should be accommodated in the relevant hospital or care home for the purpose of being given the relevant care or treatment”*. Applied to the situation where P had capacity over care but not residence in **Tower Hamlets v. A** [\[2020\] COPLR 609](#). HHJ Hilder found that an authorisation could be issued as P’s capacity over residence was to choose between two places where care was available but there was only one place available
- The best interests requirement – there are four elements of this inc that it is necessary for the person to be detained to prevent harm to them and that the detention is proportionate to the likelihood of the person suffering harm and the seriousness of that harm
- The eligibility requirement – the person not being ineligible (see below)
- The no refusals requirement – the person has not made a valid advance decision in respect of the treatment

- **Urgent authorisation**

**Urgent authorisation**

- Granted by the managing authority of the care home / hospital
- Available where a standard authorisation has or will be applied for but care has to start before it could be granted, para 76 sched A1 MCA
- Takes effect at the exact moment it is made **Re MB** [\[2010\] COPLR Con Vol 65](#)
- Can only last 7 days with one renewal (which can only be made by the supervisory body), **para 77/78 sched A1 MCA**

- Standard authorisation

### Standard authorisation

- Granted by the supervisory body (ie local authority)
- Managing authority must apply where a resident meets the requirements/ is likely to do so within 28 days
- The supervisory body must first carry out an assessment of each of the above qualifying requirements, [para 33 of Sched A1 MCA](#) – this has proved administratively burdensome
- The maximum period is 1 year, [para 42\(2\) Sched A1 MCA](#)
- The authorisation can be subject to conditions, [para 53 Sched A1 MCA](#)
- Who can carry out assessments is subject to regulations, **The Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008**, SI 2008/1858

- Relevant Person's Representative (RPR)

Statutory scheme to ensure there is someone to advance the interests of P

Appointment:

- RPR must be able to maintain contact with P, represent P in matters relating to the schedule and support the person in matters connected with the schedule, [para 140 Sched A1 MCA](#)
- Appointed by supervisory body on granting standard authorisation, [para 139 Sched A1 MCA](#)
- There are detailed regulations about how an RPR is appointed and how the appointment is terminated.
- Although the supervisory body makes the appointment the right of nomination is first to the relevant person, a donee of an LPA, a deputy or the Best Interests Assessor: **The Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008**, SI 2008/1315
- If a person is not “eligible” under this scheme a supervisory body should not appoint them **AJ v. A Local Authority** [\[2015\] COPLR 167](#) paras 80-82

For a case considering the role of RPR and criticism of an LA for appointing as RPR a family member who would not bring a challenge to a DOL see **AJ v. A Local Authority** [\[2015\] COPLR 167](#). An LA should “*not to permit access to a court to be dependent on the exercise of discretion by a third party who supports the deprivation of liberty*”. For a case on the detail of appointing an RPR see **Hillingdon v. JV** [\[2020\] COPLR 264](#)

### LIMITS TO STATE POWER AND TO THE ROLE OF STANDARD AUTHORISATION

The standard authorisation process must not be used by a local authority to shut down a genuine dispute about the residence and care of people lacking capacity:

*... The DOL scheme is an important safeguard against arbitrary detention. Where stringent conditions are met, it allows a managing authority to deprive a person of liberty at a particular place. It is not to be used by a local authority as a means of getting its own way on the question of whether it is in the person's best interests to be in the place at all...*

**Hillingdon LBC v. Neary** [2011] COPLR Con Vol 632, para 33

The Judge also found that a local authority must “*scrutinise the assessment it receives with independence and a degree of care that is appropriate to the seriousness of the decision*”. Failing that “*it cannot expect the authorisations to be legally valid*”

A local authority has “*no power to regulate, control, compel, restrain, confine or coerce. They are concerned with the provision of services and support*” **Re A and C (Equality and Human Rights Commission intervening)** [2010] COPLR Con Vol 10 para 66.

A local authority needs a court order to move someone from their home, they have no statutory power to do this **Re AG** [2016] COPLR 13

A local authority is under a safeguarding duty as may be a mental health trust **Re: DD (no4) (Sterilisation)** [2015] EWCOP 4 paras 22-28

**Care Act 2014, s.42** – where adult with needs for care or support is “at risk of abuse or neglect” the LA must make whatever enquiries it thinks necessary to decide whether any action should be taken. Section 43 provides that Safeguarding Adults Board must be created.

### CHALLENGES TO AN AUTHORISATION

- **Section 21A**

Section [21A MCA](#) allows a challenge to a standard authorisation, in particular:

- (1) whether P meets the qualifying requirements
- (2) the period during which it is in force
- (3) its purpose
- (4) any conditions

When the court determines any of those questions it may make an order varying or terminating the standard authorisation or directing the supervisory body to vary or terminate the standard authorisation (s.21A(3)).

The Court may go beyond those questions and make declarations under s.15 or make decisions for P under s.16, **CC v. KK and STCC** [\[2012\] COPLR 627](#) para 16:

*When a standard authorisation has been made by a supervisory body, [s 21A\(2\)](#) empowers the Court of Protection to determine any questions relating to, inter alia, whether P meets one or more of the qualifying requirements. In particular, once the court determines the question, it may make an order varying or terminating the standard authorisation: [s 21A\(3\)\(a\)](#). But once an application is made to the court under [s 21A](#), the court's powers are not confined simply to determining that question. Once its jurisdiction is invoked, the court has a discretionary power under [s 15](#) to make declarations ... [and] ... wide powers under [s 16](#) to make decisions on P's behalf in relation to matters concerning his personal welfare or property or affairs*

In **DP v. A Local Authority** [\[2020\] EWCOP 45](#) the Court held that a s.21A challenge is to the authorisation and the Court's role is to vary or discharge the authorisation. An interim capacity declaration is neither permitted nor required as the authorisation remains in force until it expires, is terminated or suspended. The Court does not become responsible for authorising the person's DOL, paras 35, 45, 46.

<ul style="list-style-type: none"> <li>• Errors of form may be disregarded</li>   <li>• Must be an effective right</li> </ul>	<p>Many <a href="#">s.21A</a> applications become complicated. Hayden J suggested it should be possible to keep them simple (DP para 41):</p> <p style="padding-left: 40px;"><i>...I doubt that it was necessary to instruct a further expert on what is, when properly identified, an essentially uncomplicated issue ie does DP have capacity to decide to change care homes to be nearer to his friend Bill and, if not, whether it is in his best interests to do so</i></p> <p>P and his/ her RPR is entitled to no means/ no merits legal aid but this does not apply where an application is really about something else, eg medical treatment <b>Director of Legal Aid Casework v Briggs</b> <a href="#">[2017] COPLR 370</a>, CA.</p> <p>Where a standard authorisation referred to the wrong name 19 times the Court was entitled to conclude that this was a typographical error <b>Re: YC; YC v. City of Westminster</b> <a href="#">[2021] COPLR 481</a>, para 75</p> <p style="padding-left: 40px;"><i>I do not accept that errors of form necessarily invalidate the authorisation. Even in the serious domain of authorisations of deprivation of liberty, there is room for a degree of pragmatic realism...</i></p> <p>The state is under a duty to “enable” detained people to have their detention considered by a Court. The main statutory route to this is <a href="#">s.21A</a> but the duty on public bodies is wider, <b>AJ v. A Local Authority</b> <a href="#">[2015] EWCOP 5</a>:</p> <p style="padding-left: 40px;"><i>... there is a positive duty on public authorities under the Convention to ensure that a person deprived of liberty is not only entitled but enabled to have the lawfulness of his detention reviewed speedily by a court, to ensure that a mentally incapacitated adult is afforded independent representation, enabling them to have their Convention complaints examined before a court or other independent body .... a clear duty to ensure that he or she is able to challenge a deprivation of liberty in a process that is judicial, accessible and independent of the detaining authority</i></p>
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### COPDOL11

Practice Direction [11A](#) – sets out two procedures: (1) [s.21A MCA](#) and (2) streamlined procedure known as [COPDOL11](#):

- Duty on applicant of full and frank disclosure including identifying factors needing judicial scrutiny, suggesting arrangements may not be in best interest or indicating an order should not be made
- Accompanied by draft order
- Consultation with P and other persons – with detail set out

See **Re: JDO; Barnet v. JDO** [\[2020\] COPLR 226](#) for an example of how not to proceed with the OS submitting the LA showed “*a lack of insight, even with the benefit of hindsight, into the sort of concern that should trigger the applicant to reconsider whether the Re X procedure is an appropriate one to use*” including not consulting properly and not disclosing opinions of other people if the LA thought them wrong.

### ELIGIBILITY

MCA says someone can be “ineligible to be deprived of their liberty” under MCA - it means they are ineligible to have that deprivation authorised under MCA. This largely applies where the person is already subject to MHA.

[Sched 1A MCA](#) sets out 6 circumstances – Cases A to E – where someone is ineligible:

- Note that person who is ‘ineligible’ cannot have their detention authorised under the Sched A1 procedure or by COP ([s.16A\(1\) MCA](#))
- Two “cases” in sched 1A have caused most problems: (1) Case B, where someone who is “subject to the hospital treatment regime but not detained” – ie often someone on leave under s.17 MHA - where any authorisation under MCA would conflict with the leave; and (2) Case E, where someone is “*within the scope of MHA*” while not subject to any “*of the mental health regimes*”, ie MHA orders – and “*objects to being a mental health patient or to being given some or all of the ... treatment*”. See **Manchester University Hospitals v. JS** [\[2023\] EWCOP 33](#) para 48 -for a review of these terms

This complexity has created lacunae:

- Someone lacking capacity to decide about their medical treatment who is subject to MHA detention – where the treatment involves a DoL and is not authorised under s.63 MHA the DoL element of the treatment cannot be authorised under MCA. The Court was forced in that situation to use the inherent jurisdiction (*An NHS Trust v. Dr A* [\[2013\] COPLR 605](#)).
- Where the MCA eligibility assessor decides that P is “*within the scope of the MHA*” but the doctors treating under MHA consider P is not within the scope of the MHA - neither Act could be used to authorise a DoL

In addition the relationship of MHA and MCA for someone receiving treatment under MHA who needs treatment for an unrelated physical health condition is complex, see **NHS Trust v. FG** [\[2014\] COPLR 598](#) paras 85-89

The MHA does not allow a DOL to be placed on someone conditionally discharged under s.37/41 MHA but the powers of COP under MCA could be used **Birmingham CC v. Lancashire CC v. JTA** [\[2020\] COPLR 62](#) paras 43-46.

Judge Burrows found that someone was unlawfully deprived of their liberty after being held in a hospital after the expiry of their detention under s.2 MHA pending a care plan being put in place in the community. They should have been detained under s.3 MHA until that care was available. Their detention could not be authorised under MCA:

*If the patient has to be detained for treatment for their mental disorder, and there is no alternative outside the hospital setting, and no other treatment plan available, then it seems clear to me the patient should not be detained under the MCA but rather under the MHA.*

**Manchester University Hospitals NHS Trust v. JS** [\[2023\] EWCOP 12](#)

This was upheld by Theis J in **Manchester University Hospitals v. JS** [\[2023\] EWCOP 33](#)

### LIBERTY PROTECTION SAFEGUARDS

[Mental Capacity \(Amendment\) Act 2019](#) – a short 6 section Act trying to make simple what should be simple. The key is a new schedule AA1 to MCA. Before this can be introduced there has to be a draft Code of Practice and a consultation. The intended introduction date of October 2020 has been lost and in April 2023 implementation was delayed indefinitely. When introduced the new system will be broadly as follows:

- Authorisation conditions: P lacks capacity to consent; P has a mental disorder within the meaning of s.1(2) MHA 1983 and the arrangements are necessary to prevent harm to P and proportionate to the likelihood and seriousness of that harm
- Will apply to any environment: supported living, shared lives and private settings as well as hospitals and care homes
- Will apply from age 16
- Will cover transport to the place of detention (mistakenly not covered by standard or urgent authorisations)

## 10. HUMAN RIGHTS AND COMPENSATION

### ARTICLE 2 – RIGHT TO LIFE

Article 2:

1. *Everyone's right to life shall be protected by law...*
2. *Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary for [defined purposes eg defending people from violence]*

For a summary of duties to investigate loss of life, protect the disabled and prevent ill treatment:

*131. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Where the authorities decide to place and maintain in detention a person with disabilities, they should demonstrate special care in guaranteeing such conditions as correspond to any special needs resulting from his disability ... More broadly, the Court has held that States have an obligation to take particular measures to provide effective protection of vulnerable persons from ill-treatment of which the authorities had or ought to have had knowledge ...*

**Campeanu v. Romania**, Application 47848/08

- **Operational duty**

There is an operational duty to protect life where (1) assumption of responsibility; (2) circumstances of sufficient vulnerability; (3) exceptional risk arises, **Rabone v Pennine Care Foundation Trust** [2012] 2 AC 72 concerning a voluntary patient in a psychiatric hospital.

For an application of this to someone with a learning disability who died in the absence of any proper care see **Campeanu**, above.

The duty will also arise where the state is aware of appalling conditions, either because it is told or because of regulatory inspections. There are debates about whether actual or imputed knowledge is required. Systemic or structural dysfunction can lead to a breach of article 2 (**Lopes de Sousa v Portugal** [\(2018\) 66 EHRR 28](#)).

Other examples include:

- (1) protecting prisoners from other prisoners, **Edwards v UK** [\(2002\) 35 EHRR 487](#)
- (2) protecting prisoners from suicide, **Keenan v UK** [\(2001\) 33 EHRR 913](#) – but note para 91 find that “restraints will inevitably be placed on the preventive measures by the authorities” by arts 5 and 8
- (3) protecting detained immigrants, **Slimani v France** (2004) 43 EHRR 1068
- (4) protecting psychiatric patients, **Savage v. South Essex Partnership Foundation Trust** [\[2009\] AC 681](#)
- (5) protecting elderly care home residents on transfer, **Watts v United Kingdom** (2010) 51 EHRR SE 66

There are also examples from outside treatment of individuals including industrial and environmental risks

The operational and procedural duties do not apply to someone in a care home simply because a DOLS authorisation is in place unless the death results from extreme conditions or failings of which the state was aware from inspection reports (**R (Maguire) v. MH Coroner for Blackpool** [\[2020\] COPLR 654](#), paras 96-97). The negligent provision of ordinary medical treatment does not trigger an article 2 operational duty

For an example of the court interfering in art 8 rights – and closely considering any impact on art 5 – in order to protect someone’s right to life:

*Mr Meyers's life requires to be protected and I consider that, ultimately, the State has an obligation to do so. Additionally, it is important to recognise that the treatment of Mr Meyers has not merely been neglectful but abusive and corrosive of his dignity*

**Southend on Sea v. Myers** [\[2019\] COPLR 202](#) para 42

Deciding on the withdrawal of life-sustaining treatment engages a state's positive obligations under Article 2 but permitting withdrawal and the circumstances and procedure under which it is permitted (and the balance between the right to life and right to autonomy) are within the margin of appreciation of states, **Lambert v. France** [\[2016\] 62 EHRR 2](#)

- Article 2 engaged in withdrawal cases

Burke was found inadmissible by ECtHR on the basis that domestic protections were sufficient:

*A doctor, fully subject to the sanctions of criminal and civil law, is only therefore recommended to obtain legal advice, in addition to proper supporting medical opinion, where a step is controversial in some way. Any more stringent legal duty would be prescriptively burdensome - doctors, and emergency ward staff in particular, would be constantly in court – and would not necessarily entail any greater protection*

**Burke v. UK** 19807/06 rejecting complaints under arts 2, 3, 8 and 14 as manifestly ill-founded

An article 2 complaint was manifestly ill-founded in **Gard v. United Kingdom** [\[2017\] 2 FLR 773](#) because of the domestic regulatory framework, the child being represented in court by the guardian and the hospital having applied to court

Judicial scrutiny is “particularly important” for a treatment plan which prioritises autonomy over preservation of life, **Cambridge University Hospitals NHS Foundation Trust v. RD** [\[2022\] EWCOP 47](#) where P had twice injured her neck in acts of self-harm.

### ARTICLE 3 – INHUMAN AND DEGRADING TREATMENT

<ul style="list-style-type: none"> <li>• Minimum level of severity</li> <li>• Procedural aspect</li> <li>• Example</li> </ul>	<p>Article 3:</p> <p style="text-align: center;"><i>“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”</i></p> <p>Characteristics:</p> <ul style="list-style-type: none"> <li>• Absolute – no derogation possible – and applies irrespective of person’s behaviour</li> <li>• Minimum level of severity required – assessment is relative: duration, effects, who the victim is, intention</li> <li>• If force is used the court must satisfy itself that it is necessary but a measure which is “a therapeutic necessity” cannot be inhuman or degrading, <b>Herczegfalvy v. Austria</b> <a href="#">(1993) 15 EHRR 437</a> paras 82-83</li> <li>• Procedural aspect: a thorough and effective investigation capable of leading to the identification and punishment of those responsible, <b>Selmouni v. France</b> <a href="#">25803/94 [2000] 29 EHRR 403</a>; even if no complaint; must be prompt and thorough</li> </ul> <p>For an example of a breach of article 3 in relation to care for infirmity of mind: P was involuntarily admitted to hospital for “psychotic agitation” and tied to a bed for 15 hours in an isolation room (1) substantive aspect - treatment was found to breach article 3 because the notes did not show P was aggressive before restraint, other approaches were not tried and restraint was not properly monitored paras 103-111; (2) procedural aspect – failure to investigate complaints <b>MS v. Croatia</b> <a href="#">75450/12 [2015] ECHR 196</a></p>
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## ARTICLE 5 – RIGHT TO LIBERTY AND SECURITY OF THE PERSON

### Article 5

*5 (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*

...

*(e) the lawful detention of persons ... of unsound mind...*

See also 5(4) and 5(5) for a right to access a court and to compensation

### Characteristics:

- Article 5 is concerned with depriving someone of liberty and not “mere” restrictions on movement (see article 2 of protocol 4, which is not within the HRA) – difference is one of degree not kind, **Guzzardi v. Italy** (1980) 3 EHRR 333 para 93
- Lawful means lawful under domestic law – decision by a proper authority and not arbitrary

A brief /time limited order might not be a breach of art 5 for example a 4 week order in **Redcar & Cleveland PR, SR, TR** [2019] COPLR 446 para 41 noting that Winterwerp states that “*except in emergency cases, the individual concerned should not be deprived of his liberty.*”

Positive obligation – a duty to investigate, a duty to provide supporting services and a duty to refer the matter to a court, **Re A and C (Equality and Human Rights Commission Intervening)** [2010] COPLR Con Vol 10 and **Staffordshire** [2017] COPLR 120 on when action is required, para 95:

*If, however, the local authority concludes that the measures imposed do or may constitute a deprivation of liberty, then it will be under a positive obligation ... to take reasonable and proportionate measures to bring that state of affairs to an end ... it might for example ... require the local authority to exercise its statutory powers and duties so as to provide support services for the carers that will enable inappropriate restrictions to be ended, or at least minimised*

- **Brief restrictions**

- **Positive obligation**

**Storck v. Germany** [\(2005\) EHRR 96](#).

*102. ... the Court considers that Article 5 § 1, first sentence, of the Convention must equally be construed as laying down a positive obligation on the State to protect the liberty of its citizens. ... The State is therefore obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge*

- LA can be liable

LA can be liable under art 5 where closely involved in care plan and service provision **Re: A and C (ECHR intervening)** [\[2010\] COPLR Con Vol 10](#) and under a duty to put matter before the Court in private arrangement **Staffordshire** [\[2017\] COPLR 120](#)

- Conditions of detention

Detention for mental infirmity is only lawful for article 5 purposes if effected in an appropriate clinical environment but article 5(1) is not otherwise concerned with suitability of the treatment or conditions:

*The Court would further accept that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention... However, subject to the foregoing, Article 5(1)(e) is not in principle concerned with suitable treatment or conditions*

**Ashingdane v United Kingdom** (1985) 7 EHRR 528, para 44

For a case considering conditions of detention as a breach of art 5(1)(e) see **Cumbria, Northumberland, Tyne and Wear NHS Foundation Trust v. EG** [\[2022\] COPLR 83](#) para 64, where it was established that return to hospital would cause P harm and a community placement was available.

This is based on **Rooman v Belgium** [\[2020\] MHLR 250](#)

*208. ... the current case-law clearly indicates that the administration of suitable therapy has become a requirement in the context of the wider concept of the "lawfulness" of the deprivation of liberty. Any detention of mentally ill persons must have a therapeutic purpose, aimed specifically ... at curing or alleviating their mental-health condition, including, where appropriate, bringing about a reduction in or control over their dangerousness. The Court has stressed that, irrespective of the facility in which those persons are placed, they are entitled to be provided with a suitable medical environment accompanied by real therapeutic measures, with a view to preparing them for their eventual release...*

- **Practical consequences for care plans**

There are practical consequences to article 5 – if a care plan involving a deprivation of liberty is not authorised then it must change. See **Wakefield MDC v. DN** [\[2019\] COPLR 525](#) where a 25 year old man with autism, GAD and EUPD was sentenced to a 2 year community order with a mental health treatment requirement:

*As Art 5 of the European Convention is currently engaged, and DN is objectively being deprived of his liberty, it follows that DN and the Applicants will need, urgently, to discuss and implement changes to his regime at Stamford House. Those aspects which currently deprive him of his liberty (and to which he does not agree) will need to be relaxed, essentially so that it becomes clear that he is 'free to leave'. [Note the judge explained a lack of co-operation might lead to his being re-sentenced for the original offences]*

- **Can be capacitous but of unsound mind for art 5 purposes**

Note a capacitous individual for MCA purposes may be of unsound mind for article 5 purposes and in an emergency someone can be deprived of their liberty without breaching article 5, **A local Authority v. BF** [\[2019\] COPLR 150](#), Baker LJ.

**Lack of alternatives** - If someone has nowhere else to go the available accommodation is likely to be in their best interests – assessors are required to compare practically available placements, **Re MB** [\[2010\] COPLR Con Vol 65](#)

For relationship of writ of habeas corpus and article 5 see **Evans v. Alder Hey** [\[2018\] EWCA Civ 805](#)

## ARTICLE 8 – RIGHT TO PRIVATE AND FAMILY LIFE (AND HENCE AUTONOMY)

### Article 8

*8 (1) Everyone has the right to respect for his private and family life, his home and his correspondence.*

*8 (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

For a recent example of the CoA applying article 8 (in the context of abortion) see: **In Re: AB (Termination of Pregnancy)** [\[2020\] COPLR 42](#)

**Re: P (Discharge of Party)** [\[2022\] COPLR 173](#) para 35 citing ECHR authority:

*'whether, having regard to the particular circumstances of the case and the serious nature of the decisions to be taken, those affected have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests.'*

Interference with art 8(1) rights is therefore possible if necessary (for the aims defined in art 8(2)) and proportionate.

Refusing to take up parents' preferred treatment of their child was an interference in article 8 rights but not a breach because it was proportionate (**Gard v. United Kingdom** [\[2017\] 2 FLR 773](#) para 123):

*The Court is also mindful that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. The Court has already found that the legal framework in place was appropriate and that the authorities have a margin of appreciation in this sphere. The Court therefore considers that the legal framework as a whole has not been shown to be disproportionate*

- Procedural element

- Interference must be necessary & proportionate

### Issues included within article 8

- Personal autonomy
- Right to establish relationships and become a parent

Orders under MCA and the inherent jurisdiction may interfere with article 8 rights or may protect their exercise but must be necessary and proportionate:

*... the use of the inherent jurisdiction in this context is compatible with Art 8 in just the same manner as the MCA 2005 is compatible. Any interference with the right to respect for an individual's private or family life is justified to protect his health and or to protect his right to enjoy his Art 8 rights as he may choose without the undue influence (or other adverse intervention) of a third party. Any orders made by the court in a particular case must be only those which are necessary and proportionate to the facts of that case, again in like manner to the approach under the MCA 2005*

**DL v. A local authority** [\[2012\] COPLR 504](#) para 66

*A best interests assessment, properly conducted under English law in accordance with established principles, is fully compliant with the Convention...*

**In re: M (Adult Patient) (MCS: Withdrawal of Treatment)** [\[2012\] 1 WLR 1653](#) para 96

Personal autonomy is an important element of Article 8:

*The freedom to accept or refuse specific medical treatment, or to select an alternative form of treatment, is vital to the principles of self-determination and personal autonomy. A competent adult patient is free to decide, for instance, whether or not to undergo surgery or treatment, or, by the same token, to have a blood transfusion. However, for this freedom to be meaningful, patients must have the right to make choices that accord with their own views and values, regardless of how irrational, unwise or imprudent such choices may appear to others*

**Jehovah's Witnesses of Moscow v Russia** [\(Application No 302/02\) \[2011\] 53 EHRR 4](#), at para 136.

Includes right to establish relationships with other people, **Niemietz v Germany** [\(1993\) 16 EHRR 97](#) and respect for decisions to become and not to become a parent, **Evans v United Kingdom** [\[2006\] 2 FLR 172](#)

<ul style="list-style-type: none"> <li>• How a person dies</li> </ul>	<p>How someone dies is within ambit of article 8: <b>Pretty v. United Kingdom</b> <a href="#">(2002) 35 EHRR 1</a>, including the right to die at home, <b>VE v. AO</b> <a href="#">[2020] COPLR 844</a> para 28</p>
<ul style="list-style-type: none"> <li>• Care regimes</li> </ul>	<p>Where P had a personality disorder and a record of paedophilia and was subject to a regime including his correspondence being checked, strip search and listening to phone calls Article 8 was engaged and required a detailed policy – in that case involving the NHS Trust and CQC <b>J Council v. GU</b> <a href="#">[2013] COPLR 83</a></p>
<ul style="list-style-type: none"> <li>• Finding someone to lack capacity</li> </ul>	<p>Legal decision that someone lacks capacity “<i>undeniably constitutes a serious interference</i>” and in the circumstances not necessary or proportionate – but that relates to a system where someone could be declared generally incapacitated, <b>AN v Lithuania</b> <a href="#">[2017] 65 EHRR 23</a></p>
<ul style="list-style-type: none"> <li>• Compensation</li> </ul>	<p>See <b>R (Bernard) v. London Borough of Enfield</b> <a href="#">[2003] UKHRR 148</a></p>
<ul style="list-style-type: none"> <li>• General</li> </ul>	<p><b>Article 12</b> – right to marry and found a family. Discussed in <b>Re: DD (No 4) (Sterilisation)</b> <a href="#">[2015] EWCOP 4</a> paras 99-102</p> <p><b>Article 15</b> – permits derogation from some articles of the ECHR in time of “<i>public emergency threatening the life of the nation</i>” – see <b>BP v. Surrey CC</b> <a href="#">[2020] EWCOP 17</a> and <a href="#">[2020] EWCOP 22</a> for discussion re: arts 5 and 8 during the Covid pandemic but note that a state party to the Convention must notify (not a Court) and the notification must include “<i>the measures taken and the reasons</i>”. Art 15 is not one of the articles in the HRA</p> <p>Standing for EHCR complaint – see <b>Gard v. United Kingdom</b> <a href="#">[2017] 2 FLR 773</a> and <b>Lambert v. France</b> <a href="#">46043/14</a></p>
<ul style="list-style-type: none"> <li>• Private providers exercising function of public nature</li> </ul>	<p>Where a local authority pays for personal care at home or accommodation with nursing / personal care the provider is taken to be exercising a function of a public nature for the purposes of <a href="#">s.6(3)(b) Human Rights Act 1998</a> – <a href="#">s.73 Care Act 2014</a>. The result is the body falls within <a href="#">s.6(1) Human Rights Act</a> “<i>It is unlawful for a public authority to act in a way which is incompatible with a Convention right</i>”</p>
<ul style="list-style-type: none"> <li>• Duties on local authorities</li> </ul>	<p>Safeguarding duties in <a href="#">Care Act 2014</a> – LA must take “whatever action it thinks necessary” to decide what action to take about an adult in its area who is at risk of abuse / neglect and who cannot protect themselves because of their need for care and support <a href="#">s.42 Care Act 2014</a>. Note Safeguarding Adults Boards and Reviews in ss.43/44</p> <p>Duty to investigate welfare of vulnerable adult, impliedly in common law, <b>Re: Z (Local Authority Duty)</b> <a href="#">[2005] 1 FLR 740</a></p>

- Specialist care is required for people with additional needs

*“...despite the plethora of Government guidance and regulation, the court is left with a worrying impression that urban myth and so called 'common sense' rather than expert advice and multi-disciplinary working practices continues to be influential in some residential settings”.*

**R (C) v. A Local Authority** [\[2011\] COPLR 972](#) para 122, the Blue Room case.

- Statutory defence

**Section 5 MCA –**

IF a person does an act “in connection with the care or treatment of another person” (P) AND takes reasonable steps to establish if P has capacity AND reasonably believes (1) that P lacks capacity; and (2) the act is in P’s best interests THEN there is no liability arising from the lack of valid consent

Liability in negligence and criminal law is not affected

**Section 5 “provides a significant degree of protection from liability” An NHS Trust v. Y v Intensive Care Society** [\[2019\] AC 978](#) para 36 Lady Black.

**Section 6 MCA** – section 5 only applies to restraint (as there defined) if D reasonably believes it is necessary to prevent harm to P; and it is in fact proportionate to the likelihood of harm and the seriousness of that harm. Note that section 5 does not give any protection against liability for a DOL, **section 4A and 4B MCA.**



**The Local Authority and Mrs D** [\[2013\] EWCOP B34](#) DJ Mainwaring-Taylor. Mrs D had respite care but LA refused to allow her to return home. No COP application for 8 months and then not pursued urgently with a 4 month delay before first hearing. At that hearing Court found that 4 months to be a deprivation but other periods were in issue. Judge approved £15,000 plus costs for Mrs D and £12,500 plus costs for Mr D commenting it *“does then fall within a reasonable range of sums, although it would be towards the lower end of the range if the damages sum paid in Neary was taken as a bench mark (rather than the high water mark)”* (para 55).

Where a 91 year old with dementia was moved to a locked care home without any authorisation costs and damages were agreed by the LA, **In the Matter of CP** [\[2015\] EWCOP](#) *“There is no evidence that consideration was given to the less restrictive option of supporting him at home in accordance with his wish to remain there”* (para 54). *“There was a procedural breach of P’s Article 5 and 8 rights for 13 months of his 17 month detention”* (para 58) and P was then found to be capacitous such that there was also a substantive breach. DJ Mort considered the band of awards was £3,000 - £4,000 per month (para 77).

Where the deprivation follows a judicial act the routes of challenge are appeal, judicial review and an action for damages for unlawful detention, **Mazhar v. Lord Chancellor** [\[2019\] EWCA Civ 1558](#), [\[2020\] 2 WLR 541](#).

#### **False imprisonment**

Where a person was in hospital for 4 months without proper capacity assessment the MCA had been over-ridden and P falsely imprisoned. The award was £130 per day for 119 days (about £3,900 pcm) plus £5,000 aggravated damages.

In any damages claim consider the statutory charge from LAA and the venue in which the claim should be brought

## 11. LASTING POWERS OF ATTORNEY

### STATUTORY BASIS

At common law a power of attorney is an arrangement made by deed where one person entrusts another to act on his/her behalf. At common law incapacity of the donor revokes the power of attorney. Statute changes that in certain circumstances, **Public Guardian v. DA** [2018] COPLR 493 para 2, Baker LJ

**s.9 MCA** – LPA confers power on donee/s to make decisions about personal welfare and/ or property and affairs but an LPA is only created if:

- Section 10 MCA is complied with
- Instrument conferring LPA is made and registered in accordance with schedule 1
- P must be over 18 and have capacity when the instrument is executed

**s.10 MCA** – donees can be appointed jointly or jointly and severally or a mixture (but jointly unless specified otherwise).

#### **s.11 MCA:**

- Donee cannot do anything intended to restrain P unless (1) donee reasonably believes that P lacks capacity; (2) donee reasonably believes it is necessary to prevent harm to P; and (3) the act is a proportionate response to likelihood and seriousness of that harm
- Health and Welfare LPA only applies where P lacks capacity or the donee reasonably believes P lacks capacity and is also subject to any advance decision to refuse treatment
- The authority extends to giving or refusing consent to treatment (unless the LPA says otherwise) but life-sustaining treatment is only within the authority if expressly included

**MCA** – P&A attorney cannot make gifts except (1) on a customary occasion or to a charity; and (2) value is not unreasonable in all the circumstances including size of estate. In **Chandler v. Lombardi** [2022] EWHC 22 (Ch) the Court held that a gift which was not authorised by s.12 MCA was void (not merely voidable)

[s.13 MCA](#) – P may revoke LPA when has capacity; and LPA is terminated by donee’s death or incapacity or, for P&A, donor’s or donee’s bankruptcy

[Sched 1](#) – sets out detailed requirements to make a valid LPA and to register it

### TERMS OF AN LPA

- Personal welfare LPA

[Code of Practice para 7.21](#) states that “personal welfare LPAs might include decisions about”.

- (1) where the donor should live and who they should live with
- (2) day-to-day care, including diet and dress
- (3) who the donor may have contact with
- (4) consenting to or refusing medical examination and treatment on the donor’s behalf
- (5) arrangements needed for the donor to be given medical, dental or optical treatment
- (6) assessments for and provision of community care services
- (7) whether the donor should take part in social activities, leisure activities, education or training
- (8) the donor’s personal correspondence and papers
- (9) rights of access to personal information about the donor
- (10) complaints about the donor’s care or treatment

The Code notes that donors can add restrictions or conditions and that the power only arises when P lacks capacity. Of course, donors need to see the terms of the LPA in question

- **Property & Affairs LPA**

[Code of Practice 7.36](#) states that “If a donor does not restrict decisions the attorney can make, the attorney will be able to decide on any or all of the person’s property and financial affairs. This might include:”

- (1) buying or selling property
- (2) opening, closing or operating a bank account
- (3) claiming, receiving and using benefits and pensions
- (4) receiving any income on behalf of the donor
- (5) dealing with the donor’s tax affairs
- (6) paying mortgage/ rent
- (7) insuring, maintaining and repairing property
- (8) investing
- (9) making limited gifts on the donor’s behalf
- (10) paying medical and care bills
- (11) applying for NHS and social care funding
- (12) repaying loans

- **Duties of an attorney**

The Code of Practice lists the following obligations of LPAs arising under the law of agency, [Code of Practice 7.58](#)

- duty of care when making decisions
- act on instructions: ie carry out the donor’s instructions
- fiduciary duty: not to take advantage of their position and not benefit themselves
- not delegate decisions, unless authorised to do so
- act in good faith
- respect confidentiality
- comply with the directions of the Court of Protection
- not give up the role without telling the donor and the court

- **Details of the scheme: 2007 Regulations**

**Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007** SI 2007/1253 set out the detail of the scheme (including rules on execution) with standard forms in schedule 1.

- **Registration of LPA**

The function of the Public Guardian when deciding whether to register an LPA is to consider if restrictions are ineffective or prevent the instrument being a valid LPA – the duty is either to register the LPA or apply to the Court

Practical difficulties created by an instrument do not matter **Re XZ; XZ v The Public Guardian** [\[2015\] EWCOP 35](#) paras 39-41 – in that case requirement was that incapacity was attested to by 2 psychiatrists and endured for 60 days with review by a lawyer. That was a valid LPA. *“The Public Guardian has no right to make a paternalistic judgment on his behalf and decide that it would be in his best interests for these provisions to be severed”* (para 38).

The MCA *“should be construed in a way which gives as much flexibility to donors to set out how they wish their affairs to be dealt with as possible, the Act being intended to give autonomy...”* so that a donor can appoint A and B jointly with either of them allowed to act alone if the other was unable to act (sometimes called jointly with survivorship) **Miles v. The Public Guardian** [\[2015\] COPLR 676](#) para 19. Careful drafting is required.

For a case where the Court directed that an LPA was not registered (warring appointees, para 47) see **Re: KC; LCR v SC** [\[2021\] COPLR 195](#) applying the power in s.22(4) MCA.

### DRAFTING ISSUES

- Severance

Drafting issues include, **Public Guardian v. DA** [\[2018\] COPLR 493](#)

- Instructions to attorneys which are inconsistent with MCA do not create an LPA
- If attorneys are appointed as joint and several the LPA cannot give one precedence – eg providing a spouse can act alone if still capacitous. This contradicts [s.10\(4\) MCA](#) (paras 45-52)
- Requiring consent of a third party is consistent with MCA – eg consent of children (para 57)
- A preference to carry out an illegal act (eg to arrange euthanasia) is ineffective (para 24) even if predicated on there being a change in the law allowing that act (para 29)
- It might be possible to save the power by severance

Further drafting issues, **In re: Public Guardian’s Severance Applications** [\[2023\] EWCOP 24](#)

- Joint and several attorneys cannot be directed to deal separately with defined areas (para 40), but the donor could create separate LPAs (para 41)
- Appointing attorneys to act on a majority basis was inconsistent with the MCA – but as they were told they ‘should’ act by majority it could be interpreted as a preference (para 45-46)
- The standard form is misleading and should be amended (para 41)

If the LPA is not properly executed then it must not be registered/ the registration must be cancelled **Re: BGO; Public Guardian v. PGO** [\[2019\] COPLR 365](#), where the LPA was witnessed by one of the attorneys and the donor had lost capacity so a further LPA could not be granted.

- Payments

Attorneys have fiduciary duties and should (1) keep donor’s money separate from their own; (2) keep donor’s investments in their name or in a trust; (3) apply to the court re: gifts, investments in attorney’s own business, sales at an undervalue and conflict of interest; and (4) be aware of the law on their role and responsibilities, **Re: Buckley: The Public Guardian v. C** [\[2013\] COPLR 39](#) on the unusual facts of the attorney investing c.£90k in their own reptile breeding business.

Payments can be approved retrospectively **Re: HH; TH v. JH and others** [\[2018\] COPLR 311](#) paras 13-26. See Deputies “*payments*” below – principles may apply by analogy.

## OVERSIGHT

*“Essentially, the LPA scheme is based on trust and envisages minimal intervention by public authorities”* **Re: Harcourt [2013] COPLR 69** para 39.

- **Public Guardian**

Created by [s.57 MCA](#) as statutory office-holder. Duties include:

- (1) keeping a register of LPAs
- (2) keeping a register of orders appointing deputies
- (3) supervising deputies
- (4) directing visitor to visit deputies and attorneys and receiving reports from them
- (5) reporting to the court [s.58 MCA](#).

- **Court**

Court of Protection can:

- (1) determine whether requirements to create LPA met, [s.22\(2\) MCA](#)
- (2) determine whether LPA was revoked or has come to an end, [s.22\(2\) MCA](#)
- (3) direct that LPA not be registered or be revoked where fraud or undue pressure was used [s.22\(3\) \(4\) MCA](#) or something was done contravening authority or contrary to P’s interests, [s.16\(8\) MCA](#) and [22\(3\)\(b\) \(4\)](#)
- (4) determine meaning and effect of LPA, [s.23\(2\) MCA](#)
- (5) give directions re decisions the attorney has authority to make/ give any consent, [s.23\(2\) MCA](#)
- (6) require accounts/ documents, [s.23 \(3\) MCA](#)
- (7) give directions as to expenses and relieve the attorney from any liability incurred as a result of breach of duties owed to the done, [s.23\(3\) MCA](#)
- (8) authorise gifts which are outside s.12, [s.23\(4\) MCA](#)

- Revocation

In **Chandler v. Lombardi** [2022] EWHC 22 (Ch) the Court held that a gift which was not authorised by s.12 MCA was void (not merely voidable)

For cases on revocation see for example:

- **Re: J** [2011] COPLR Con Vol 716 – in an application for revocation of an LPA to a firm of solicitors in the context of a family dispute (para 73). Note also the use of directions to the attorney under s.23 (para 183) instead of the “serious step” of revocation and that the Court would have regarded the attorney as a suitable deputy had the attack of P’s capacity to grant the LPA succeeded:

*It appears to me that the general thrust of s 22(3)(b) is that the court can revoke an LPA if it is satisfied that there is evidence that the attorney cannot be trusted to act in the manner and for the purposes for which the LPA was conferred upon him/her. This does not require limiting the 'behaviour' which can be considered to behaviour as, or in anticipation of acting as, P's attorney*

- **Re: Harcourt** [2013] COPLR 69:

*The factor of magnetic importance in determining what is in Mrs Harcourt's best interests is that her property and financial affairs should be managed competently, honestly and for her benefit... Although the OPG has been unable to complete its investigation because of the attorney's reluctance to co-operate, what it has managed to unearth so far has resulted in a successful challenge to her competence and integrity. Even if she has behaved honestly, she has not managed her mother's finances well. Otherwise, there would be no outstanding arrears of care home fees or complaints that Mrs Harcourt is not receiving an adequate personal allowance*

- Appointee

Appointee cannot be appointed in respect of benefits where there is a deputy appointed by COP or an EPA or LPA in respect of those benefits covered by SI 2013/380.

- Guidance

OPG guidance LPA for P&A and welfare: former is [here](#):

- Can claim expenses which are proportionate to the estate but only fees if the LPA says so
- Can pay professional fees when reasonable
- You can sell their property but need COP approval to sell below market value or to yourself
- You can make gifts on customary occasions

<b>12. DEPUTIES</b>	
<b><u>STATUTORY BASIS</u></b>	
<ul style="list-style-type: none"> <li>• <b>Joint / several</b></li> <li>• <b>Whether to have a deputy</b></li> </ul>	<p><a href="#">Section 16 (2) MCA</a> – where P lacks capacity the Court may make the decision or appoint a person (a deputy) to make decisions on P’s behalf</p> <p>MCA specifies principles for deciding whether it is in P’s interests to appoint a deputy: (1) a decision of the Court is preferred to appointing a deputy and (2) the powers of a deputy should be as limited as possible in scope and duration, <a href="#">s.16 (4) MCA</a></p> <p>Deputy acts as P’s agent on anything within the scope of the appointment <a href="#">s.19 MCA</a> (and hence has a fiduciary duty not to put themselves in a position where their interests conflict with P)</p>
<b><u>APPOINTMENTS</u></b>	
<ul style="list-style-type: none"> <li>• <b>Joint / several</b></li> <li>• <b>Whether to have a deputy</b></li> </ul>	<p>Two or more deputies can be joint or joint and several (or a mixture of both in different areas), <a href="#">s.19(4) MCA</a></p> <p>For health and welfare, many cases have considered whether local decision making, the appointment of a deputy or a court decision is to be preferred (eg <b>Re P (Vulnerable Adults: Deputies)</b> <a href="#">[2010] COPLR Con Vol 922</a>; <b>London Borough of Havering v LD and KD</b> <a href="#">[2010] COPLR Con Vol 809</a>). Para 8.38 of the Code of Practice says a welfare deputy is needed only for “<i>the most difficult cases</i>”:</p> <ul style="list-style-type: none"> <li>• <b>SBC v. PBA</b> [2011] COPLR Con Vol 1095 para 67, preferring to “<i>look at the unvarnished words of the statute</i>”</li> <li>• <b>A Local Authority v. TZ</b> <a href="#">[2014] COPLR 159</a> paras 82-86 – “<i>That is simply a matter of common-sense</i>”. Long term decisions should be made by the court and (in a case concerning contact) the appointment of a deputy would be contrary to the scheme of the code because deputies had no power to limit contact and it would be wrong to allow a deputy to have power to remove TZ from a situation, possibly using restraint</li> </ul>

- Welfare

**Re: Lawson, Mottram and Hopton (Appointment of Personal Welfare Deputies)** [\[2019\] COPLR 371](#):

- (1) the informal collaborative decision making of s.5 is often appropriate and appointment of a deputy was not less restrictive
- (2) there was no presumption or starting point but the application of MCA would often mean it was not in P's best interests to appoint a personal welfare deputy
- (3) incapacitous people also enter a different phase of life on turning 18 and their autonomy should be respected
- (4) there was no tension in the earlier cases.

- Property and affairs

For property and affairs there is, in practice, an order of preference: spouse/ partner; relative; close friend; professional advisor; LA social services and then a panel deputy **Re: AS** [2013] COPLR 29. *"...the case-law in relation to the appointment of property and affairs deputies is almost entirely focused on the suitability of the individual, rather than the necessity for an appointment"* (**Re: Lawson** para 36)

For the resolution of a contested application by a trust corporation and a solicitor to be appointed P&A deputy see **KKL executor v. Harrison** [\[2020\] COPLR 597](#). KKL was a trustee company linked to a charity. KKL had drawn up P's will with the charity as the main beneficiary of the will. The 'magnetic factor' in refusing to appoint KKL as deputy was the need to investigate a possible breach of the fundraisers' code and the possibility for future conflicts of interest

The information to be supplied by trust corporations seeking appointment is considered in **Re: Various Incapacitated Persons (Appointment of Trust Corporations)** [\[2018\] COPLR 239](#)

- Removal

The Court may revoke the appointment or vary the powers if the deputy (1) contravenes the authority conferred on him/her; (2) acts contrary to P's best interests; or (3) proposes to do so, [s. 16\(8\) MCA](#).

The decision whether to remove a deputy is made in P's best interests including all the circumstances [\(s.4\(2\) MCA\)](#) and considering the wishes of anyone engaged in caring for or interested in P's welfare **Re: Rodman** [\[2012\] COPLR 433](#).

Note that resignation does not take effect automatically and that a Court can refuse to accept it:  
*It follows, from the reasoning set out above, that where a deputy wishes to discontinue in the role, an application must be made to the court. The decision is one for the court, acting within the parameters of reasonable discretion*  
[Cumbria County Council v. A \[2020\] EWCOP 38](#) para 30

For a case where a third professional deputy was seeking to resign due to a poor relationship with P's family, see [Kambli \(as P&A deputy for MBR\) v. the Public Guardian \[2021\] EWCOP 53](#)

### POWERS

- **Restrictions**

Restrictions on the power of deputies in [s.20 MCA](#) – a deputy:

- Cannot prohibit anyone from having contact with P
- Cannot refuse consent to life sustaining treatment or direct a health care provider to hand P over to someone else
- Cannot be given power to settle P's property, execute a will or exercise a power vested in P
- Cannot be given power to make a decision inconsistent with a decision made by holder of LPA
- Can only restrain P if (1) within scope of authority; (2) believe that P lacks capacity; (3) necessary to prevent harm to P; and (4) act is proportionate to the likelihood of that harm and its seriousness

- **Standard range**

What is the standard range of deputy powers? The standard deputy order gives "general authority" to take possession of P's property and exercise the same powers as the beneficial owner:

- Covers much non-contentious work eg tax returns, employment of carers, leases, conveyancing
- Does not authorise contested proceedings in P's name, where express authority of the Court is required "*Involvement in contentious litigation is a much less ordinary feature of life, and costs are inherently likely to be significant*" (para 53.11)
- A deputy wishing to use their own firm should get 3 quotes and seek permission for costs over £2k

**ACC** [\[2020\] EWCOP 9](#)

<ul style="list-style-type: none"> <li>• Payment</li> </ul>	<p>The standard order confers “a broad discretion” on deputies, subject to supervision by the Office of the Public Guardian / the COP, <b>Ross v. A (by her litigation friend, the OS)</b> <a href="#">[2015] COPLR 397</a> para 38.</p> <p>Deputy is entitled to expenses and (<u>only if the Court so directs</u>) to remuneration from P’s property <a href="#">s.19 (7) MCA</a>. See r.19.13 COPR and Practice Direction 19B, Fixed Costs in the Court of Protection.</p> <p>Charging is a question to be decided in P’s best interests <b>Re: AR</b> <a href="#">[2018] COPLR 274</a>. See <b>The Friendly Trusts Bulk Application</b> <a href="#">[2016] All ER 171</a> for consideration of charging at local authority or solicitor rates; and <b>Penn Trust Ltd v. West Berkshire DC</b> <a href="#">[2021] COPLR 142</a> for a discussion of whether to authorise detailed assessment retrospectively.</p> <p>Hourly rates – the guideline hourly rates from 2010 were the starting point but, given inflation, rates at 120% of those rates were likely to be reasonable <b>Re: PLK (Court of Protection: Costs)</b> <a href="#">[2021] COPLR 163</a>.</p> <p>Note that <a href="#">PD 19B</a> provides for Fixed Costs and includes provision for detailed assessment by the Supreme Court Costs Office – but only where there is a specific order if the estate is worth less than £16k.</p>
<p><b><u>PAYMENTS</u></b></p>	
<ul style="list-style-type: none"> <li>• Court approval</li> <li>• Gifts</li> </ul>	<p>Deputies are well placed to decide about payments because of close and continuous contact, expertise in investment and knowledge of MCA, <b>Ross v. A (by her litigation friend, the OS)</b> <a href="#">[2015] COPLR 397</a>.</p> <p><i>When an experienced professional deputy has gone through the checklist of factors in s 4 of the MCA and has considered all the relevant circumstances and has concluded a particular course of action is in P’s best interests, the court should be reluctant to interfere with his decision unless it is plainly wrong</i></p> <p>Whether to make gifts assessed by factors about P (life expectancy, care needs etc) and subject to de minimis in relation to IHT exemption and annual gift allowance <b>Re: GM</b> <a href="#">[2013] COPLR 290</a> para 67 and 89 – setting out principles to be applied.</p> <p>Gifts should not impact on the estate of P, where his/ her will is a clear statement of their wishes and feelings. Customary occasions: birthday, Christmas, Christening, housewarming and graduation. <b>Re: Joan Treadwell, Decd</b> <a href="#">[2013] COPLR 587</a></p>

- Family care

Approval given to pay for a nanny for 3 children of P injured in road accident, **Re: X, Y and Z** [2014] COPLR 364:

*the court has power under the 2005 Act to approve payments for the maintenance or other benefit of members of P's family, notwithstanding the absence of an express provision to that effect in the Act, provided such payments are in P's best interests*

Approval was given to pay school fees of P's brother, noting that it is common for family members of profoundly disabled person to become dependent on P's damages award, **Ross v. A (by her litigation friend, the OS)** [2015] COPLR 397

A loan and annual gifts to pay it off: approved to build a house abroad for P, **Lomas v. AK** [2014] COPLR 180.

Payments can be made for care from a family member – see "[OPG's approach to family care payments](#)" Public Guardian Practice Note SD 14, updated September 2022:

- Can have both informal family arrangements and formal contractual arrangements. OPG note applies to former
- Professional deputy can approve family care payments but lay deputy should seek approval for payments to themselves or closely connected person
- Factors: care must be reasonably required; payments must be affordable and reflect the degree of care offered; care must actually be provided; payments should be lower than professional care; payments should be agreed in consultation with family members if possible

Various ways to calculate payment - including commercial rate less 20%, **Re: HC** [2015] EWCOP 29 retrospectively approving payments for person who gave up career to care for parent – and some form of indexing will avoid need for repeat applications.

- Settlements

For approval of a settlement on an urgent basis immediately before P's death and without notifying his biological father see **Re: CJF; LCN v. KF, AH, EH and CJF** [2019] COPLR 262. For non-notification of a statutory will application see **Re P; M v P** [2020] COPLR 305.

Where P received £60k of benefits - £52k means tested – the Court refused an application to execute a deed of settlement to move an inheritance of £400 to £600k into a disabled person's trust. The tax and benefit consequences were unclear and the Court could not endorse a proposal to preserve an eligibility which Parliament had decided did not exist **F v. R** [2022] EWCOP 49

- Tax arrangements

Court refused to move £325k of £2m into a trust to save inheritance tax as damages are compensatory and should not result in a surplus nor was the aim to manage the funds to ensure inheritance **Re: JDS** [\[2012\] COPLR 383](#) *“it is not the function of the court to anticipate, ring-fence or maximise any potential inheritance for the benefit of family members on the death of a protected party, because this is not the purpose for which the compensation for personal injury was intended”* para 39.

However the court approved gifts of £7m and a statutory will reducing likely IHT from £6m to £3m (depending on how long P lived) and leaving P with £10m applying a standard best interest approach and considering her will, her deceased spouse’s will, her practice of gifts and of taking financial advice **Re: JMA; PBC v. JMA** [\[2018\] COPLR 428](#)

### STATUTORY WILLS

See sections [16](#) and [18](#) MCA, above.

[Schedule 2 MCA](#) makes specific provision about a will:

- A will executed for P pursuant to [s.18MCA](#) *“may make any provision ... which could be made by a will executed by P if he had capacity to make it”*, sched 2 para 2
- Provisions for executing a will authorised under [s.16 MCA](#), sched 2 para 3(2)
- A will executed pursuant to [s.16 MCA](#) *“has the same effect for all purposes as if — (a) P had had the capacity to make a valid will...”*

See **In Re: P (Statutory Will)** [\[2010\] Ch 33](#) for the tests to be applied under MCA:

*In deciding what provision should be made in a will ... which, ex hypothesi, will only have effect after he is dead, what are P's best interests? ... what will live on after P's death is his memory; and for many people it is in their best interests that they be remembered with affection by their family and as having done 'the right thing' by their will*

**Examples:**

- **Re M (statutory will)** [\[2011\] 1 WLR 344](#) – approving a statutory will. P had lived with Z's family for 4 years. In that time Z had received much of P's non-property assets and P had made a will leaving Z the rest of her estate on the basis that his family would care for her for the rest of her life. The court ordered move to a care home and cessation of contact was a change of circumstances – as P would regard Z's treatment of her (para 52). Noting submissions that earlier wills could be seen as relevant written statements under [s.4\(6\) MCA](#) and that COP cannot rule on the validity of a will
- **Re: Jones** [\[2014\] EWCOP 59](#) where P had dementia and lacked testamentary capacity – the court approved a statutory will 75% to his wife and 25% to his daughter along with a life-time gift to the latter, who was in difficult circumstances:

*128... based solely on [P's] past wishes, beliefs and feelings, I would not make any immediate lifetime provision for his daughter. There is no history of life-time giving to her ... However, those*

- *circumstances have changed ... she is in urgent need of help*

*129...Affordability is always a 'magnetic factor' in that it is essential that sufficient money will be available to Mr Jones to ensure that he enjoys the standard of living that he has worked for and is used to, and receives good quality care and treatment, during the remainder of his life.*

## 13. MEDICAL TREATMENT

### RIGHTS OF CAPACITOUS ADULT PATIENTS

Medical treatment is given on the basis of consent and, generally, it is trespass unless consented to:

*a doctor cannot lawfully operate on adult patients of sound mind, or give them any other treatment involving the application of physical force ...without their consent', and if he were to do so, he would commit the tort of trespass to the person*

**In Re: F (Sterilisation)** [\[1990\] 2 AC 1](#)

A capacitous adult can reject treatment:

*An adult patient who ... suffers from no mental incapacity has an absolute right to choose whether to consent to medical treatment ... This right of choice is not limited to decisions which others might regard as sensible. It exists notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent*

**Re T (Adult: Refusal of Treatment)** [\[1993\] Fam 95](#) at 102

**Airedale NHS Trust v Bland** [\[1993\] AC 789](#) at [864], Lord Goff:

*... the principle of self-determination requires that respect must be given to the wishes of the patient, so that if an adult patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for his care must give effect to his wishes, even though they do not consider it to be in his best interests to do so*

Applied in the “sparkles case” where the evidence was “during her life C has placed a significant premium on youth and beauty and on living a life that, in C's words, 'sparkles'” **King's College Hospital v. C and V** [\[2016\] COPLR 50](#). C was found capacitous to reject dialysis notwithstanding it would lead to her early death. For a case about a 34 year old man preferring not to live with a stoma see **Barnsley Hospital NHS Foundation Trust v. MSP** [\[2020\] EWCOP 26](#).

- **Advance decisions to refuse treatment**

**Ss.24-26 MCA** codify a scheme for people to make decisions when capacitous which apply when they lose capacity

**s.24 MCA** – ‘Advance decision’ means a decision by a capacitous person over 18 specifying treatment which is not to be carried out when he/she lacks capacity

**s.25 MCA** – validity and applicability:

- the decision applies
  - unless P has withdrawn it or has created a relevant LPA (each of which requires capacity); or
  - has done anything “clearly inconsistent” with the advance decision. For a discussion of what is ‘clearly inconsistent’ see **Re: PW (Jehovah’s Witness: Validity of Advance Decision)** [2021] [COPLR 201](#) paras 50-61, which also noted that doing something included speech (para 52) and the ‘thing done’ could be done either before or after losing capacity (para 50)
- the decision does not apply if any circumstances specified in the decision are absent or circumstances exist which P did not anticipate
- the decision only covers life sustaining treatment if the decision says it applies even if life is at risk, it is in writing, signed by P and a witness

**s.26 MCA** – the decision has effect as if P had capacity and made that decision at the time a question arises about whether the treatment should be carried out. If someone reasonably believes there is a valid and applicable advance decision there is no liability for acting on it. A Court may make a declaration about whether an advance decision exists, is valid and applies to the treatment

Previous cases show the law had reached a similar position pre-MCA to the statutory advanced decision scheme, **Re AK (Medical Treatment: Consent)** [2011] 1 FLR 129 at 134

**A Local Authority v. E** [\[2012\] COPLR 441](#) considered a 32 year old with anorexia and an advanced decision only to accept pain relief and palliative care:

*I consider that for an advance decision relating to life-sustaining treatment to be valid and applicable, there should be clear evidence establishing on the balance of probability that the maker had capacity at the relevant time. Where the evidence of capacity is doubtful or equivocal it is not appropriate to uphold the decision (para 55)*

*Against such an alerting background, a full, reasoned and contemporaneous assessment evidencing mental capacity to make such a momentous decision would in my view be necessary (para 65)*

**NHS Cumbria CCG v. Rushton** [\[2019\] COPLR 283](#) paras 16-18 set out criteria for an advance decision. The advance decision was not available to the hospital and was misinterpreted (para 24).

**NHS Surrey Heartlands ICB v. JH** [\[2023\] EWCOP 2](#) concerned a 41 year old man with a long history of gastrointestinal pain whose BMI had fallen below 14. He had entered into an Advance Decision copied from the website of Compassion in Dying setting out circumstances in which he would refuse treatment. Additionally he had written in restrictions on treatment “if I should collapse and not have capacity to make decisions”, including that he would not attend hospital or have “tubes inserted into his body”. The Court saw the [Suicide Act 1961](#) as a “challenging backdrop to the facts of cases like this one” (para 9). The case is also interesting as regards remedy. The ICB sought a declaration under [s.26\(4\) MCA](#) that the advance decision was valid and applies to any invasive test (even if lifesaving). That is squarely within the section. The ICB also sought a declaration that it would incur no liability for acting on the advance decision. That seems to be a restatement of [s.26\(3\) MCA](#) and not within the declarations that the Court is expressly empowered to make in s.26 (4). It is also of limited use because the question of whether people are acting under the advance decision will remain.

Note that a defective Advance Decision may be a very influential statement of wishes and feelings

## CHILDREN

- Children aged 16 can give valid consent
- Parents and the court can consent to age 18
- Wishes and feelings and beliefs of older children / blood cases
- Role of the Court in best interests

Children over 16 can give consent for medical treatment by [s.8 Family Law Reform Act 1969](#).

But this does not give an absolute right to refuse treatment – it primarily protects medical practitioners from an action for trespass – the court can over-ride refusal of treatment in a minor’s best interests, **In re: W (a minor) (medical treatment: Court’s jurisdiction)** [1992] 3 WLR 758:

*the present state of the law is that an individual who has reached the age of 18 is free to do with his life what he wishes, but it is the duty of the court to ensure so far as it can that children survive to attain that age*  
Nolan LJ at 781

This was confirmed after detailed review in **Re: X (A Child) (No 2)** [\[2021\] COPLR 626](#)

The Court ordered that two Gillick-competent children who were over 16 and over 17 should have blood transfusions/ products if required contrary to their beliefs as Jehovah’s Witnesses. The CoA refused permission to appeal on the question of whether the decision of a 16 or 17 year old can be over-ruled, holding that was settled law (paras 5 and 44). It gave permission and reviewed the wider decision making, **E v. Northern Care Alliance** [\[2022\] EWCA Civ 1888](#).

*50 That does not mean that the welfare assessment takes place in a vacuum. The law reflects human nature in attaching the greatest value to the preservation of life, but the quality of life as experienced by the individual must also be taken into account. The views of the parents of a baby or young child are always matters of great importance. Likewise, our common experience leads us to pay increasing regard to the views of children and young people as they grow older and more mature.*

*53 Welfare assessments in medical treatment cases concerning young persons with decision-making capacity involve the balancing of two transcendent factors: the preservation of life and personal autonomy....*

Under [s.1 Children Act 1989](#) the child’s welfare is the paramount consideration on any question concerning their upbringing. Section 1(3) contains the ‘welfare checklist’ which sets out factors the court is required to have regard to, including on applications for specific issue orders under s.8 CA 1989.

*“From the decisions to which I have referred which bind this court, it is clear that when an application under the inherent jurisdiction is made to the court, the welfare of the child is the paramount consideration”*

**In re T (Wardship: Medical Treatment)** [\[1997\] 1 WLR 242](#)

Welfare and best interests are “used interchangeably”, **Parfitt v. Guy’s and St Thomas’** [\[2021\] EWCA Civ 362](#) para 69.

There is no equivalent to the “*significant harm*” threshold test in public law children proceedings under [s.31 Children Act 1989](#) which must be passed before the Court can “over-rule” parental views, **In re: Gard (Child on Life Support: Withdrawal of Treatment)** [\[2018\] 4 WLR 5](#). Of course, the Court “*will look keenly*” at options from parents (para 97):

*Where... the judge has made clear findings that going to America for treatment would be futile, would have no benefit and would simply prolong the awful existence ... the proposal for nucleoside therapy was not a viable option before the court*

Essentially supported by **Gard v. United Kingdom** [\[2017\] 2 FLR 773, para 118](#)

See ‘Making Decisions to Limit Treatment in Life-limiting and Life-threatening Conditions in Children: a Framework for Practice’, published in March 2015 by Royal College of Paediatrics and Child Health

Withdrawal is possible where children are involved: “*The Court notes that no consensus exists among the Council of Europe member States in favour of permitting the withdrawal of artificial life-sustaining treatment, although the majority of States appear to allow it*” Gard, para 83.

Note that “*it is not helpful to seek to import, wholesale, principles from the Mental Capacity Act 2005*” such that while the child’s wishes and feelings are factors in the welfare checklist that does not mean that the cases on values and beliefs under s.4(7) MCA read directly across, **Raqeeb v. Barts** [\[2020\] 1 FLR 1298](#) para 122. In children cases one must consider the “*principle of evolving capacity*” (para 124). See Fixsler para 81: “*The family’s religion and culture are fundamental aspects of this child’s background. The fact that she has been born into a devout religious family in which children are brought up to follow the tenets of their faith is plainly a highly relevant characteristic of hers*”.

- End of life cases for children

For example, **Re E (A Minor) (Wardship: Medical Treatment)** [1993] 1 FLR 386 where 15 yo child who was a Jehovah's Witness was ordered to have a blood transfusion – but later, as an adult, required and refused blood and died as a result

For other end of life cases for children see:

- **Alder Hey v. Evans** [\[2018\] 2 FLR 1223](#) finding that life sustaining treatment was a violation of dignity and should end (para 66):

*It was entirely right that every reasonable option should be explored for Alfie. I am now confident that this has occurred. The continued provision of ventilation, in circumstances which I am persuaded is futile, now compromises Alfie's future dignity and fails to respect his autonomy. I am satisfied that continued ventilatory support is no longer in Alfie's best interest.*

- **Raqeeb v. Barts** [\[2020\] 1 FLR 1298](#) summarises the principles at para 116 and note para 176 questioning whether 'dignity' has a sufficiently precise definition. The Court noted that each case is fact specific and found it was in the child's best interests for treatment to continue:

*Having undertaken that balance, in circumstances where, whilst minimally aware, moribund and totally reliant on others, Tafida is not in pain and medically stable; where the burden of the treatment required to keep her in a minimally conscious state is low; where there is a responsible body of medical opinion that considers that she can and should be maintained on life support with a view to placing her in a position where she can be cared for at home on ventilation... (para 186).*

Note **Gregory v. Nottingham University Hospitals NHS Foundation Trust** [\[2023\] EWCA Civ 1324](#) where 6 hearings were held in 25 days leading Peter Jackson LJ to comment:

*The court will not tolerate manipulative litigation tactics designed to frustrate orders that have been made after anxious consideration in the interests of children, interests that are always central to these grave decisions.*

### POWER OF THE COURT

- The Court cannot require treatment that is not otherwise available

The Court cannot compel doctors to carry out treatment which they are not prepared to offer:

*Alternatively, the doctors may not agree to perform a tracheostomy, in which case any declaration by me might appear to be an attempt to do what I have no right or power to do, namely to require doctors to carry out a positive medical intervention against their own judgment and will*

**An NHS Trust v. MB (A child)** [\[2006\] 2 FLR 319](#)

The Court of Appeal took the same approach in a CJD case, **AVS v. NHS Trust** [\[2011\] COPLR Con Vol 219](#):

*One has to ask, therefore, what purpose will be served by such declarations. ... It is trite that the court will not order medical treatment to be carried out if the treating physician/surgeon is unwilling to offer that treatment for clinical reasons conscientiously held by that medical practitioner*

*“That is not to say that his wishes must prevail, any more than those of a fully capable patient must prevail. We cannot always have what we want”* **Aintree v. James** [\[2013\] COPLR 492](#) para 45.

The idea that treatment can be refused to incapacitated patients is not a breach of article 14 *“the Court notes that neither a competent nor an incompetent patient can require that a doctor give treatment which that doctor considers is not clinically justified and thus no difference of treatment arises in that regard”* **Burke v. United Kingdom** 19807/06 finding the complaint manifestly ill-founded.

- COP should therefore only consider realistic options

The court should only consider realistic options, treatment which may be available *“There is no purpose in deciding whether a particular option is in the best interests of the patient if it is not in fact known to be available”* **PW v. Chelsea and Westminster Hospital** [\[2020\] COPLR 346](#) para 97 per Peter Jackson LJ.

In a feeding case with a complex care plan Peter Jackson J said the state had offered a care plan and was *“honour-bound to see it through ... Had the authorities not made that commitment, I would not have reached the conclusion that I have”*, **A Local Authority v. E** [\[2012\] COPLR 441](#) para 143.

- Question is consent to treatment and not permission to stop treatment
- Ongoing treatment
- When to apply to Court

For an end of life case where the Court referred to the lack of any option other than palliative care, **London North West Hospital Healthcare NHS Trust** [\[2022\] EWCOP 13](#)

The question is the lawfulness of giving treatment, not withholding it:

*Before turning to the central questions in the case, it is worth restating the basic position with regard to medical treatment, because it is upon this foundation that everything else is built. Although the concentration is upon the withdrawal of CANH, it must be kept in mind that the fundamental question facing a doctor, or a court, considering treatment of a patient who is not able to make his or her own decision is not whether it is lawful to withdraw or withhold treatment, but whether it is lawful to give it. An NHS Trust v. Y* [\[2018\] 3 WLR 751](#) para 92.

The Court can approve ongoing treatment plans – but refused to make an order approving 2 years of blood transfusions in **Re: X (A Child) (No 2)** [\[2021\] COPLR 626](#)

**Applications Relating to Medical Treatment** [\[2020\] COPLR 205](#) Guidance of Hayden J:

- Consider application where (1) finely balanced, or (2) there is a difference of medical opinion, or (3) there is a lack of agreement as to a proposed course of action from those with an interest in the person's welfare, or (4) there is a potential conflict of interest of those involved in the decision-making process
- Probably life sustaining treatment, sterilisation, organ donation, experimental treatment or significant ethical question, degree of force or restraint

What treatment can be given without going to Court? Consider the CoA in **E v. Northern Care Alliance** [\[2022\] EWCA Civ 1888](#) para 24, where P had a motorbike accident and might require a blood transfusion over-night.

The Trust asserted it could act using “emergency powers” (presumably necessity) and the Judge listed the matter for hearing the next day. The CoA stressed it had not heard argument but stated:

*We were not addressed in detail about the extent of any “emergency powers”, and we do not therefore express a concluded view about the assertion made to Arbuthnot J, and repeated to us on behalf of F, that the doctors could have transfused overnight if the medical need arose. Doctors undoubtedly have a power, and may have a duty, to act in an emergency to save life or prevent serious harm where a patient lacks capacity or cannot express a view, for example because of unconsciousness. However, we very much doubt that such a power exists in respect of treatment that has been foreseen and refused by a capacitous patient. It is doubtful whether such circumstances can properly be described as an emergency.*

*“To assist Trusts more generally as to the kind of circumstances in which applications should be brought to court”*  
 Hayden J commended the decision of a trust to apply to court even where there was agreement and P was happy to receive the treatment because (1) the treatment is intrusive and long lasting (2) the treatment involves premature menopause in a woman in her 30s without children (3) the treatment was onerous and P might withdraw her cooperation, **University Hospital Coventry v. K and Mrs W** [\[2020\] EWCOP 31](#)

It is not necessary in every case to apply to Court to withdraw CANH from a patient with PDOC, neither the common law nor MCA require this, **An NHS Trust v. Y and Intensive Care Society** [\[2019\] AC 978](#)

An application was necessary to approve covert medication where the man’s family wanted the matter considered by the court and there would be an impact on his relationship with his clinical team and his family, **An NHS Trust v. XB** [\[2021\] COPLR 505](#)

See procedure, below.

### BEST INTERESTS

Objective decision taken from P’s perspective:

*... consider the nature of the medical treatment in question, what it involves and its prospects of success; they must consider what the outcome of that treatment for the patient is likely to be; they must try and put themselves in the place of the individual patient and ask what his attitude to the treatment is or would be likely to be; and they must consult others who are looking after him or interested in his welfare, in particular for their view of what his attitude would be*

**Aintree v. James** [\[2014\] AC 591](#) para 39.

*... account must be taken of the pain and suffering and quality of life, and the pain and suffering involved in proposed treatment against a recognition that even very severely handicapped people find a quality of life rewarding*

**Re A (A Child)** [\[2016\] EWCA Civ 759](#)

- Consider all the circumstances

- Preserving life – Article 2 ECHR

The question is giving consent to treatment and not to its withdrawal:

*the focus is on whether it is in the patient's best interests to give the treatment rather than whether it is in his best interests to withhold or withdraw it. If the treatment is not in his best interests, the court will not be able to give its consent on his behalf and it will follow that it will be lawful to withhold or withdraw it. Indeed, it will follow that it will not be lawful to give it...*

**Aintree v. James** [\[2013\] COPLR 492](#) para 22.

Where P's mother and carer had leukaemia it was approved for P to donate stem cells to her mother – there was no physical benefit to P but an obvious social benefit, **A NHS Trust v. MC** [\[2020\] EWCOP 33](#)

Brain stem death remains the measure of death and once a patient is dead there is no best interests decision to make In **Re: M (Declaration of Death of a Child)** [\[2020\] 4 WLR 52](#) – “*The appropriate declaration is that the patient died at a particular time and on a particular date without more*” para 96.

For example: wishes and feelings, pain, enjoyment of life, prospects of recovery, dignity:

*we do not think it possible to attempt to define what is in the best interests of a patient by a single test applicable in all circumstances*

**R (Burke) v. GMC** [\[2006\] QB 273](#), CA para 63 in response to the suggestion that ‘intolerability’ of life was the test.

Decision makers must factor in P's “*own aspirations, not for how he will die, but in how he will live the remainder of his life, however long that may be*” Hayden J in **Imperial Healthcare v. MB** [\[2019\] EWCOP 30](#)

The withdrawal of life-sustaining treatment engages a state's positive obligations under Art 2 but permitting withdrawal and the circumstances and procedure under which it was permitted (and the balance between the right to life and right to autonomy) are within the margin of appreciation of states **Lambert v. France** [\[2016\] 62 EHRR 2](#)

[Code of Practice para 5.31](#): generally in best interests to prolong life but not without limit: “*All reasonable steps which are in the person's best interests should be taken to prolong their life. There will be a limited number of cases where treatment is futile, overly burdensome to the patient or where there is no prospect of recovery*”.

*“the fundamental principle is the principle of the sanctity of human life ... but this principle, fundamental though it is, is not absolute ... there is no absolute rule that the patient’s life must be prolonged by such treatment or care, if available, regardless of the circumstances”* Lord Goff **Airedale NHS Trust v. Bland** [\[1993\] AC 789](#) at 863.

*“very strong presumption in favour of taking all steps which will prolong life”* **R (Burke) v. GMC** [\[2005\] QB 424](#), Munby J.

*“Against them, I place E’s life in the other scale. e only live once – we are born once and we die once – and the difference between life and death is the biggest difference we know. I would not overrule her wishes if further treatment was futile, but it is not. Although extremely burdensome to E, there is a possibility that it will succeed”*  
**A Local Authority v. E** [\[2012\] COPLR 441](#) para 137/138 Peter Jackson J.

But the Courts have long considered end of life treatment plans and approved steps which would shorten life, **An NHS Trust v. A** [2006] Lloyds Rep Med 29, CA discontinuing ventilation and renal support for terminally ill patient.

## COVERT TREATMENT

Two cases approving covert medication following detailed consideration:

- Covert contraception was approved where knowledge of it would cause P distress and possibly harm her relationship with her family but *“in all probability this state of affairs cannot continue indefinitely. Covert treatment should only be countenanced in exceptional circumstances”*. The case confirms that covert medication is an interference with art 8 rights to be justified under art 8(2), in that case, as being in accordance with the law and for the protection of P’s health,

**Re: P (Sexual Relations and Contraception)** [\[2019\] COPLR 44](#) para 63.

- Covert hormone therapy was approved for a 20 year old woman with primary ovarian failure who had not entered puberty and was at greater risk of conditions inc osteoporosis. She would benefit from maintenance therapy and hence continuing treatment, whether overt or covert. The Court ordered *“exploring the most effective way of transitioning from covert to open medication and/or ending covert medication in a way that is likely to cause the least harm to A”* (para 38). P’s mother was not told of the treatment and the case therefore considers proceedings and contact, **Re: A (Covert Medication: Closed Proceedings)** [\[2022\] EWCOP 44](#)

*“Covert medication is a serious interference with a person's autonomy and the right to self-determination under Article 8. It is likely to be a contributory factor giving rise to the existing DoL. Safeguards by way of review are essential”* **AG v BMBC** [\[2016\] EWCOP 37](#), DJ Bellamy. The case considers that medication (Diazepam in that case) can be a factor leading to a DoL, as it is part of continuous control. The Judge sets out guidance including consultation, reviews and a covert medication policy.

Factors relevant to whether to approve covert medication:

- If deception is in P’s best interest the court is obliged to authorise it, **NHS Trust v. JP** [\[2019\] COPLR 298](#) para 21.
- The Court will approve covert medication where it is in P’s best interests, which in particular may be preferable to daily medication with active resistance, **Re: AB** [\[2018\] COPLR 269](#)

- Use of force / restraint

Giving treatment without prior consultation but which someone will be aware of when it is given (or when any “trickery” is found out) differs from covert treatment because P may never know about the covert treatment:

- “*extremely important in any civilised society that they are not subjected to anaesthesia or invasive surgery without, as a minimum, being informed in sensitive and appropriate language as to what is about to be done to them before it is done*” **An NHS Trust v The Patient** [2014] EWCOP 54, Holman J
- For use of force to facilitate treatment, see **Re DD (No.4) (Sterilisation)** [2015] EWCOP 4 paras 136-138

The Court has also approved P not being told that her baby will be taken into care after birth, **North Middlesex University Hospital NHS Trust v. MB** [2023] EWCOP 23 para 44

The alternatives to covert treatment are persuasion and use of force/ restraint.

Restraint is defined [s.6\(4\) MCA](#) – (1) uses, or threatens to use, force to secure the doing of an act which P resists, or (2) restricts P's liberty of movement, whether or not P resists.

Medical necessity for the use of force is required, **Herczegfalvy v. Austria** [1993] 15 EHRR 437 and **MS v. Croatia** [2015] MHLR 294. Restraint has to be weighed in the balance when assessing the benefit and burden of treatment **Trust A v. H** [2006] EWHC 1230. Where treatment has to be regular active resistance may make treatment impossible, **Re: D (Medical treatment)** [1998] 2 FLR 22 considering dialysis four times per week.

For two anorexia cases with different conclusions see **A Local Authority v. E** [2012] EWHC 1639 and **NHS Trust v. L** [2012] EWHC 2741.

For covert sedation to enable an operation **An NHS Trust v. K** [2012] EWHC 2922 “*lawful, and in her best interests, to sedate her to enable it to take place, and lawful to do so before she is told, after sedation but before anaesthesia, what is planned*” (para 43).

See also **NHS Trust v. JP** [2019] COPLR 298 para 38 balancing covert medication and misleading JP (likely to make her feel tricked) with the benefit of maximising her chances of delivering a healthy baby.

- Novel treatment
- Section 63 MHA 1983

For approval of use of force see **Re: DD (No 4) (Sterilisation)** [\[2015\] EWCOP 5](#)

For permission to give a novel (but not experimental) treatment see **University College v. KG** [\[2019\] COPLR 70](#)

[Section 63 MHA](#) is increasingly relied on, it reads:

*The consent of a patient shall not be required for any medical treatment given to him for the mental disorder from which he is suffering*

This needs to be read with s.145(4) MHA which provides that treatment must be to “*alleviate or prevent the worsening of, the disorder or one or more of its symptoms or manifestations*”.

**JK v. A Local Health Board** [\[2019\] EWHC 67](#) - JK was being held on remand accused of murder; Lieven J held that JK’s refusal to eat was a manifestation of his autism noting “*I do accept that with a condition such as autism which is a fundamental part of JK’s personality, it is exceptionally difficult to see how any decision making is not a manifestation of that disorder*” (para 72). Note the discussion of the Court’s role and jurisdiction in cases under s.63 MHA

In **A Healthcare and B Trust v. CC** [\[2020\] EWHC 574](#) P had psychotic depression and a personality disorder. A manifestation of this was self-neglect. Lieven J found at para 36 that:

*In my view this is a clear case of the treatment proposed, the dialysis, treating a manifestation of the mental disorder, namely personality disorder. The need for dialysis stems from CC’s self-neglect, including in regard to diet, which has led in whole or in part to his kidney failure. The reason his diabetes has resulted in kidney failure is to a large extent because of that self-neglect, which is itself a consequence of his mental disorder. Mr Lock argued that the primary cause of the condition which required the treatment must be the mental disorder. As with any mental disorder or mental illness and its link to physical ill-health, causation and the link between the mental and physical condition is intensely complex and not really amenable to a primary cause analysis...*

## FEEDING

Usually arises in anorexia and refusal to eat (including hunger strikes).

Anorexia is often found to remove capacity in respect of eating. Two examples are:

- **A Local Authority v. E** [\[2012\] COPLR 441](#). The Court approved a complex plan with a 20% chance of success and 2-3% risk of death from the procedure. Capacity considered at para 49:

*However, there is strong evidence that E's obsessive fear of weight gain makes her incapable of weighing the advantages and disadvantages of eating in any meaningful way. For E, the compulsion to prevent calories entering her system has become the card that trumps all others. The need not to gain weight overpowers all other thoughts*

- Anorexia *"is capable of destroying the ability to make an informed choice. It creates a compulsion to refuse treatment or only to accept treatment which is likely to be ineffective. This attitude is part and parcel of the disease..."* **Re: W (Medical Treatment: Court's jurisdiction)** [1993] Fam 64 Lord Donaldson.

For a case approving a decision not to require inpatient treatment (even if it might save P's life) and suggesting applications should be made for decisions not to treat, see **Re: RD (Anorexia: Compulsory Treatment)** [\[2021\] COPLR 593](#) paras 10 and 29. For a case approving no further treatment for a 19 year old who had received 1,000 NG feeds under restraint, see **A Mental Health Trust v. BG** [\[2022\] EWCOP 26](#)

As to approaching anorexia under s.63 MHA see:

- Nasogastric feeding has been held to be a treatment for anorexia – relieving symptoms being a treatment as much as treating the cause, **South West Hertfordshire v. KB** [1994] 2 FCR 1051.
- Where P had a compulsion to harm herself treatment was found to be properly within [s.63 MHA](#):

*I am satisfied that the words in section 63 of the Mental Health Act 1983 "any medical treatment given to him for the mental disorder from which he is suffering" include treatment given to alleviate the symptoms of the disorder as well as treatment to remedy its underlying cause*

**B v. Croydon Health Authority** [1995] Fam 133 Neill LJ.

- See **R v. Collins and Ashworth Hospital Authority ex p Brady** [2000] 1 MHLR 17 – where a detained patient on hunger strike was lawfully fed under s.63 MHA as treatment for his personality disorder (the hunger strike found to be a power play with the clinicians).

Conversely Dr A was detained under MHA but not for the disorder which could be treated by feeding. Section 63 MHA was therefore excluded as was the MCA. Dr A was “ineligible” to be deprived of his liberty under MCA because he was subject to MHA. The inherent jurisdiction was used, **An NHS Trust v. Dr A** [\[2013\] EWCOP 2442](#)

## REPRODUCTION

- Birth

The foetus does not have legal rights of its own, **Paton v. British Pregnancy Advisory Service** [1979] QB 276. However the Court will generally take the view that it is “a safe assumption that one of the foremost pieces of information a pregnant woman would consider relevant in deciding whether to undergo any medical procedure during pregnancy is that of the potential impact on her unborn child” **North Bristol NHS Trust v. R** [\[2023\] EWCOP 5](#). There are however hard cases when the pregnant person professes no interest in the life of the baby. Sometimes this is dealt with by evidence about how traumatic (for example) a still birth can be.

Further, while a capacitous woman can make decisions which harm her child the position of the Court is more nuanced:

*The caselaw has emphasised the right of a capacitous woman, in these circumstances, to behave in a way which many might regard as unreasonable or "morally repugnant", to use Butler-Sloss LJ's phrase. This includes the right to jeopardise the life and welfare of her foetus. When the Court has the responsibility for taking the decision, I do not consider it has the same latitude. It should not sanction that which it objectively considers to be contrary to P's best interests. The statute prohibits this by its specific insistence on 'reasonable belief' as to where P's best interests truly lie. It is important that respect for P's autonomy remains in focus but it will rarely be the case, in my judgement, that P's best interests will be promoted by permitting the death of, or brain injury to, an otherwise viable and healthy foetus...*

**Guy's and St Thomas' Trust v. R** [\[2020\] COPLR 471 para 63](#)

The same case goes on to consider the common issue of temporary loss of capacity at the time of birth:

*Caesarean sections however, present particular challenges even weighed against all these parlous circumstances. The inviolability of a woman's body is a facet of her fundamental freedom but so too is her right to take decisions relating to her unborn child based on access, at all stages, to the complete range of options available to her. Loss of capacity in the process of labour may crucially inhibit a woman's entitlement to make choices. At this stage the Court is required to step in to protect her*

**Guy's and St Thomas' Trust v. R** [\[2020\] COPLR 471 para 67](#)

- Abortion

Often the issue is the risk of a loss of capacity at the time of birth. Consider a statement of wishes and feelings made when capacitous or relying on the doctrine of necessity, **Shrewsbury and Telford NHS Trust v. T** [2023] [EWCOP 20](#) para 25

For an early case on temporary loss of capacity for needle phobia or under the immediate stresses of delivery see **Bolton Hospitals NHS Trust v. O** [2003] 1 FLR 824, Butler-Sloss P.

Where a patient suffers from a mental health condition, leave under [s.17](#) MHA may be used to facilitate P receiving care at an acute hospital and the MCA used to give that care. Some maternity care may be given under [s.5 MCA](#) but the Trust needs to apply to Court to get authorisation if (1) more than transient forcible restraint; (2) serious dispute as to best interests; (3) risk that P will suffer a DOL not otherwise authorised, **NHS Trust v. FG** [2014] [COPLR 598](#) para 88.

Where a pregnant woman is receiving psychiatric care note the following practice guidance: (1) to have both the mental health trust and acute trust involved in the capacity assessments and for each to have copies of all the records and (2) to apply as early as possible see **North Middlesex University Hospital NHS Trust v. SR** [2021] [EWCOP 58](#) paras 26-28 per DHCJ Gollop QC.

The information relevant to the decision:

- *“It is of course a profound and grave decision, but it does not necessarily involve complex issues”*  
**Re: SB (Capacity to consent to termination)** [2013] [COPLR 445](#) para 44.
- **S v. Birmingham Women and Children’s Trust** [2022] [EWCOP 10](#) where the Court identified the information to be understood as (1) what the procedures involve; (2) the effect of the procedure; (3) the risks; and (4) the possibility of safeguarding measures for the baby. The first 3 were usefully summarised as what it is, what it does, what it risks
- In **Re: CS** [2016] [EWCOP 10](#) counsel identified wider information: (1) options for termination; (2) extent of her pregnancy; (3) her previous views about pregnancy; (4) her personal circumstances; and (5) her ability to care for her existing children.

- Sterilisation

For a recent case on abortion stressing the importance of wishes and feelings, **Re: AB (Termination of Pregnancy)** [2020] COPLR 42 para 72 King LJ:

*It may be that, on any objective view, it would be regarded as being an unwise choice for AB to have her baby, a baby which she will never be able to look after herself and who will be taken away from her. However, in as much as she understands the situation, AB wants her baby. Those who know her best, namely CD and her social worker, believe it to be in AB's best interests to proceed with the pregnancy...*

Should the father be involved in the proceedings and / or consulted under s. 4 MCA? See **Re: SB** [2013] EWHC 1417 where a woman with bipolar disorder was found capacitous (para 8):

*the father of the expected child, who is present and represented, has a full right to participate in these proceedings and to express views about the various issues that arise” and Re: CS [2016] EWCOP 10 where the application was served on P’s partner in prison (para 14).*

For a case on non-therapeutic sterilisation see **A Local Authority v. K** [2013] COPLR 194. It can be argued that sterilisation, while medically more restrictive than a coil, is socially less restrictive because there is no ongoing monitoring by professionals **Re: DD (No 4)(Sterilisation)** [2015] EWCOP 4 paras 98 and 110:

*No medical follow-up would be required (either in the short-term or long-term). This most fully gives effect to DD's long held, and consistent, wish and feeling to be treated as normal as possible and to be left alone without interferences in her private life. She finds the involvement of agencies intolerable...*

For therapeutic sterilisation for someone distressed by menstruation and endometriosis, **University Hospitals of Derby and Burton Trust v. J** [2019] COPLR 317.

For male sterilisation where the preponderant factor was to enable P to resume his long term relationship, **An NHS Trust v. DE** [2013] COPLR 531.

- Collection of sperm/ gametes

The Human Fertilisation and Embryology Act 1990 regulates the storage and use of human gametes. Consent is central to regulation and para 1(1) of Sched 3 provides that consent must be “in writing and ... signed by the person giving it”.

Can the MCA be used to allow someone's gametes to be used after their death?

In **Y v. A Healthcare NHS Trust** [\[2018\] EWCOP 18](#) it was allowed in circumstances where the applicant was in a long relationship with P, they had started fertility treatment together to have a sibling for their first child, P was injured in a road traffic accident just before their second appointment and they had discussed posthumous use of P's sperm and P agreed to have a child after his death. Given the terms of that Act it was necessary for the Court to approve storage and use of the sperm before P died. Conversely in **X (Catastrophic Injury: Collection and Storage of Sperm)** [\[2022\] EWCOP 48](#) the Court did not make the order. The application was brought by P's parents and there was no evidence that P and his girlfriend had discussed having a baby. There was no evidence that P wanted his sperm stored after his death or wanted to father a child posthumously (the Court seeing wanting to be a father as a different wish).

For a case on posthumous use of an embryo following the death of the person who provided the egg and would have carried the embryo see, **Jennings v. HFEA** [\[2022\] EWHC 1619](#).

## END OF LIFE

The [Code of Practice](#) states:

*5.31 All reasonable steps which are in the person's best interests should be taken to prolong their life. There will be a limited number of cases where treatment is futile, overly burdensome to the patient or where there is no prospect of recovery. In circumstances such as these, it may be that an assessment of best interests leads to the conclusion that it would be in the best interests of the patient to withdraw or withhold life-sustaining treatment, even if this may result in the person's death...*

The question is giving consent to treatment and not to its withdrawal:

*the focus is on whether it is in the patient's best interests to give the treatment rather than whether it is in his best interests to withhold or withdraw it. If the treatment is not in his best interests, the court will not be able to give its consent on his behalf and it will follow that it will be lawful to withhold or withdraw it. Indeed, it will follow that it will not be lawful to give it...*

**Aintree v. James** [\[2013\] COPLR 492](#) para 22

Many cases consider withdrawal of CANH. A summary of principles is at para 29 of **Salford Royal Infirmary v. Mrs P** [\[2018\] COPLR 120](#) including (1) sanctity of life is not absolute and can be outweighed by autonomy and dignity; (2) look at best interests in the widest sense and from P's perspective; (3) consider whether P's condition may improve; (4) consider P's values and beliefs; (5) generally follow P's views/ give them great respect, but they are no determinative.

CANH can be withdrawn from a patient even if they are not in a vegetative state, cases summarised at para 26 of **Z v. RS and University Hospital Plymouth** [\[2021\] COPLR 342](#).

Where P had suffered a stroke severely damaging his brain it was inappropriate to continue treatment, even for the purpose of providing 3 weeks for his family to visit him (delayed by pandemic travel restrictions):

*It follows from what I have said that TW cannot feel the pain of that, but for it to occur in circumstances where treatment can achieve nothing, I consider that Dr B is right to recognise this as a compromise to his patient's dignity... both Dr A and Dr B intimated that to require them to provide treatment in these circumstances, which they assess as contrary to TW's interests, comes perilously close to, if not crossing, an ethical boundary* **TW v. Sandwell and West Birmingham Hospitals NHS Trust** [\[2021\] COPLR 304](#) para 33.

For a case approving sedation and withdrawal of CANH for a 34 year old with a 60-70% chance of surviving ventilation but preferring not to live with a stoma, see **Barnsley Hospital NHS Foundation Trust v. MSP** [\[2020\] EWCOP 26](#)

The Court has approved withdrawal of treatment from someone who otherwise had a 6-9 month prognosis (para 71):

*“I do not consider that AH's best interests are presently met by ventilatory treatment in the ICU; ventilation is now both burdensome and medically futile; it is protracting avoidable physical and emotional pain”* subject to giving time for her children to be with her, **Cambridge University Hospitals NHS Foundation Trust v. AH** [\[2021\] COPLR 519](#) para 108.

This was overturned on appeal for procedural reasons ([Re: AH \[2021\] EWCA Civ 1768](#)) and at the re-hearing it was decided that:

*“the very real burdens in the particular circumstances AH is in, with the prospect of no change and more probably a continued deterioration which may last many months of treatment, with the risk of an infection and dying away from her family, outweigh those very considerable benefits”* [of maintaining life; according with religious beliefs and family view].

**Cambridge University Hospitals NHS Foundation Trust v. AH** [\[2021\] EWCOP 64](#) para 93.

For an exposition of the importance of human dignity in the COP and in end of life cases in particular see **North West London CCG v. GU** [\[2022\] COPLR 137](#). Note the alternative analysis, that dignity is a difficult concept to apply:

*The concept of human dignity as an element of the best interests analysis is however, not without difficulty. The term 'human dignity' does not lend itself to precise definition and there is no universal agreement as to its meaning. The concept of human dignity must, accordingly, contain a significant element of subjectivity and thus be influenced by, for example, the religious or cultural context in which the question is being considered*

**Raqeeb v. Barts NHS Foundation Trust** [\[2019\] EWHC 2530](#) para 176.

- MCS and VS

A person may experience both harms and (probably) benefits of which they may have no conscious awareness, **Parfitt v Guy's and St Thomas' Children's NHS Foundation Trust & Anor** [2021] EWCA Civ 362 paras 50- 62:

*The proposition that no physical harm can be caused to a person with no conscious awareness seems to me to be plainly wrong ... In the criminal law, for example, an unconscious person can suffer actual or grievous bodily harm ... The judge was in my view entirely justified in citing examples from the law of tort in which it has been recognised that physical harm can be caused to an insensate person. As Mr Mylonas observed, if the proposition advanced on behalf of the appellant was correct, there would be no limit on a doctor's ability to perform any surgery upon any insensate patient...*

Brain stem death remains the measure of death and once a patient is dead there is no best interests decision to make In **Re: M (Declaration of Death of a Child)** [2020] 4 WLR 52 – “The appropriate declaration is that the patient died at a particular time and on a particular date without more” para 96. However, practitioners should note the case where a baby had a brain stem death diagnosis withdrawn, **Guy's and St Thomas' NHS Foundation Trust v. A** [2022] EWHC 1873

Following **Bland** it was considered treatment, including ANH, was futile if P was in a vegetative state, **Airedale NHS Trust v. Bland** [1993] AC 789 but that if P was in a minimally conscious state a balance sheet approach should be used, In **re: M (Adult Patient) (MCS: Withdrawal of Treatment)** [2012] 1 WLR 1653. That might result in a decision to withdraw treatment from the person in MCS but it might not.

In **An NHS Trust v. Y** [2018] 3 WLR 751 Lady Black advised against relying on categorisation to dictate best interests between PDOC patients and other patients eg critically ill or with degenerative disease (para 119):

The categorisation is now of diminishing importance, on the basis that consciousness is not a series of absolute states but a spectrum:

*There is, in any event within each definition, potentially a wide range of variables – ie there are, plainly, many degrees of consciousness (from those who are only just above vegetative to those who are bordering on full consciousness) within the broad category of 'minimally conscious state' ... It would be wrong in my view to conclude that where the patient is not diagnosed as MCS or VS, a significantly different approach to the determination of the case should be taken ... It all depends, as I have indicated, on the individual facts, and every decision must ultimately be governed by what is in a patient's best interests*

**PL v. Sutton CCG** para 29.

For a recent case finding MCS (despite the absence of a longitudinal study) and relying on P's past wishes and feelings to withdraw consent for CANH, **A CCG v. P** [\[2019\] COPLR 235](#)

Also **NHS Cumbria v. Rushton** [\[2019\] COPLR 283](#) para 30 "*The perceived importance of a definitive diagnosis had reduced over time*".

## VACCINES

Well, it wouldn't be the post 2020 world without something on vaccines.

Evaluating capacity on whether to have a Covid-19 vaccination was *“unlikely to be a complex or overly sophisticated process”* and for the Covid vaccine: *“This risk matrix is not, to my mind, a delicately balanced one. It does not involve weighing a small risk against a very serious consequence. On the contrary, there is for Mrs E and many in her circumstances a real and significant risk ...”*, **Re E (Vaccine)** [\[2021\] COPLR 189](#)

Note that it is not for the court to *“arbitrate medical controversy or to provide a forum for ventilating speculative theories. My task is to evaluate V’s situation in light of the authorised, peer-reviewed research and public health guidelines”* **SD v. Kensington & Chelsea** [\[2021\] COPLR 294](#) criticising delay. For a case considering Covid-19 vaccines post pandemic and indicating that decisions should be made quickly and it is not serious medical treatment, **North Yorks CCG v. E** [\[2022\] EWCOP 15.](#)

For the European Court of Human Rights on compulsory vaccines for children see: **Vavricka v. Czech Republic** App [47621/13](#) para 277:

*... consensus among the Contracting Parties, strongly supported by the specialised international bodies, that vaccination is one of the most successful and cost-effective health interventions and that each State should aim to achieve the highest possible level of vaccination among its population*

As to the risk side of the vaccination equation note the evidence from Dr A in **TW v. Sandwell and West Birmingham Hospitals NHS Trust** [\[2021\] COPLR 304](#) para 31: *“He told me that he had seen more deaths in the last twelve months than in the rest of his career put together”*.

Courts occasionally find that vaccination is not in P’s best interests, in one case where there was no record of them ever having a vaccine, in another because P would object vociferously and lose trust in their carers, **SS v. London Borough of Richmond upon Thames** [\[2021\] EWCOP 31.](#)

Note there are many applications relating to children where parents disagree about vaccination, see **H (A Child) (Parental Responsibility: Vaccination)** [\[2020\] EWCA Civ 664.](#)

## PROCEDURE

There is no automatic requirement to apply to Court to withdraw life-saving treatment. The MCA does not require it and Code of Practice and Bland should not be read as requiring it. The MCA, Code of Practice and professional guidance are sufficient to comply with article 2 ECHR, **An NHS Trust v. Y** [\[2018\] COPLR 371](#), SC. See also **M (By Her Litigation Friend Mrs B) v A Hospital** [\[2017\] COPLR 398](#), Peter Jackson J.

The application can be made on the papers where the parties are agreed **NHS Windsor and Maidenhead CCG v. SP (Withdrawal of CANH)** [\[2018\] COPLR 334](#) para 19.

See **Mazhar v. Birmingham Community Healthcare NHS Foundation Trust** [\[2020\] EWCA Civ 1377](#) for guidelines about urgent applications under the inherent jurisdiction which are useful more generally.

For guidelines for out of hours applications see **Sandwell and West Birmingham Hospitals NHS Trust v CD** [\[2014\] COPLR 650](#), Theis J: suitable arrangements for the parents to participate in the hearing; alerting the OS with sufficient time; notifying the Clerk of the Rules; providing a Word version of the draft order; the statement in support should have information regarding the history or quality of P's life (para 39).

For guidelines see also **St George's Healthcare NHS Trust v. S** [1998] 3 WLR 936.

Note that for children applications are made under the inherent jurisdiction and as a specific issue order under s.8 Children Act 1989 (see **Re: JM (a Child) (Medical Treatment)** [\[2015\] 2 FLR 235](#))

“open-ended” declarations should be avoided as it is “*not the function of the court to oversee the treatment plan for a gravely ill child*” **Wyatt v. Portsmouth NHS Trust** [\[2006\] 1 FLR 554](#) para 117.

“*We do not overlook the pressure under which urgent orders are drafted, but it is essential that orders of this importance accurately reflect the court's decision*” noting that (1) contrary to the order P had capacity and the order was in the inherent jurisdiction for children (2) the order said blood could be given if clinically indicated but the Judge had decided only if there was a risk of ‘serious injury or death’, **E v. Northern Care Alliance** [\[2022\] EWCA Civ 1888](#), para 19.

- Orders

- Care plans

For a decision of the Court approving a care plan that a tracheostomy would not be reinserted following removal by P in an act of self harm see **Cambridge University Hospitals NHS Foundation Trust v. RD** [\[2022\] EWCOP 47](#)

*“a lead clinician with central overall responsibility, overseeing and coordinating the plan is, to my mind, indispensable”* **Imperial College Healthcare v. MB** [\[2019\] EWCOP 30](#) para 14 for return home of complex patient at end of life.

The Court can make an order in principle with a restraint plan to follow where this is required by urgency:

*The absence of [a restraint] plan is a direct consequence of my decision to cause the case to be heard quickly. I am able to make the best interest declarations I have indicated but they are not to be given effect until the plan has been put together and approved initially by the Official Solicitor and subsequently by this court.*

**Sherwood Forest Hospitals v. C (by her litigation friend the OS)** [\[2020\] COPLR 696](#)