

# Navigating Closed Material, Contempt, and Inherent Jurisdiction in the Court of Protection

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# Overview:

- **Closed Hearings**
- **Closed Material**
- **Contempt Proceedings**
- **Inherent Jurisdiction**
- **Q & A**





# Principles of closed hearings & closed material



# Starting Point in COP proceedings

## Parties

- All parties
- P (if not joined)



## Participation in proceedings

- Have access to all documents
- Attend all RTMs/hearings



## Reasons

- Open Justice
- Enables parties to present their case fully
- Court has the assistance of all parties
- Article 6 ECHR

# Closed hearings & closed material

01

## Closed Hearing

A party (& their representatives),  
is excluded by court order

02

## Private Hearing

All parties are present, but not  
members of the public/press

03

## Closed Material

Material which the court has  
determined should not be  
disclosed to a party (or their  
representative)

**Guidance: *Closed Hearings' and 'Closed Material'* [2023] EWCOP 6**

# Derogation from starting point

**P's rights  
under the  
ECHR**

**Parties'/  
wider  
public  
interest**

**Restrict  
-ions**

**Kept  
under  
review**



# Closed Hearings



# Closed Hearings

01

## Considerations

- Last resort;
- Justify (with evidence) why a closed hearing it is necessary
- Protect & promote P's best interests

02

## Applications

- All other (less restrictive) alternative steps which have been considered (e.g. redactions)
- Steps take to minimise interference
- Reference relevant COPR rules relied on (e.g. r.6.10 10.4(5))

03

## Notice

Short notice: burden on applicant to explain why full notice could not be provided



# Practical considerations

01

## Procedural matters

- Tier 3 Judge (case management)
- Listing of hearing:
- Can fact of hearing be disclosed?
- If not: no case identifying information & no link to current open proceedings
- Orders

02

## Transparency

- Outside PD4C Transparency provisions
- Publication of reasoned judgement (rationale for holding of hearing & substantive decision)

03

## Without Notice applications

- Onerous obligation on applicant
- Pre-issue: joinder of parties/disclosure of fact/outcome of application to party
- Party's ECHR/common law rights



# Closed Material



# Staged Approach (secure P's rights)

- Is there a real possibility of significant harm to P by disclosing material



- Would P's overall interests benefit from non-disclosure:
  - P's interests in properly testing the material;
  - Magnitude of risk of harm & gravity of the harm



- **Overall test for non-disclosure:**
  - **Is it strictly necessary to meet the risk?**
  - **Any interference must be lawful, necessary & proportionate**



- Non-disclosure v other party's interests to review & respond to material
- Relevance of material to issues of case

# Staged Approach (some other compelling reason)

- Is there a real possibility of significant harm to P by disclosing material



- Would P's overall interests benefit from non-disclosure:
  - P's interests in properly testing the material;
  - Magnitude of risk of harm & gravity of the harm



- Overall test for non-disclosure:
  - Is it strictly necessary to meet the risk?
  - Any interference must be lawful, necessary & proportionate



- Non-disclosure v other party's interests to review & respond to material
- Relevance of material to issues of case
- Nature of the interest relied upon;
- Interest of the party in question
- Impact of non-disclosure on the Court's ability to discharge its obligation towards P



## Case Examples (Closed Hearings & Closed Material)

*Re A (Covert  
Medication:  
Closed  
Proceedings)*  
[2022] EWCOP 44

*Re P [2021]  
(Discharge of  
a party)*  
EWCA Civ 512

*AA v London  
Borough of  
Southwark*  
[2021] EWCA  
Civ 512

*P (Application to  
Withhold Closed  
Material:  
Concurrent Civil  
Proceedings)*  
[2024] EWCOP 26

*KK v Leeds  
City Council*  
[2020]  
EWCOP 64

*Closed  
Hearings' and  
'Closed  
Material'*  
[2023] EWCO  
P 6



# Contempt Proceedings in the Court of Protection



## Court of Protection Rules 2017

- **Governed by Part 21**
- **Applications made under Part 10**





## Permission required?

- **Permission required if it is alleged that:**
  - there has been interference with due administration of justice; or
  - a person has knowingly made a false statement which was verified by a statement of truth
  
- **Permission not required for allegations of contempt in the face of the court, or in respect of alleged breach of order / undertaking**

## Requirements of an application

- **An order with a penal notice (nb service); or**
- **An undertaking (form N117?)**
- **As to *penal notice*, see r. 21.2**

*“penal notice” means a prominent notice on the front of an order warning that if the person against whom the order is made (and in the case of a corporate body, a director or officer of that body) disobeys the court’s order, the person (or director or officer) may be held in contempt of court and punished by a fine, imprisonment, confiscation of assets or other punishment under the law.*

## Requirements of an application

- **Rule 21.4**
- **Requirements include:**
  - affidavit evidence (not statements)
  - confirmation of personal service (or that such was dispensed with (unusual))
  - details of alleged breach
  - statements as to defendant's rights, inc. legal aid
- **To be served, usually personal service, r. 21.5**

## Service of the order (which included the penal notice)

- The Court can dispense with personal service of the order
- If service likely to be an issue, consider applying to dispense when the order is made (or at least before breach)
- Possible to dispense with service retrospectively, see *Business Mortgage Finance 4 PLC & Ors v Hussain* [2022] EWCA Civ 1264, but will need to be evidence that the defendant was aware of the order, e.g. attendance at hearing

## Hearings

- Hearings will be in public, unless the court orders otherwise, r. 21.8(1)
- Can be in private (or partly in private) if necessary for reasons including protecting P's interests or if publicity would defeat the object of the hearing, r. 21.8(4), see also *Esper v NHS NW London ICB* [2023] EWCOP 29
- Judge and advocates to be robed, whether in public or private, r. 21.8(7)
- Judgment will be published where there is an order for committal, r. 21.8(13) and PD21A, para. 4

## The Applicant's and the Defendant's role

- The Applicant has the burden of proof
- The standard of proof is the criminal standard, beyond reasonable doubt, r. 21.4(2)(o)
- The Defendant has a right to remain silent
- The Defendant can, but cannot be required, to give evidence (see PD21A as to statements from the Defendant)
- The Defendant can cross-examine the Applicant's witnesses

## Punishing Contempt

- **Imprisonment up to 2 years, or a fine up to £2,500 (Contempt of Court Act 1982, s. 14)**
- **For guidance, see *Macpherson v Sunderland* [2023] EWCA Civ 574**
- **Sentences of imprisonment can be suspended / suspended on terms**



## Punishing Contempt

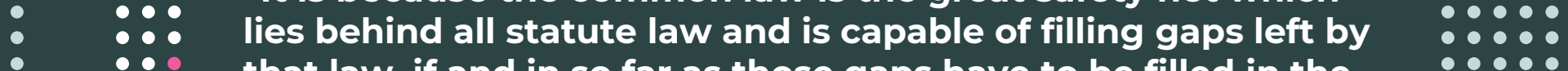
- *Re Dahlia Griffiths* [2020] EWCOP 46, 12 months imprisonment for forging a court order
- *Liverpool Victoria v Zafar* [2019] EWCA Civ 392, 6 months imprisonment for a false statement was unduly lenient (9-12 months more appropriate)
- *Sunderland City Council v MacPherson* [2024] EWCOP 8, 3 months imprisonment for social media posts identifying P (posted during period of an earlier 28 day suspended sentence)





# Inherent Jurisdiction Case Law Update





**“It is because the common law is the great safety net which lies behind all statute law and is capable of filling gaps left by that law, if and in so far as those gaps have to be filled in the interests of society as a whole”**

**In re F (Mental Patient: Sterilization) [1990] 2 AC 1**

# Seminal Cases

01

*Re SA (Vulnerable Adult with capacity: Marriage) [2005]*  
EWHC 2942 (Fam)

02

*DL v A Local Authority & others [2012]* EWCA Civ



# RE SA



*“...the inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either (i) under constraint or (ii) subject to coercion or undue influence or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.”*

# *DL – facilitative jurisdiction*

The court in *DL* specifically endorsed the approach of Macur J (as she then was) in *LBL v RYJ and VJ* [2010] EWHC 2665 (COP), that the court has the power under the inherent jurisdiction

*“to facilitate the process of unencumbered decision-making by those who they have determined do not have capacity free of external pressure or physical restraint in making those decisions”.*

# Norfolk CC v CA [2024] EWCOP 64 (T3)

## Concurrent use of the MCA and the IJ

### MCA

Lacked capacity to make decisions about care, conduct proceedings, & managing property and affairs

Had capacity to make decisions about H&W LPA & contact with daughter and ex husband

Fact finding hearing found 11 allegations of abuse proved.

### IJ

Finding that CA was a vulnerable person and subjected to undue influence by DA

# Questions Court asked:

01

Whether CA was a vulnerable adult in need of protection

02

Whether there was any other statutory scheme which could be used to protect CA from contact risks posed by family

03

Whether the proposed intervention is necessary and proportionate

# Aim of the Interventions

1.

*‘Using the inherent jurisdiction to impose a supervised framework around contact is a temporary way of ensuring that CA can be safe’.*

Done by way of injunctions to regulate DA’s conduct.

2.

*‘Direct the parties to jointly instruct an independent psychological expert to consider the family relationships and how they can be managed so that CA remains safe when she sees her family. It may then be possible for unsupervised contact to take place’*



## A LA V P [2024] EWHC 1882 (Fam)

P was a vulnerable adult under the influence and control of father.

Compelled by court order to live apart from father.

*‘...recognised the draconian nature of the orders he made...’*

Intervention has to remain necessary and proportionate:

The limit of legal intervention to protect a vulnerable adult who won't/can't take advantage of the opportunity given to her to extricate herself from a relationship of control and dependence



# ALAP



*‘The inherent jurisdiction is not unboundaried and, given that all investigations into P’s circumstances have now concluded, there is no lawful justification for the continuance of protective orders. Further protective orders in circumstances where they are unlikely to manifestly alter P’s situation would represent an unjustifiable interference’ with P’s rights.*

## *Harbin v Masterman* [1896] 1 Ch 351 Enquiry

01

Official Solicitor is directed to make enquiries and to report about such matters as the court thinks fit.

02

Independent social worker was instructed by OS to consider P's circumstances – whether P was a vulnerable adult subject to coercion or undue influence.

## LB Hackney v A [2024] EWCOP 33 (T3)

- **A significant range of orders may be made against third parties to locate P if welfare demands it.**
- **Sought collection order and for order against telephone companies to disclose information that would assist in identifying whereabouts of P**
- **Applied case of *HM and PM* [2010] EWHC 870 (Fam) - Court has the power under the inherent jurisdiction where a vulnerable adult is missing to order third parties to provide information.**

## LB Hackney v A [2024] EWCOP 33 (T3)

- **Made against telephone and IT providers, banks, airlines and travel services.**
- **Made ex parte. Orders typically forbid third party from informing abductor.**
- **Direct tipstaff to locate, collect, enter private residential property (using force to open doors) with a view to searching from and taking into custody anything that may help locate the vulnerable person.**







# Thank you

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