MENTAL CAPACITY REPORT:
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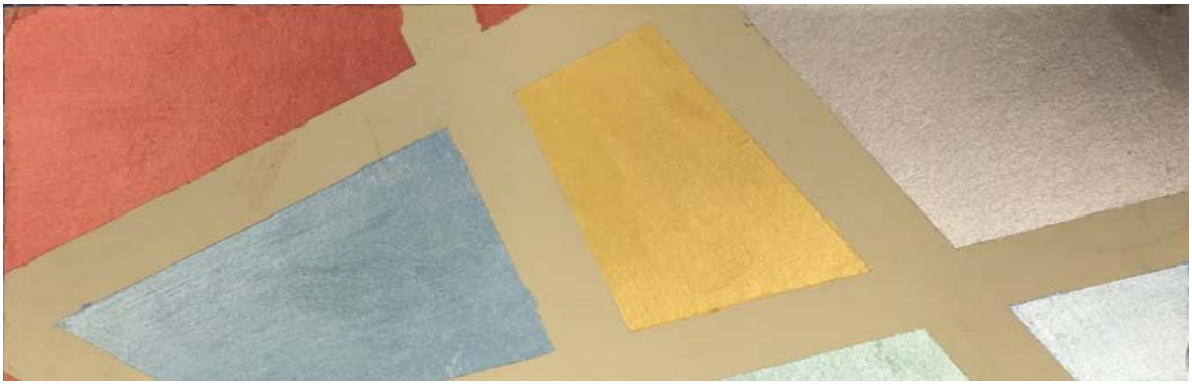

As the Court of Protection Law Reports series has been discontinued by LexisNexis, the Court of Protection has lost a dedicated series of headnoted reports. Pending any other publisher picking up the baton, we are stepping into the breach with this new series of headnotes, of which this is issue 3.

This series, which has its own citation [2023] 39ECMCR [xx], is unofficial, but we hope that it will be of assistance. Cases which appear in this series of headnotes are ones which meet the criteria of:

- containing an authoritative interpretation of the Mental Capacity Act 2005; or
- addressing a point of practice or procedure of wider significance.

The series of headnotes stands alongside our ordinary Mental Capacity Reports, in which you will find a longer summary and comment on the cases headnoted here, together with summaries and comments on cases which do not meet the criteria for inclusion here. The case report that you can find on our database will include both the headnote and the summary/comment.

For each case, you will find the headnote, together with a hyperlink to the case entry on The National Archives database.

Previous issues in the series can be found here.

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

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Esper v NHS NW London ICB (Appeal : Anonymity in Committal Proceedings) [2023] 9ECMCR 6

[2023] EWCOP 29
Court of Protection
Poole J
10 July 2023

Practice and procedure – contempt – whether power not to name contemnor

A Tier 1 judge in the Court of Protection found that a man had committed a contempt of court by breaching an order restricting his contact with the subject of the proceedings. The man appealed against the judgment which named him as a contemnor whilst restricting the identification of the subject of the proceedings and two of their relatives, respondents to the Court of Protection proceedings.[1]

Held – granting permission to appeal but refusing the appeal –

(1) There were anomalies and inconsistencies between rules governing committal proceedings in Court of Protection, Civil Courts and Family Court. However, the Lord Chief Justice's Practice Direction: Committal for Contempt of Court - Open Court, March 2015 ('PD 2015') paragraphs 14 and 15, and COPR r. 21.(11) and (13) as explained or qualified by COP PD 21A(4), were consistent in requiring a reasoned judgment to be given in public at the conclusion of all committal proceedings in the Court of Protection but only to require judgments to be published on the Judiciary website in those cases where a committal order had been made. The making of a committal order was a "committal decision" for the purposes of PD 2015, paragraph 14. COP PD 21A(4) qualified COPR r..21.8(13), it was not inconsistent with it (see paras [9] and [23]).

(2) Notwithstanding the provisions of PD 2015, judges in the Court of Protection should apply COPR r.21.8(5) when considering an order for the non-disclosure of the identity of any party or witness in committal proceedings, including the defendant. Insofar as PD 2015 indicated that there was no power to order non-disclosure of the defendant's name, it should yield to COPR r.21.8(5) which required non-disclosure of the defendant's name if and only if the two tests of necessity set out in that rule are met. COPR r.21.8(5) applied at all stages of a committal application in the Court of Protection, it applied to a defendant, any other party or a witness, and it applied to the disclosure of the identity of a party or witness by way of their being named in court, in a judgment and/or in a report of the proceedings. COPR

[1] A further ground of appeal was advanced, but does not merit reporting.

r.21.8(5) required the court to order non-disclosure of the identity of any party or witness if the two necessity conditions within the rule are met. Section 11 of the Contempt of Court Act 1981 allowed for ancillary orders to ensure that the purpose of such a non-disclosure order was not defeated. However, it would be a rare case in which the two limb test contained in COPR r.21.8(5) allowing the court to order non-disclosure of a defendant's identity would be satisfied, and an extremely rare case where they were met in respect of a defendant found to have committed a contempt of court and/or who had been made the subject of a committal order (*Sunderland City Council v Macpherson* [2023] EWCOP 3, *R (Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346 and *Bovale Ltd v SSCLG* [2009] 1 WLR 2274 considered; *EBK v DLO* [2023] EWHC 1074 (Fam) distinguished) (see paras [32], [33], [35], [36]).

(3) Reporting restrictions made in committal proceedings would be "different or additional restrictions" for the purposes of paragraph 3 of COP PD 4A, such that court had to rely solely on COPR r.21.8(5) in relation to non-disclosure of the identity of any party or witness in the committal proceedings. Hence, if, and only if, the tests within COPR r.21.8(5) were met the court would order the non-disclosure of the identity of a party or witness, and the tests must be considered at each committal hearing (see paras [47]-[49]).

(4) COPR r21.8(5) must allow the Court of Protection to make a non-disclosure order regarding the identity of the defendant or any party or witness in committal proceedings in the Court of Protection, even before the first hearing, and regardless of the mandatory terms of paragraph 13 of PD 2015. As a matter of practicality, every committal application in the Court of Protection should be put before the appropriate judge prior to the first hearing so that the question of whether COPR r.21.8(5) must prevent the identification of the defendant's name in the public court list can be considered. In the absence of any order to the contrary, the defendant's full name must appear in the list. Court listing offices needed to be fully aware of that requirement. However, if the court were to be satisfied that the necessity tests in r21.8(5) are met, then it must direct that the defendant's name be anonymised in the court list. The press should be notified and may make representations at the first hearing (see paras [52]-[53]).

(5) Whilst permission would be granted, the appeal would be dismissed. The District Judge's decisions were ones he was entitled to make, indeed it was not open to him to make an order for non-disclosure of the identity of the contemnor given the strict tests of necessity under COPR r21.8(5) and the fundamental importance of open justice, including in relation to committal proceedings (see paras [61]-68]).

Per curiam

The anomalies and inconsistencies between the different sets of procedural rules and Practice Directions mean that further consideration should be given by the Court of Protection Rules Committee to the issue, and in interim, the court set out a set of suggestions for the court to follow (se para [54]).

Statutory provisions considered

Administration of Justice Act 1960, s 12
Children Act 1989, s 8
Contempt of Court Act 1981, s 11
Human Rights Act 1998, s 12
Mental Capacity Act 2005, s 51

Cases referred to in judgment

Bovale Ltd v SSCLG [2009] EWCA Civ 171
Brearley v Higgs and Sons [2021] EWHC 1342 Ch
EBK v DLO [2023] EWHC 1074 (Fam)
G v G (Minors: Custody Appeal) [1985] UKHL 13
Khuja v Times Newspapers Ltd [2017] UKSC 49
R (Mount Cook Land Ltd) v Westminster City Council [2003] EWCA Civ 1346
Re F (Children) [2016] EWCA Civ 546
Scott v Scott [1913] AC 417
SMO v TikTok Inc. [2020] EWHC 3589 (QB)
Sunderland City Council v Macpherson [2023] EWCOP 3
XXX v Camden London Borough Council [2020] EWCA Civ 1468

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Full judgment available on The National Archives database here.

Reported by Alex Ruck Keene KC (Hon)

Re RK (Capacity; Contact; Inherent Jurisdiction) [2023] 39ECMCR 7

[2023] EWCOP 37
Court of Protection / High Court (Family Division)
Cobb J
18 August 2023

Mental capacity – inherent jurisdiction – whether Mental Capacity Act 2005 or inherent jurisdiction applicable to facts of case

A woman with a number of cognitive impairments lived in supported living accommodation. Her family wished her to come back to live with them, but she wished to remain where she was. She had sought to cut off contact with her family, in part as a result of their actions following her entry into a relationship (now ended) with another resident at the placement. Her family applied to the Court of Protection for declarations that she lacked capacity to make decisions about contact, that she was susceptible to undue influence, and measures need to be put into place to protect her from this; and that she lacked capacity to revoke Lasting Power of Attorneys ('LPAs') created in respect of property and affairs and health and welfare. In the alternative, the family sought relief under the inherent jurisdiction of the High

Court to put in place a supportive framework to encourage her to repair and maintain her relationship with her immediate and wider family and friends.

Held – declaring that the woman had capacity to make decisions about contact and (in the High Court (Family Division)) refusing to make an order under the inherent jurisdiction –

(1) There was a dispute as to whether the woman had had capacity to execute the LPAs in question, but there was no purpose served in the court examining and determining the question. There was no dispute as to the question of whether, and the court was satisfied on the evidence before it that, the woman lacked the capacity to revoke the LPAs. The family members who were attorneys having agreed to disclaim the LPAs, the recital to the order would reflect this. The court would not grant the family temporary authority to address financial issues with the supported living provider or pursue complaints on the woman's behalf to the Ombudsman. It was in the woman's best interests that her financial affairs were accurate and tidy, but the court was not satisfied that it was in her best interests for her family to continue to exercise any role in relation to them (*The Public Guardian v RI, D, RS, RO* [2022] EWCOP 22 applied) (see paras [65]-[69] and [156]).

(2) The burden lay with the person or body asserting the lack of capacity, on the balance of probabilities. On the evidence before the court, the court was satisfied that the woman's family had not rebutted the presumption that the woman had capacity to make decisions about contact with others. The court was satisfied that she understood the issues, and had been able to use or weigh the information relevant to the decision on contact. The fact the woman had vacillated in recent times over seeing seeing the family (or members of them) was perfectly understandable, and utterly predictable; it was not evidence of inappropriate pressure being applied on her to change her mind. Nor was that that she did not understand the information relevant to a decision on whether to see her family. Rather, she was deeply conflicted, very aware that she was caught in the crossfire of the dispute between her family (which fundamentally she loved) and the supported living provider (in whose care she lived, and whose relationship she valued). She might say to people that which she thought they want to hear. That of itself was not an indicator of a lack of capacity; many fully capacitous people do exactly that. Her vacillation was not, or not necessarily, an indicator that she was coming under pressure, let alone undue pressure, from external sources (see paras [101-[104] and [156]).

(3) As regards the exercise of the inherent jurisdiction, whilst it was available in the right case, it was not all-encompassing and there were clear limits to its applicability. The burden fell on the woman's family to prove that her will had been and / or was being overborne by those who are caring for her, and that she was the subject of constraint, coercion, undue influence or other vitiating factors. It was a serious allegation to make; the more so, it might be thought, when the accusation was made against professional care providers. The court considered the allegations on the balance of probabilities; and approached the task on the basis that if the party who bore the burden of proof failed to discharge it, the fact was treated as not having happened. The court also had in mind the required approach that, the more serious the allegation the less likely it was that the event occurred and, hence, the stronger should be the evidence before the court concluded that the allegation was established on the balance of probability. On the evidence before the court, there had been no deliberate attempt at, or actual, alienation of the woman against her family by members of the placement staff; the court further rejected the allegation of 'environmental alienation' – i.e. the placement creating an environment or eco-system in which the woman was not able to speak positively about her family and/or where all conversation about her family was negative. It was clear that the woman had recently made free choices, and choices which had brought into contact with her family. The court viewed with some sympathy the 'supportive framework' proposals advanced by the parties (and both discussed and actively encouraged their consideration), but it necessary for the court to make orders in relation to them in order to liberate the woman to make decisions freely, nor was it proportionate that it should.

The court was conscious of the need to guard against adopting an overly paternalistic attitude to a vulnerable adult who was the subject of the proceedings, and to make orders in the "hinterland" of the MCA 2005 which undermine the very concepts of the MCA 2005 itself (*Re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563, *Re SA (Vulnerable Adult with capacity: Marriage)* [2005] EWHC 2942 (Fam) and *DL v A Local Authority & others* [2012] EWCA Civ 253 considered and applied) (see paras [119]-[120]; [133]-[136] and [156]).

Statutory provisions considered

Mental Capacity Act 2005, ss 1, 2, 3, 15

Cases referred to in judgment

B v A Local Authority [2019] EWCA Civ 913
CC v KK & STCC [2012] EWCOP 2136
DL v A Local Authority & others [2012] EWCA Civ 253
LBL v RYJ [2010] EWHC 2664 (Fam)
LBX v K, L, M [2013] EWHC 3230 (Fam)
North Bristol NHS Trust v R [2023] EWCOP 5
PC v NC and City of York Council [2013] EWCA Civ 478
Re H (Minors)(Sexual Abuse: Standard of Proof) [1995] UKHL 16
Re SA (Vulnerable Adult with capacity: Marriage) [2005] EWHC 2942 (Fam)
Re T (Adult: Refusal of Treatment) [1992] EWCA Civ 18

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John McKendrick KC (instructed by Miles & Partners on behalf of the Official Solicitor) for the First Respondent

Full judgment available on The National Archives database here.

Reported by Alex Ruck Keene KC (Hon)

Barnet Enfield And Haringey Mental Health NHS Trust & Anor v Mr K & Ors
[2023] 39ECMCR 8

[2023] EWCOP 35
Court of Protection
John McKendrick KC (sitting as a Tier 3 Judge of the Court of Protection) Chancery Division
15 August 2023

Capacity – interim hearings – whether court could make interim declaration as to capacity under s.48 Mental Capacity Act 2005

A 60 year old man was subject to a standard authorisation under Schedule A1 to the Mental Capacity Act 2005 ('MCA 2005') in a care home following five years spent in a mental health facility in which he was not detained but which he refused to leave. He suffered from persistent delusions and paranoia and refused to engage with professionals. He had a long-standing heart condition which made any treatment against his will extremely difficult to carry out. Previous orders made by the Court of Protection had authorised his successful conveyance from hospital to a care home with provision for physical and chemical restraint – neither of which was in fact required. He had longstanding leg ulcers which he had previously treated himself. He refused to allow staff or other medical professionals to assist him or assess them. On the matter being returned urgently to court in light of the man's parlous medical condition, the court was asked to consider the man's capacity and best interests as regards assessment, conveyance to hospital, and treatment of the ulcers.

Held – making declarations pursuant to s.48 MCA 2005 as to the man's capacity and best interests, and orders authorising deprivation of liberty pursuant to ss.4A and 16 MCA 2005 –

(1) The court took from the authorities considering s.48 MCA 2005 that the language needed no gloss, and that the court need not be satisfied, on the evidence available to it, that the person lacked capacity on the balance of probabilities, but rather a lower test was applied. Belief was different from proof. Section 48 required: "*reason to believe that P lacks capacity.*" Section 2 required: "*whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.*" That being said, where medical treatment was being considered which the patient did not consent to, the court must be satisfied there was evidence to provide a proper basis to reasonably believe the patient lacked capacity in respect of the medical decision (*Local Authority v LD* [2023] EWHC 1258 (Fam) *DP v London Borough of Hillingdon* [2020] EWCOP 45 considered) (see para [57]).

(1) No party sought to persuade the court that the man had capacity to make the relevant decisions, and the court was satisfied on the evidence before it that there was reason to believe that he lacked capacity in the relevant domains. On the basis of the evidence before the court, it would make an order pursuant to s.48 MCA 2005 that the assessment and treatment care plan was in the man's best interests and authorise the use of chemical and physical restraint, if necessary as a last resort. Although the deprivation of the man's liberty was authorised by way of an earlier standard authorisation, pursuant to ss.4A and 16 MCA 2005, the court authorised any residual deprivation of his liberty occasioned by the assessment. However, before the care plan approved by the court was implemented, inquiries should be made of the Trust which managed hospital which had previously treated the man (and about which he appeared to speak very positively) as to whether it was willing to assess and treat him; if that was the case, and if he were willing to be admitted, that should be the urgent resolution to this matter (see paras [67]-[69], [85] and [89]).

(3) The question of the court's jurisdiction to make interim declarations as to capacity under s.48 MCA 2005 having been raised upon circulation of the draft embargoed judgment, the court gave reasons for making the order upon the basis of s.48. If possible, it appeared to the court that it should make an interim declaration in respect of the man's capacity in respect of the matter identified in the judgment. Having regard to COPR 2017 r.10.10(1)(b) and applying the terms of ss.48(1) and 47(1) MCA 2005, the Court of Protection had the power to make an interim declaration in respect of capacity. The fact that the terms of ss.15 and 48 do not provide for interim declarations did not limit the court's wider powers, as provided for in s.48. The court was fortified in reaching this conclusion by considering that an interim declaration could be made in respect of a vulnerable adult pursuant to the High Court's inherent jurisdiction; it would be surprising if Parliament when legislating for MCA 2005 would have chosen to

remove the power to make interim declarations in respect of incapacity. It was also desirable that the court retained the power to make interim declarations in respect of capacity. A determination that there was reason to believe P lacked capacity in relation to the matter was an important step which established the court had jurisdiction to make best interests orders in respect of P, if additionally the s.48(c) MCA 2005 test of 'without delay' was met. The declaration should be precisely worded to make clear the matters in respect of which the court had jurisdiction. A finding was a less precise basis upon which to exercise the court's jurisdiction. However, the court not having heard argument on the matter, and the need for the orders to be finalised being urgent, the court would also make a finding in the same terms as the interim declaration in case it was wrong as to its analysis (*DP v London Borough of Hillingdon* distinguished, *Re G (Court of Protection: Injunction)* [2022] EWCA Civ 1312 and *Re SA* [2005] EWHC 2942 (Fam) considered) (see paras [94]-[105]).

Statutory provisions considered

Human Rights Act 1998, Schedule 1, Articles 2, 3, 5 and 8
Mental Capacity Act 2005, ss 2, 4A, 15, 16, 47, 48
Senior Courts Act 1981, s 19

Cases referred to in judgment

A Local Authority v JB [2021] UKSC 52
Aintree University Hospitals NHS Foundation Trust v James [2013] UKSC 67
DP v London Borough of Hillingdon [2020] EWCOP 45
Local Authority v LD [2023] EWHC 1258 (Fam)
North Bristol NHS Trust v R [2023] EWCOP 5
Radia v Jhaveri [2021] EWHC 2098 (Ch)
Re G (Court of Protection: Injunction) [2022] EWCA Civ 1312
Re SA [2005] EWHC 2942 (Fam)

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Full judgment available on The National Archives database here.

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