

Cornerstone on the Court of Protection

18th June 2025



Court of Protection Dictionary

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June 2025

Court of Protection Dictionary

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'an authoritative and masterly distillation of law and practice'

Sir James Munby



Some points of note:

- Procedural flexibility, to a limit
- 'interim' capacity declarations?
- Role of fact-finding



Procedural flexibility, to a limit

- Wide case management powers, including a duty to deal with cases expeditiously, allocate appropriate resources and save expense (COP Rules, 1.1)
- Power to make orders on court's own motion (r. 3.4(1))



Procedural flexibility, to a limit

- Power to apply CPR or FPR where the COP Rules do not make express provision (r. 2.5(1))
- Therefore, power to strike out / give summary judgment, **N v ACCG** [2017] UKSC 22, at [40]
- But, the power to be exercised with caution
- Consider, in an appropriate case, preparing the ground for strike out / summary judgment

Procedural flexibility, to a limit

- ***VT v Cambridgeshire NHS ICB*** [2024] EWHC 294:
- Two matters. First, is there sufficient information to make the determination? Second, can the decision be made in a procedurally fair manner?
- Notice to the parties that final order might be made is a requirement of procedural fairness.
- See also r. 3.6(6)(b) – a notice of hearing should state if a final order might be made.
- Where the facts permit a determination of best interests, consider ensuring parties are on notice to enable the court to make a final order, without breaching procedural fairness

'interim' capacity declarations?



- ***DP v Hillingdon*** [2020] EWCOP 45 – Hayden J held – no *interim* declaration as to incapacity under s. 48
- Instead, include recital that s. 48 met
- Section 48:

The court may, pending the determination of an application to it in relation to a person (“P”), make an order or give directions in respect of any matter if—

- (a) *there is reason to believe that P lacks capacity in relation to the matter,*
- (b) *the matter is one to which its powers under this Act extend, and*
- (c) *it is in P's best interests to make the order, or give the directions, without delay.*

- Section 48 – permissive, i.e. giving jurisdiction to the Court
- No requirement for the engagement of s. 48 to be *declared*

Some controversy:

- *Barnet, Enfield and Haringey Mental Health NHS Trust v Mr K* [2023] EWCOP 35, John McKendrick KC (as he then was) concluded (in a postscript, without argument) that an interim declaration could be made under s. 47
- *Re EO* [2024] EWCA Civ 1579, Court of Appeal made an interim declaration as to litigation capacity, relying on s. 48, observing that such orders are '*routinely used*' pending a full assessment / determination as to capacity

- The Dictionary authors' view...

'... it appears that the court was not asked to determine the appropriateness of interim declarations in the COP; it appears to have been accepted that such declarations are routinely made. Whereas, in the authors' experience, such interim declarations as to capacity are not routinely made and, for the reasons set out above, it remains uncertain as to whether such interim declarations as to capacity can or should be made.'

In short, the **DP v Hillingdon** approach, of a recital, is to be preferred. For now at least.

Role of fact finding



- Whether fact-finding necessary, a case management decision (r. 1.3(3))
- Existence of disputed facts not itself enough, **Re AG** [2015] EWCOP 78
- Key question: will resolving the factual dispute help to determine capacity / and or best interests?

- Where there is fact-finding, see ***Reading Borough Council v O*** [2023] EWCOP 16:
- Burden of proof (the civil standard) is on the party asserting the disputed fact
- Court not bound by cases advanced by parties – can, with caution, make findings on alternative facts
- Must be procedural fairness to any party subject to an allegation

- Scott schedules of allegations?
- Their use criticised in family proceedings, see **Re H-N** [2021] EWCA Civ 448
- Schedules not expressly prohibited in COP, but the **Re H-N** criticisms might apply equally to COP, e.g. where allegations of conduct within a relationship
- Consider alternatives, narrative evidence (not tied to pleaded allegations), or the pleading of *cluster* / example allegations. The best approach will vary between cases. Consider seeking early case management directions before extensive evidence is filed.

The Dictionary, available in print/ebook:

www.classlegal.com



Thank you

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Making life easier: practical tips

Catherine Rowlands and Tara O’Leary

June 2025



How to use the Court system and your barristers to the best effect





Know where you are going

When lodging your application, what are you seeking?

Why are you asking the Court to do anything?

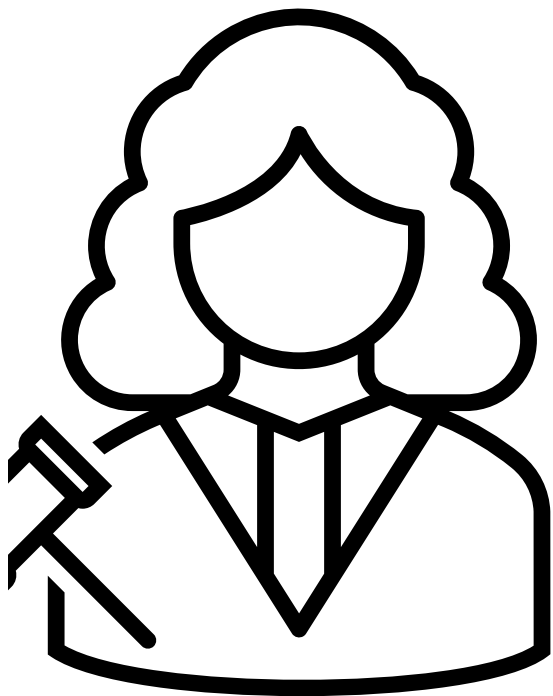
Have you got an alternative route?

How do you know when you've got there?

Do you need to change directions?

The Court's powers are limited





Know the rules

The rules of procedure are often overlooked!

And the Practice Directions even more so.

<https://www.judiciary.uk/guidance-and-resources/court-of-protection-practice-directions/>

Some recent updates:

- PD6A on service of documents:
6. Where a party seeks to serve a document by electronic means that party should first seek to clarify with the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means, including in relation to the format in which documents are to be sent and the maximum size of attachments that may be received.

Practice Directions

01

PD6A on service of documents

Before you serve a document by electronic means seek to clarify whether there are any limitations to the recipient's agreement to accept service by such means, eg format, size

02

PD9B on notification

The applicant must seek to identify at least three persons who are likely to have an interest in being notified that an application form has been issued.
COP15 form

03

PD14E on expert reports

PD includes template order for s49 report
Paragraph 7 requires checks with the NHS body before an order is made

Routes of appeal PD20B

From Tier 1
To Tier 2 Judge
Or
T3 if important
point of practice

From Tier 2
To Tier 3 Judge
Or
CoA if important
point of practice

From Tier 3
To Court of
Appeal

Don't forget two other options



Mediation



Intermediaries

Intermediaries

To assist a vulnerable person (not P) to participate in proceedings

Emphasis on assisting communication

<https://www.judiciary.uk/guidance-and-resources/practice-guidance-by-the-pfd-the-use-of-intermediaries-lay-advocates-and-cognitive-assessments-in-the-family-court/>

<https://www.gov.uk/guidance/hmcts-intermediary-services>

West Northamptonshire Council v KA & Ors [2024] EWHC 79 (Fam);
X and Y (Intermediary: Practice and Procedure) [2024] EWHC 906 (Fam);
Oxford CC -v- A Mother (Intermediary Appointment Refused) [2024] EWFC 161;
M (A Child: Intermediaries) [2025] EWCA Civ 440.

Consider how an intermediary could promote the outcome you want, who they should be and what role they should play



Help the Court to help you

Comply with time limits

Have a round table meeting at least 2 weeks before the hearing so you can draft orders in time to agree them and give the judge time to absorb them

If you are submitting an agreed order, consider whether a note (like a mini-PS) might remind the judge of the relevant background and help them understand any of the things you've agreed



"This order has effect even if it does not bear the seal of the Court"

Don't waste your time typing this.





Fact finding



K v K [2022] EWCA Civ 468 [41, 65-66]

- Not necessary in every case, even where past wrongdoing is alleged
- Not an opportunity for parties to air grievances or litigate what went wrong in the past
- Court must consider:
 - Nature of the allegations and extent they are likely relevant to P's best interests
 - Purpose of FF is to allow assessment of risk to P and impact of issues on them
 - Is FF necessary or will other evidence suffice?
 - Is a fact-finding hearing proportionate?



*“Fact-finding hearings at Tier 3 in the Court of Protection are **extremely rare**. Junior Counsel in this case tell me that they are conducted more frequently at Tier 1 and 2, especially at Tier 2. I have been surprised to hear that. I can see no obvious reason why this should be the case. For my part, I do not think that in this sphere of law, they have quite the same practical utility that they can have in the Family Court. In the Court of Protection, **the range of welfare options for P is frequently very limited and unlikely to vary very much in response to a shifting factual matrix. In determining whether a fact-finding hearing should be convened, Judges must consider, rigorously, what real purpose it is likely to serve i.e., from the perspective of informing decisions relating to P's welfare.** Such hearings are inevitably adversarial and invariably generate further hostility. This is inherently undesirable. Delay in reaching conclusions is inimical to P's best interests. In a very pressing and literal way, time is often not on P's side. Delay can only be justified if it is identifiably purposeful.*



ICB v G [2024] EWCOP 13 [22-26] – Hayden J

Getting the most out of your barrister



- Instructions: provide them!
- How best to send papers
- Bundles: size, contents, timing
- Applications for remote hearings
- Orders following hearings: recitals of doom
- Agreeing next steps: dates and diaries



Thank you

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Fluctuating Capacity in Focus

Kuljit Bhogal KC Alexander Campbell

18 June 2025

- **What is fluctuating capacity?**
- **Assessing fluctuating capacity**
- **Anticipatory declarations**



The issue

What is fluctuating capacity?





COURT OF PROTECTION PRACTICE 2025

 LexisNexis

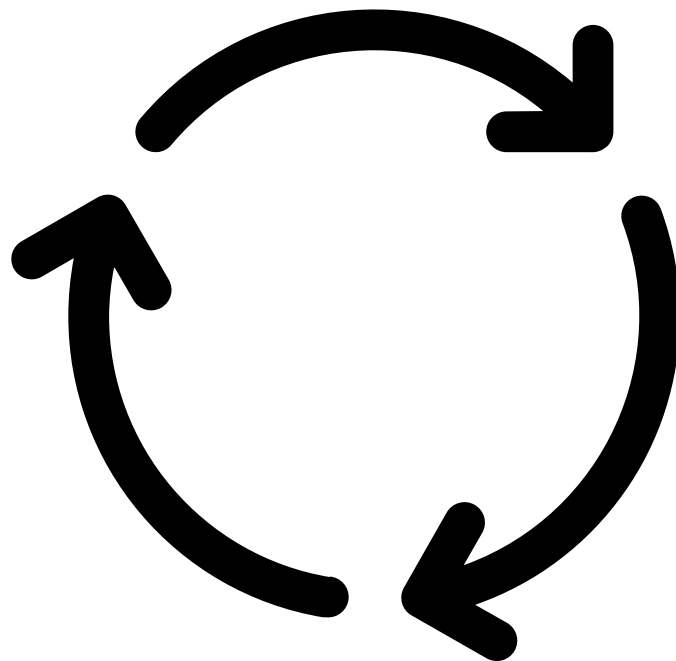
Why it matters

"There continues to be a degree of uncertainty as to the correct approach to 'fluctuating' capacity..."

- Lord Justice Baker, Court of Protection Practice 2025

The concept of fluctuating capacity

- Not in the Mental Capacity Act 2005
- But in the MCA Code of Practice



The fluctuating capacity catch-22

The three scenarios

**P has
capacity...and
consents**

**P has
capacity...and
does not
consent**

**P lacks
capacity**



The risks for a decisionmaker

- Erroneously thinking that P **has** capacity
- Or erroneously thinking that P **lacks** capacity



Assessing fluctuating capacity



Can the decision wait?

01

Yes

- Treat the impairment
- Wait until P is capacitous

02

No

- Take a decision for P
- 'Hold the ring'
- Support P to regain capacity



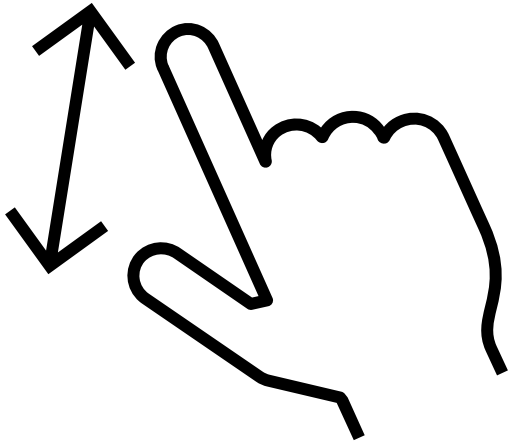
But what if repeated decisions are needed?

'Zooming out'

**The court's
pragmatic
solutions**

**Longitudinal
view**

'Zooming out'



- RB Greenwich v CDM [2019] EWCOP 32

Longitudinal approach



- Cheshire West v PWK [2019] EWCOP 57
- A Local Authority v PG [2023] EWCOP 9

Limits of the longitudinal approach

- Re DY [2021] EWCOP 28
- Section 5, MCA 2005



Points to watch out for...

01

**Does P truly
have fluctuating
capacity?**

Re DY [2024] EWCOP 4

02

**Is another
person the
problem?**

Re G [2004] EWHC 2222



Anticipatory declarations



Anticipatory declarations



- Also known as 'contingent declarations'
- An NHS Trust v CD [2019] EWCOP 24 (Francis J)

Anticipatory declarations



- An NHS Foundation trust v R [2020] EWCOP 4 (Hayden J)

Section 15, MCA 2005

“(1)The court may make declarations as to—

(a)whether a person has or lacks capacity to make a decision specified in the declaration;

(b)whether a person has or lacks capacity to make decisions on such matters as are described in the declaration;

(c)the lawfulness or otherwise of any act done, or yet to be done, in relation to that person.

(2)“Act” includes an omission and a course of conduct.”

Section 16, MCA 2005

*“(1) This section applies **if a person (“P”) lacks capacity** in relation to a matter or matters concerning—*

(a) P's personal welfare, or

(b) P's property and affairs.

(2) The court may—

(a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or

(b) appoint a person (a “deputy”) to make decisions on P's behalf in relation to the matter or matters.”

Anticipatory declarations

- North Middlesex University Hospital NHS Trust v SR [2021] EWCOP 58 (Katie Gollop DHCJ)





Anticipatory declarations

- A Local Authority v PG [2023]
EWCOP 9 (Lieven J)

Anticipatory declarations



- Shrewsbury and Telford Hospital NHS Trust v T [2023] EWCOP 20 (Lieven J)



Anticipatory declarations

- Leicestershire County Council v P [2024] EWCOP 53 (Theis J)

Thank you

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Case Law Update

India Flanagan – Hannah Taylor

18th June 2025

Overview:

- **Deprivation of liberty**
- **Sexual relations**
- **Capacity & other interesting cases**



Section 1: Deprivation of Liberty

Is the deprivation of liberty imputable to the State?

- *Peterborough City Council v Mother & Ors* [2024] EWHC 493 (Fam)
- *Rochdale Borough Council v V* [2025] EWHC 200
- *QX* [2025] EWHC 745 (Fam)

Deprivation of liberty and Care Orders

- *J v Bath and North East Somerset Council* [2025] EWCA Civ 47
- *West Sussex CC v AB* [2025] EWCA Civ 132



Deprivation of Liberty

Storck v Germany [2005] 43 EHRR 6

An objective
component of
confinement in a
particular restricted
place for a not
negligible length of
time
(*Cheshire West*)

A subjective
component of lack of
valid consent.

The attribution of
responsibility to the
State.

Peterborough City Council v Mother & Ors [2024] EWHC 493 (Fam) ('SM')

- SM, a 12 year old, had profound disabilities and was subject to a range of restrictions
- Issue: Is the third component of *Storck* met?
- Ratio: Lieven J considered that due to the extent of SM's disabilities, her deprivation of liberty was not attributable to the state:
 - [37]: *"There are a number of different ways of explaining why SM is not deprived of her liberty in breach of Article 5, but they all come down to **focusing on the reason why she cannot leave where she is living. That reason is her profound disabilities, not any action of the State, whether by restraining her or by failing to meet the State's positive obligations to enable her to leave.**"*
 - [38]: *'On a conceptual level **it is difficult to see how one can be deprived of something that one is incapable of doing.** Equally, how can one be deprived of a right that one is incapable of exercising, not through the actions of the State or any third party, but by reason of ones own insuperable inabilities'.*

Rochdale Borough Council v V [2025] **EWHC 200 (Fam)**

- HHJ Middleton-Roy (sitting as a High Court Judge) (decision on 31 January 2025) was concerned with V (a 15-year-old child)
- HHJ Middleton-Roy adopted the same reasoning of Lieven J in *SM*:
- *[14]: Respectfully, this Court disagrees with the submission that there is any material distinction of the principle in SM, this current case. The young person, 'V' who is at the centre of this case, requires support because of his profound disabilities. **In practical terms, 'V' cannot leave his care placement of his own volition, due to his enduring disabilities.** For 'V', the reason he can't leave his care placement and requires intimate support is because of those disabilities, not by reason of any action of the State. For the same reasons articulated by Lieven J in *SM*, the facts of this case show that the State is not depriving 'V' of his right to liberty and security of person within the meaning of Article 5 ECHR. **'V's Article 2, 3 and 5 rights are not infringed by the restrictions necessarily implemented by the Local Authority to supervise him, monitor him and provide for his personal care'.***

QX [2025] EWHC 745 (Fam)

[41]: *'Had this case rested wholly or in part on this argument, I would have struggled to follow those authorities that appear to **be plainly wrong. Wrong conceptually, because they fail to distinguish between "negative" liberty, the freedom from being prevented from doing something, and "positive liberty", the freedom to be enabled to do something.** There are many people who are incapable of doing things without the help of others and are enabled to do those things by carers/family etc, often funded or provided for by the State, or following assessments under the Care Act. Where a carer for a profoundly physically, but not mentally disabled person, decides not to assist that person to move from a place where they do not want to be, no one would surely argue that the disabled person was not deprived of their liberty. Unless, it seems, they are mentally incapable, too. **But in that case, the universality of human rights, for abled and disabled people alike, as in Cheshire West must be recognised. In which case both are deprived of their liberty**'.*



HHJ Burrows (sitting as a High Court Judge)

J v Bath and North East Somerset Council [2025] EWCA Civ 478

- J was a 14-year-old who had autism, ADHD and an eating disorder.
- Final Care Order was made by agreement, pursuant to section 31 Children Act 1989
- Issue: if a child is subject to a care order, and LA has consented to the child's confinement, is a DOL necessary?
- Ratio:
 - [46]: The question of whether a DOL is necessary must be determined in accordance with HRA 1998;
 - [50]: *"The effect of the judge's decision, where a local authority consents to the confinement by the State of a child in their care, **would be to remove the case from Art 5, thereby avoiding the important protection, safeguards and independent authorisation by a court that would otherwise be required.** Irrespective of whether it may be said that, as a matter of domestic law, a local authority may give valid consent if they hold parental responsibility under a care order, **HL v UK and Cheshire West make it plain that it is simply not open to the State, through the local authority, to avoid the constraints of Art 5. As Lady Hale stated: 'In the end, it is the constraints that matter'.**"*

West Sussex CC v AB [2025] EWCA Civ 132

- CD was 17 years old, and had very complex needs
- Had several detentions under MHA 1983
- Issue: was a final care order necessary in circumstances where a DOLs order has already been made?
- Key points:
 - [4]: *'.....It is not unusual for a DOLs order to be combined with a care order, and there is no legal impediment to doing so'*
 - [30]: ***'The judge was in error as a matter of law in justifying the imposition of a care order as a means of obliging or galvanizing a local authority into delivering the agreed care plan. As paragraph 37 of Re JW repeats, it has long been held that a care order should not be used solely to encourage a local authority to do that which it is already statutorily obliged to do'***

Section 2: Capacity to engage in Sexual Relations

- *Re EE* [2024] EWCOP 5
- *Re CLF* [2024] EWCOP 11
- *JC v Cornwall CC* [2024] EWCOP 75 (T2)
- *PS v Local Authority* [2024] EWCOP 42 (T2)
- *A Local Authority v ZX* [2024] EWCA Civ 1462



Re EE [2024] EWCOP 5 (1)

- EE diagnosed with autistic spectrum disorder with mild learning disability, emotionally unstable personality disorder, and recurrent psychotic disorder.
- She was on anti-psychotic and other medication.
- She wanted to become pregnant and have a baby
- EE had capacity to engage in sexual relations, and lacked capacity to make decisions about contact

Issues:

- Did EE have capacity to make decisions about contraception?
- What was the relevant information for assessing whether someone had capacity to make decisions about contraception?

Re *EE* [2024] EWCOP 5 (2)

01

Sexual relations

- Relevant information: woman will become pregnant
- Irrelevant information: risks to baby (unless clearly identified, high risk of grave harm consequent on pregnancy/childbirth)

02

Conception

- Capacity in relation to engaging in sexual relations includes consideration to make decisions about conceiving/ conception

03

Contraception

Adopted list of relevant information from *A Local Authority v Mrs A and Mr A* [2010] EWHC 1549 (Fam) [2010] EWHC 1549 (Fam):

- Understanding of reproductive process
- Understanding of purpose of contraception
- Types available and how each is used
- Advantages and disadvantages of each
- Possible side effects
- How easily each type can be changed
- Effectiveness of each
- Relevant medical information associated with pregnancy



Re CLF [2024] EWCOP 11

Applied the test in *JB*

- Whether P has capacity to make decisions to *engage* in sexual relations,
- Relevant information:
 - the sexual nature & character of sexual intercourse (including the mechanics);
 - the other person must have the capacity to consent, including before and throughout the sexual activity
 - P is able to decide whether to give or withhold consent;
 - pregnancy is a reasonably foreseeable consequence of sexual intercourse;
 - health risks involved,

Guidance on the test in *JB*:

- Achieving a balance between identifying relevant information within specific factual context of the case, and setting practical limits as to what should be envisaged as a reasonably foreseeable consequence of a decision:
 - The decision is or is not person-specific;
 - All, or only some, of the information listed in *JB* will be relevant
 - The court should consider if any additional information is relevant;
 - Relevant information must include what the likely consequences of a decision would be;
 - The bar for capacity must not be set too high by stretching the '*reasonable foreseeable consequences*' too far.

PS v Local Authority [2024] EWCOP 42

- Example of the Court maximising capacity to make decisions in relation to her partner
 - [27]: The threshold for capacity is deliberately low;
 - Modified relevant information in this case (beyond childbearing age and risk of STIs was low)
 - [55]: Sexual activity is between established and loving partners. WP can be trusted to ensure that he behaves appropriately within the context of their relationship;

Conclusion:

- [61]: Concluded that PS has capacity to engage in sexual activity with WP
- [62]: Presumption of capacity only survives with the existence of a proper protective *TZ style* care plan to put in place to enable PS to enjoy sexual activity

Interesting:

- HHJ Burrows' approach to PS' capacity to make decisions about contact with people in general and then with WP in general

Section 3: Capacity in a wider context and other interesting cases

- *Oldham MBC v KZ* [2024] EWCOP 72 (T3)
- *Re EO* [2024] EWCA Civ 1579
- *Hywel Dda University Health Board v P* [2024] EWCOP 70 (T3)
- *A Local Authority v B* [2024] EWCA Civ 572
- *Abbasi and Newcastle upon Tyne hospitals* [2025] UKSC 15
- *Johnston v Financial Ombudsman Service* [2025] EWCA Civ 551



Re A (by her litigation friend, the Official Solicitor) [2024] EWCA Civ 572

Useful case management considerations:

- [90]: *'...The Court of Protection exists to make decisions about whether a particular decision or action is in the best interests of the individual. **It is not a supervisory court**'.*
- [91]: **Court's role is inquisitorial** and the judge is not limited to choosing between the position of the parties
- [68]: Court must exercise its best interests jurisdiction. Court is *'is under considerable pressure, and it was perfectly proper for the judge to proceed with making a decision as opposed to incurring unnecessary delay by directing another hearing'*
- [89]: when considering when a final decision should be made, the *'exceptional length of time'* would be relevant
- [99]: *'good practice'* for the Court to notify the parties that it is considering an outcome not positively sought, and oral submissions have a *'particular value'* in difficult cases

Oldham MBC v KZ [2024] EWCOP 72 (T3)

01

Anticipatory Declarations

- Court has jurisdiction to make anticipatory declarations
- Anticipatory declarations (for residence, care and contact) would provide a clear legal framework for the care team, and provide a consistent approach

02

Specialist Expert

- Use of a non-specialist expert was not an appropriate substitute for a specialist MCA of a deaf individual
- Guidance:
- MCA undertaken by a suitably qualified expert at relevant BSL level
- Assessory should have suitable experience
- Approach compliant with CoP Rules PD15A paragraph 2

Section 48 MCA 2005

01

Re EO [2024] EWCA Civ 1579

- Clarification by the Court of Appeal, that the Court has the power to make an interim declaration about a party's capacity under the MCA 2005 s.48, if there was reason to believe that the party lacked capacity.

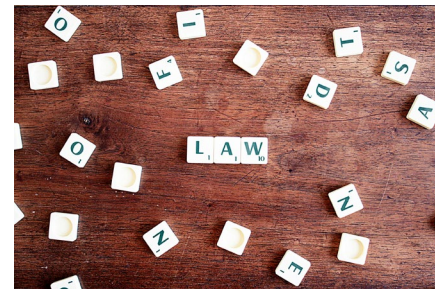
02

Hywel Dda University Health Board v P [2024] EWCOP 70 (T3)

- Limits of the s.48 threshold - the court had no evidence about P's capacity, so the threshold for making a s.48 recital was not crossed.

Other cases to consider

- ***Abbasi and Newcastle upon Tyne hospitals* [2025] UKSC 15.**
 - UKSC case, which concerned when to discharge injunctions (which prohibited the identification of the treating clinicians)
- ***Johnston v Financial Ombudsman Service* [2025] EWCA Civ 551**
 - Court of Appeal case which provided a very helpful summary of the law in relation to litigation capacity





Thank you

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Social Media and Internet Use

Zoe Whittington and Peggy Etiebet

18th June 2025



CASE LAW: assessing capacity for internet & social media use & subsequent restrictions

Zoë Whittington

June 2025

Cases we will be looking at today...

**Re A
&
Re B
(Capacity)
(2019)**

**Re
EOA
(Capacity)
(2021)**

**Manchester CC
v CP
(Restrictions)
(2023)**



Context



"The rise and development of the internet and social media networks over recent years has fundamentally reshaped the way we engage with each other and as a society."

Cobb J in *Re A* (§ 1)





Context: benefits



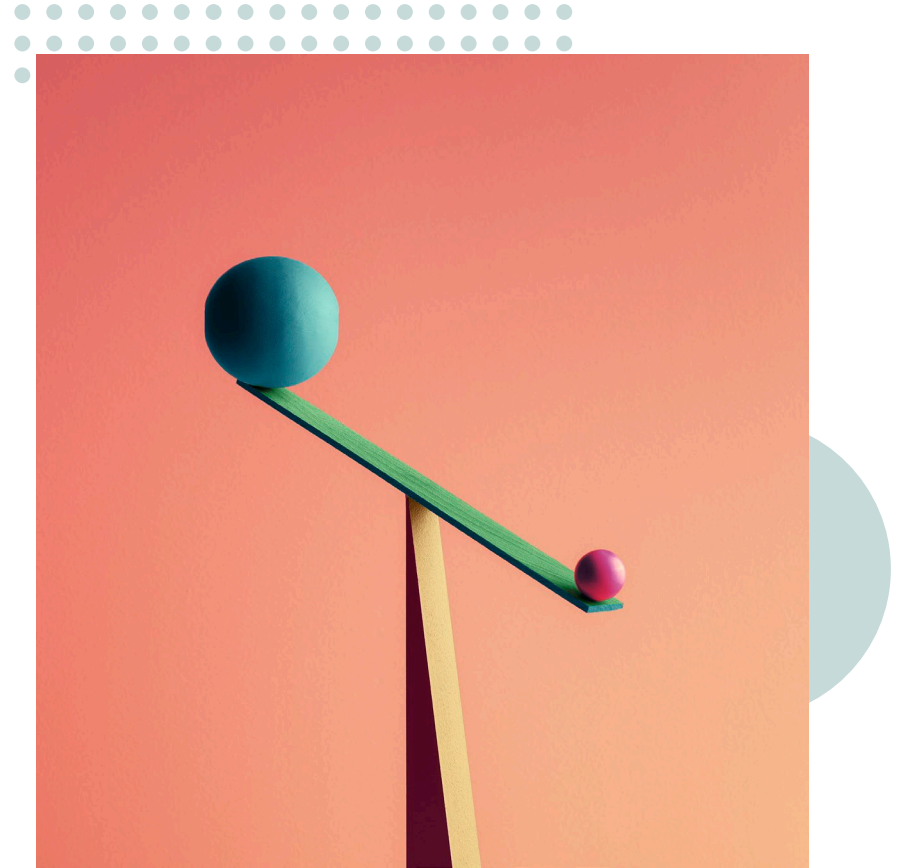
- Importance of access to internet, social media and mobile phones in modern life.
- Importance, in particular, for people who have disabilities and/or social communication problems (see as per Cobb J on next slide).
- Even more so for those whose liberty is restricted in other ways e.g. being confined under a DOLS authorisation to live in a particular placement.
- This context is important –decisions that P lacks capacity to make decisions in this area could lead to serious restrictions on a person's autonomy. The bar for capacity should therefore not be set too high.

*"The internet and associated social media networks are particularly important for people who have disabilities and/or social communication problems. They enable ready access to information and recreation, and **create communities for those who are otherwise restricted in leaving their homes**. The internet and social media networks have generally served over the years to **promote social inclusion, rather than exclusion**; they **offer disabled users opportunities and enhanced autonomy**, they **provide a means to express social identity** and they **enable the learning of new skills and the development of careers**. The importance of creating and maintaining ready access for the disabled to electronic and digital technology is well recognised and needs no amplification in this judgment; it is indeed identified as a right within the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD")" (emphasis added)*

Cobb J in Re A (§ 2)

Context: risks of harm

- Balanced against the benefits and importance of access to internet and social media are the potential risks of significant harm posed by access, particularly for vulnerable people.
- Balancing exercise for professional and the court.



Examples of risk

**Harmful or
dangerous
people**

**Harmful or
dangerous
information**

Exploitation

**Sexual
grooming &
abuse**

Harassment

Bullying

**Criminal
liability**

Retaliation

Advances in cyber and digital technology continue to outrun society's ability to monitor or control it and, to an extent, the law's ability to keep pace with its development. The internet is, or can be, a dangerous place; it has a dark side, where dehumanising and illegal material (including images, pseudo-images, videos, live-streaming and text) is all too readily accessible. Internet abuse is commonplace and is known to take many forms: bullying, harassment, child sexual abuse, sexual grooming, trafficking, trolling and the theft of personal identity among them. These activities thrive when they are left unchecked.

Cobb J in Re A (§ 4)





2

Assessing capacity for internet & social media use



Re A and Re B

- 2 linked judgments of Cobb J in the Court of Protection in 2019 dealing with the correct approach to assessing capacity in respect of internet and social media usage:
 - *Re A (Capacity: Social media and internet use: best interests)* [2019] EWCOP 2
 - *Re B (Capacity: Social media, care and contact)* [2019] EWCOP 3
- Both concerned with internet and social media use for “the purposes of developing or maintaining connections with others” i.e. ‘online contact’.



Re A: facts



- P = 21 yr old man with LD & impairments in executive and adaptive social functioning.
- Lived in supported living and attended college.
- Low literacy and poor written communication - severely impaired his ability to navigate the internet safely e.g. was unable to read/understand warnings on sites.
- Concerns about his capacity to make decisions about his social media & internet use.
- Specific concerns included:
 - Sharing of intimate photos and videos
 - Accessing extreme pornographic sites
 - Dangerous contacts online
 - Allegations of rape
 - Concerns that he could become negatively affected by his social media use including potentially as a perpetrator of online crimes.



Re A



- Confirmed capacity to make decisions about internet and social media use do not form a 'subset' of a person's ability to make decisions about care or contact (however see slides on *Re EOA* case).
- Outlines relevant information for assessing whether P has capacity in this area.
- Observed that capacity to use the *internet* and capacity to use *social media* are "inextricably linked":
 - For these purposes does not make sense to treat them as different things;
 - Impractical and unnecessary to assess capacity separately re using the internet for social communications as opposed to using it for other purposes (e.g. entertainment, education, relaxation, gathering information).



Relevant information: internet & social media



1. Information and images (including videos) which you share on the internet or through social media could be shared more widely, including with people you don't know, without you knowing or being able to stop it.
2. It is possible to limit the sharing of personal information or images (and videos) by using “privacy and location settings” on some internet and social media sites.
3. If you place material or images (including videos) on social media sites which are rude or offensive, or share those images, other people might be upset or offended.

Relevant information: internet & social media

4. Some people you meet or communicate with (“talk to”) online, who you don’t otherwise know, may not be who they say they are (“they may disguise, or lie about, themselves”); someone who calls themselves a “friend” on social media may not be friendly.
5. Some people you meet or communicate with (“talk to”) on the internet or through social media, who you don’t otherwise know, may pose a risk to you; they may lie to you, or exploit or take advantage of you sexually, financially, emotionally and/or physically; they may want to cause you harm.
6. If you look at or share extremely rude or offensive images, messages or videos online you may get into trouble with the police, because you may have committed a crime..

NOT relevant: internet & social media

- Cobb J considered and decided it is not part of the relevant information that internet use may have a psychologically harmful impact on the user.
- Acknowledged it is widely known that internet use can be addictive, sites could cause distress and/or lead viewer to develop distorted views of healthy human relationships (e.g. extreme pornography, violence or radicalisation).
-
- But, took the view that *“many capacious internet users do not specifically consider this risk or, if they do, they are indifferent to this risk”*.
- Did not therefore regard it as appropriate to include in list of information relevant to the decision on a test of capacity in this area of decision making.



Re B: facts



- Vulnerable woman in 30s with considerable care needs, living at home with family.
- Some of the concerns were:
 - She sent intimate photos to men
 - Searched the internet looking for a boyfriend & viewed all social media contacts as friends
 - Regular 'sex chats' with men online
 - She shared her home address & met with a number of men met online
 - Was in contact with a known sex offender

Re B

- Followed the same approach as in Re A to both questions i.e.:
 - Is capacity to use internet and social media a subset of contact and/or care? (No); and
 - What is the relevant information to assess capacity for internet & social media use?



Re EOA



- *Re EOA* [2021] EWCOP 20
- Another Court of Protection decision – subsequent to *Re A* and *Re B*.
- Williams J identified that re general issues of access to the Internet and social media decisions such as *Re A* provided a proper route map
- However also sought to distinguish between general access to the internet and access for the purposes of seeking to make contact with specific people.
- Suggest Cobb J's route map in *Re A* should therefore be read alongside this decision.

*“[...] this approach does not assist in relation to the particular decision which arises in relation to **use of the Internet and social media for the purposes of searching for his family or contacting them. In this regard the issue is far more closely aligned with the approach to contact with other named individuals** where the courts evaluation should be decision specific. The use of the Internet or social media is merely one vehicle by which EOA might seek or have contact with family members who pose a risk to him and in respect of whom he lacks capacity to make decisions as to contact... **The danger of not dividing these domains into more specific identifiable decisions would be to either apply an approach which was too restrictive in that it would apply a high bar in relation to strangers which in fact was only relevant to family members or alternatively it would apply too low a bar relevant to strangers to issues of contact with high risk family.**” (emphasis added)*

Williams J in Re EOA (§ 53)



3

Restricting access to devices & social media

Manchester CC v P

- *Manchester CC v CP and Ors* [2023] EWHC 133 (Fam)
- LA's application in High Court under the inherent jurisdiction for authorisation of restrictions imposed on a 16 year old P in her non-Ofsted registered placement
- Case considered, amongst other matters, whether restrictions on mobile phone, laptop, tablet and social media constituted a deprivation of her liberty within the meaning of article 5(1) ECHR

Manchester CC v P

- *Held* , since the removal of or restrictions on use of these did not act to deprive P of her physical liberty but, rather, acted to restrict her communication they did not constitute a deprivation of her liberty within the meaning of art.5 ECHR and accordingly it was not appropriate to grant an order authorising such restrictions as a DoL under the IJ.
- As P was a 16 year old and subject of a full care order Court considered LA could restrict as an exercise of parental controls under s.33(3)(b) of Children Act 1989 unless physical restraint or other force was required to remove the phone etc in which case would require sanction of the court (nb. CA 1989 case so different for adults).



TRICKY ISSUES: interventions and restrictions in social media and internet use plans

Peggy Etiebet

June 2025



Justified and Proportionate



Interventions/restrictions need to be justified and proportionate.

As Mr Justice Cobb put it in *Re B (Capacity: Social Media: Care and Contact* [2019] EWCOP 3),

‘significant issues will arise in the ‘best interests’ evaluation in relation to the exercise of her freedoms which are protected by Article 10 and Article 8 of the European Convention on Human Rights and Articles 21 and 22 of the United Nations Convention on the Rights of Persons with Disability in the context of her use of the internet; Mr. Karim has helpfully drawn attention to these issues at this hearing



Interventions/restrictions need to be justified and proportionate.



...I readily acknowledge that any interference with those rights (by way, for example, of supervision, filters, 'Parental Control Applications', and monitoring) will have to be justified and proportionate. Careful thought will also have to be given to the ways which can be devised which are effective in limiting or supervising her internet and social media use without being unduly "restrictive of [Miss B's] rights and freedom of action" (section 1(6) MCA 2005) (at paragraph 41).



2

Level of Restrictiveness



Level of Restrictiveness



Social media and internet use plans may be very restrictive if that is proportionate to the situation.

In *Calderdale MBC v LS* [2025] EWCOP 10 (T3) a decision of Mr Justice Cobb, it was determined that P lacked capacity due to '*her cognitive rigidity, arising from her intellectual disability, results in her becoming pre-occupied with the need for sexual gratification and she does not have the capacity to weigh up the risks of using social media and the internet.*'



Level of Restrictiveness



A 'significantly enhanced support and protection plan was put in place'

Restrictions were that P:

- can only access her phone with support and access the internet under supervision;
- is offered 2.5 hours access to her phone and the internet each evening;
- is required to surrender her phone at all other times; and
- the plan should make some provision for P to be able to access harmless sites on the internet safely.



3

**Address the issue & P's
agreement to care plan**





Address the issue & does P agree to it?



Interventions need to address the issue/meet the risk.

In *A LA v AA* [2021] EWCOP 70, Mr Justice Keehan, observed that a social media and internet use plan for daily checks would not be in P's best interests.

Address the issue & does P agree to it?

'Even if I am wrong in coming to that conclusion and I ought to find that he does lack capacity, I am entirely satisfied that it is not in his best interests for the daily checks to be undertaken of his electronic devices because:

(a) they deliver no evidence of any value and afford no protection to AA [because of settings which AA has put on those devices, reveals very little information at all as to the use made by AA of the internet and of social media.]

(a) it is contrary to AA's wishes that those checks are undertaken, which causes him some distress and/or at least uneasiness.' (at *paragraph 17*).



4

**Consider wide range of
possible interventions**





Wide range of possible interventions



Education:

- Social stories around online safety e.g. not to provide personal details, or send photos/videos, 'friends' may not be friends.

To address excessive time spent online:

- Turn off wifi/restrict data at certain times/cap data.
- Hand in phone at certain times.



Wide range of possible interventions



Holistic measures:

- Increase 1:1 so can be supported in other activities to reduce time spent on phone.
- Suggest breaks/alternative activities regularly to reduce time spent on phone.
- Supervise finances e.g. if buying items/signing on to sites is an issue and P lacks capacity in this domain.



Wide range of possible interventions



Supportive supervision and monitoring:

- Supervise/monitor e.g. 1:1, carer in the same room, checking devices daily/weekly.
- Use phone in communal areas to enable supervision/monitoring.

Technological interventions:

- Use of apps/settings that filter content/schedule internet access: e.g. privacy settings on device, install parental control apps, install controls on internet router.



Wide range of possible interventions



Monitoring and Surveillance:

- use services of cyber security firms e.g. CyberSpider to monitor use, compile reports on online activity, give real-time alerts, usage logs, flag certain words/sites.



Outside expertise & Section 49 reports





Section 49 report



Consider whether outside expertise is needed – section 49 MCA 2005 report

- Where there are difficulties
 - agreeing the content of the social media and internet use plan; and/or
 - whether it addresses the issues; and/or
 - where P does not engage with the plan the court may order a section 49 report.

Section 49 report

Issues included:

- The report had to be prepared by a person nominated by the local authority and considered by them to have the appropriate expertise/knowledge.
- The report had to address what options are available to restrict a person's access to social media and the internet in terms of both time and content.

Section 49 report

- What is appropriate in P's case to restrict his access to social media and the internet in terms of both time and content.
- The costs of such options.
- An indication of the types of providers or services that may be able to provide services.

Thank you

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**Thank you for joining us
today**

