



Neutral Citation Number: [2023] EWCOP 14

Case No: 13883642

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/04/2023

Before:

MR JUSTICE HAYDEN

Between:

**CESHIRE AND WIRRAL PARTNERSHIP NHS
FOUNDATION TRUST**

Appellant

- and -

JMC

**(By his Accredited Legal Representative, Mrs Jolanta
Edwards) (1)**

FLINTSHIRE COUNTY COUNCIL (2)

Respondents

Mr Adam Fullwood (instructed by The Trust) for the Appellant
Ms Eliza Sharron (instructed by Peter Edwards Law) for the First Respondent
**Mr Parishil Patel KC and Ms Rebecca Clark (instructed by Blake Morgan LLP) for the Second
Respondent**

Hearing dates: 16th February 2023

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE HAYDEN

The judge has given leave for this version of the judgment to be published.

MR JUSTICE HAYDEN:

1. This is an application for permission to appeal a case management decision made by District Judge Hennessy on the 26th October 2022. The order in focus records: “A report is required pursuant to section 49 of the Mental Capacity Act 2005”. A further recording states “the report must be prepared by a person nominated by Cheshire Wirral Partnership NHS Foundation Trust (‘the Trust’) and considered by the Trust to have the appropriate expertise / knowledge to provide the report”. Also included within the Court’s recording is an extended account of what is considered to be the “context of the report”. In the circumstances and in order properly to evaluate the criteria upon which such a report can be ordered, it is necessary to set these paragraphs out in full:

“Context of report

4. The court is considering an application regarding the care and residence arrangements for JMC, who deprived of his liberty under a standard authorisation at County Homes Care Home and wishes to be discharged. JMCH has a diagnosis of alcohol related brain damage.

5. There were previous section 21A proceedings, in the course of which a report was obtained from Professor Wilson, from the Trust, dated 30 August 2018 as detailed above. Professor Wilson was involved in assessing JMC’s capacity, but also provided ongoing assessment and input in respect of the appropriate treatment pathway for JMC, in light of his diagnosis of alcohol related brain damage. The context of the input from the Trust was explained by Professor Wilson at E1 of his report as follows:

‘The programme of neurocognitive management that has been devised and recommended by the Royal College of Psychiatrists (CR185) is designed to augment this natural recovery. The principles of management involve facilitating the individual’s abilities to care for themselves in a graded fashion over the recovery period. This is underpinned by a programme of social integration, education and diminishing levels of support as the individual improves. Support is subsequently maintained at optimum levels dependent on the degree of recovery.

6. The conclusion of Professor Wilson’s initial report was as follows:

‘On-going attempts to encourage and facilitate increased autonomy are most likely to enhance his quality of life and optimise any small chance of cognitive improvement. This is best encouraged in an establishment that is specifically designed to cater for active, relatively physically well people with some experience in working with mid-aged adults with cognitive deficits. JMC is now resident in a nursing home; principally designed to cater for older people suffering from dementia and other health needs. Most of the residents are frail, likely to have communication difficulties and have little in common with JMC. Necessarily, the nursing home care is principally focussed on the care of older, frail residents. The optimum care for a relatively fit man with ARBD involves a different care focus. A personalised care plan, close familiarisation with staff and a comprehensive programme

of activity and stimulation designed for patients with similar conditions is recommended. Attempts can be made to introduce care of this nature into larger generalised nursing homes. The establishment of one-to-one care package in which outside agencies are paid to provide the patient with trips out of the nursing home have been employed with varying success. This would be co-ordinated with ongoing family support. I expect in this case of JMC this is likely to have limited effect (due to poor compliance by JMC) in his current situation. I recommend to the Court consider placement in a specialist nursing home: Evergreen Lodge Nursing Home on the Wirral has experience of working with long stat ARBD patients and represents one of the few resources. I am always aware that other long-stay residential facilities specialising in ARBD (which may be even more appropriate) are expected to open in the foreseeable future on the Wirral. Alternatively, in the absence of any behavioural disturbance, a smaller residential home setting (on the Wirral) may be considered. It should be alcohol free and cater for residents subjected to Deprivation of Liberty Orders. Attempts should be made to locate an institution with residents of similar age bracket and of relatively good physical health. In such a situation, an enhanced care package (additional 1:1 care of up to six hours a week) may be evaluated with a view to promote his quality of life’.

7. Efforts were made to identify more suitable provision, however at the time the proceedings were concluded it had not been possible to identify such a placement. A further report from Professor Wilson had been obtained dated 26 June 2019, which concluded:

*‘It is advised that the current nursing home does not provide JMC with an optimal quality of life as it is primarily designed to cater for people suffering from progressive dementias. However, this is somewhat mitigated by regular family visits and support from his wife [...] In view of the potential room for improvement in JMC’s quality of life, we recommend that our team will continue to visit JMC for a period of six months with view to continue to build his confidence and facilitate his socialisation through encouraging visits outside the Nursing Home environment. This will involve encouraging the family engagement and visits from our own team. **At the end of this period we will be able to give the Court a more definitive long term social prognosis.** (my emphasis)*

2. The order continues, still under the heading of “AND UPON it being recorded that”:

‘On balance, we advise the court that the risks to the patient’s quality of life, contact with support from his family and JMC’s mental health, currently outweigh the possible advantages in moving the patient to currently available alternative accommodation which is substantially further away (Formby, Merseyside). We will continue to review his

progress with a view to trying to eventually find a more appropriate residence in the Wirral Area’.

8. *On the basis of the above, the parties agreed to conclude the section 21A proceedings, on the basis that the qualifying requirement would be met, subject to further review following additional input and recommendations from the Trust. The final order recorded that:*

‘Professor K Wilson’s team intends to continue to work with JMC over the next six months and at the end of this period will be able to provide a more definitive long-term social prognosis (“the further report”).

9. *Permission was granted for the ‘further report’ to be disclosed to JMC’s RPR and litigation friend, however no report was subsequently produced. It would appear that further follow up visits did take place following the conclusion of the proceedings, however no substantive recommendations were made and the ‘further report’ envisaged by the order of 25 July 2019, was not produced. JMC was discharged by the Trust on 01 April 2020 (my emphasis).*

10. *Since the last involvement of the Trust, there have been concerns raised by social care professionals that his presentation has markedly deteriorated. JMC’s contact with his family and access to the community was substantially curtailed over the course of the pandemic, and there do not appear to have been any efforts to implement the individualised sort of care plan recommended by Professor Wilson. There have been concerns raised by social care professionals and the Best Interests Assessor that JMC’s willingness to accept personal care has declined substantially, he refuses to shower or wash at the placement, and concerns have been raised by social care professionals that there has been an overall deterioration in his mood and willingness to engage in activities that used to be of interest. Dr Feroze, mental health assessor, also raised concerns as follows:-*

*‘[JMC] is likely to continue to display issues around poor personal hygiene and resistance to care. He does come across as somewhat blunted and irritable in mood which appears to be a long-standing issue but he is resistant to a change of antidepressant. Nevertheless, it would be helpful if the care home staff continue to encourage him to consider a medication change and arrange a review with his GP.’
And in the Form 4 Mental Health and Eligibility Assessments completed on 15 August 2022 stated:-*

‘In my opinion, the person’s mental health and wellbeing is likely to be affected by being deprived of liberty in the following ways: JMC is presenting with significant levels of self-neglect. In my opinion there is a need for a review of his care plan to see if anything can be put in place to encourage his compliance with care interventions. It is unlikely that

deprivation will have a long-term negative impact on his mental health.'

11. Recently a trial of 1:1 support took place to support JMC to access the community. JMC engaged in the first 3 of 8 sessions well, but declined to engage thereafter. JMC has recently begun going out with his estranged wife twice a week, which he enjoys. JMC is amenable to showering/washing at the homes of his family, but flatly refuses to in his current setting.

12. The court is exploring whether JMC's current arrangements are in his best interests, and whether they are the least restrictive that could meet his needs, or whether the environment is exacerbating some of his behavioural challenges. The court is particularly interested in whether the environment is clinically suitable, in light of the previous recommendation of Professor Wilson, and the Royal College of Psychiatrists guidelines for the treatment of individuals with alcohol related brain damage."

3. DJ Hennessy's order also identified the scope and ambit of the content of the report in the following terms:

13. The report must contain all the material required by relevant practice direction and be prepared in the form there specified.

14. The court is particularly interested in the following information:

a. An update regarding JMC's mental health and medication needs together with a review of whether the current arrangements meet his care and treatment needs, arising out of his alcohol related brain damage, as previously recommended by the Trust. If not, recommendations are sought as to the environment and intervention required to optimise his quality of life, recovery and opportunity for independence;

b. With input from occupational therapy with expertise in functional mental health (as opposed to a functional assessment of ability to engage in activities of daily living) insofar as an individual with the requisite expertise is employed by the Trust.

4. The essence of the appeal is that the order falls outside the scope of Section 49 of the Mental Capacity Act 2002. For the purposes of this application, (permission to appeal with appeal to follow) I propose to ignore the fact that the requirement for a Section 49 report is expressed by way of recording, rather than an order. No party has, entirely properly in my view, taken any point on this.
5. It is contended by Mr Fullwood that the District Judge erred in law for the following reasons:

"In making the section 49 Order the learned Judge erred in law for the following reasons:

(a) in the manner in which she considered and applied the relevant factors including those contained in Practice Direction 14E; and/or

(b) by concluding that the information required was within the remit of the Trust and that information from the local authority is not required (save in relation to sexual disinhibition) and by including in the section 49 order a requirement to address adult social care issues

including his “care” and his “environment” that fall within the remit of the local authority’s duties and responsibilities arising under the

***Social Services and Well-being (Wales) Act 2014 (the 2014 Act);**
and/or*

(c) by concluding that her Order does not require the Trust to provide

healthcare services to JMC in circumstances in which it had already decided not to provide and would not have been offered to him had he had mental capacity contrary to the decision of the Supreme Court

in N v ACCG [2017] UKSC 22; and/or

(d) in the alternative, not limiting the report to a review by the Trust based on the information already in its possession or control.”

6. JMC is a 72-year-old man with an established diagnosis of alcohol amnesic syndrome and dementia and a lengthy history of alcohol misuse and self-neglect. It is unnecessary to rehearse the factual background, even in summary format, as the key aspects have already been recorded in the court order, of the 27th October 2022 and are set out above.
7. Section 49 provides as follows:

Power to call for reports

(1) This section applies where, in proceedings brought in respect of a person (“P”) under Part 1, the court is considering a question relating to P.

(2) The court may require a report to be made to it by the Public Guardian or by a Court of Protection Visitor.

(3) The court may require a local authority, or an NHS body, to arrange for a report to be made—

(a) by one of its officers or employees, or

(b) by such other person (other than the Public Guardian or a Court of Protection Visitor) as the authority, or the NHS body, considers appropriate.

(4) The report must deal with such matters relating to P as the court may direct.

(5) Court of Protection Rules may specify matters which, unless the court directs otherwise, must also be dealt with in the report.

(6) The report may be made in writing or orally, as the court may direct.

(7) In complying with a requirement, the Public Guardian or a Court of Protection Visitor may, at all reasonable times, examine and take copies of—

(a) any health record,

(b) any record of, or held by, a local authority and compiled in connection with a social services function, and

(c) any record held by a person registered under Part 2 of the Care Standards Act 2000 (c. 14) [Chapter 2 of Part 1 of the Health and Social Care Act 2008 or Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016], so far as the record relates to P.

- (8) If the Public Guardian or a Court of Protection Visitor is making a visit in the course of complying with a requirement, he may interview P in private.
- (9) If a Court of Protection Visitor who is a Special Visitor is making a visit in the course of complying with a requirement, he may if the court so directs carry out in private a medical, psychiatric or psychological examination of P's capacity and condition.
- (10) "NHS body" has the meaning given in section 148 of the Health and Social Care (Community Health and Standards) Act 2003 (c. 43).
- (11) "Requirement" means a requirement imposed under subsection (2) or (3).

8. In December 2022, I met with the NHS Mental Health Directors. Concern had been expressed about the burden experienced by the medical profession in reports requested pursuant to Section 49. There was a clear and strong feeling that some of the Section 49 requests were becoming disproportionate, overly burdensome, and wrongly authorised. Having been convinced of the legitimacy of this sensitively expressed complaint, I issued guidance to the profession to highlight the problem. As I noted in that guidance, there are obvious reasons (i.e., costs) why a Section 49 report might be preferred where what is truly required is an independent expert report. I also made the following observation:

"Section 49 reports are, paradigmatically, appropriate where the NHS body (typically a Mental Health Trust) has a patient within their care, who is known to them. This ought to enable the clinician to draw quickly on his knowledge of the patient and respond concisely to the identified questions, which will be directed to the issues clearly set out in the Practice Direction. Importantly, it avoids the patient having to meet with a further professional with whom, he or she, has no existing relationship.

Instructions under Section 49 should be clearly focused with tight identification of the issues. It should be expected that the reports will be concise and will not require extensive analysis across a wider range of questions than those contemplated in the Practice Direction. Reports requiring that kind of response should be addressed to an independent expert."

9. I emphasised in my document that, having reread the earlier and existing guidance, I considered that it required no further addition, "gloss or embellishment". I requested recirculation of the guidance, along with my own observations, highlighting those paragraphs which I considered needed to be restated. At risk of overburdening this judgment, but in order that the relevant legal framework is set out in one coherent whole, I repeat the guidance below:

PRACTICE DIRECTION 14E – SECTION 49 REPORTS

This practice direction supplements Part 14 of the Court of Protection Rules 2017

General

1. Attention is drawn to—

(a) section 49 of the Act – which makes provision for the court to require a report in proceedings brought in respect of P where the court is considering a question relating to P;

(b) rule 3.7(2)(a) – which provides that the court, when giving directions, may require a section 49 report and give directions about any such report;

(c) rule 14.24 – which sets out the duties of a person required to prepare a section 49 report and specifies to whom the report may be sent; and

(d) rule 14.25 – which makes provision for the court to permit written questions to be put to a person who has made a section 49 report.

The court's direction for a report

2. The Annex to this Practice Direction contains the form of an order requiring a report under section 49 of the Act and the forms of directions relating to the report. When requiring a section 49 report, the court will as far as possible base its order and directions on those forms. For practical reasons, the order should be self-contained and not form part of other directions.

3. The following are common factors which the court may consider when deciding whether to order a section 49 report—

(a) where P objects to the substantive application or wishes to be heard by the court and does not qualify for legal aid;

(b) where it has not been possible to appoint a litigation friend or rule 1.2 representative, including where the court has made a direction under rule 1.2(5);

(c) where a party is a litigant in person and does not qualify for legal aid;

(d) where the public body has recent knowledge of P; or it is reasonably expected that they have recent knowledge of P; or should have knowledge due to their statutory responsibilities under housing, social and/or health care legislation;

(e) the role of the public body is likely to be relevant to the decisions which the court will be asked to make;

(f) the application relates to an attorney or deputy and involves the exercise of the functions of the Public Guardian;

(g) evidence before the court does not adequately confirm the position regarding P's capacity or where it is borderline; or if information is required to inform any best interests decision to be made in relation to P by the court.

Reports by Public Guardian or a Court of Protection Visitor

4. Where a report is to be prepared by either the Public Guardian or a Court of Protection Visitor¹, a copy of the approved order, the directions and the information described in paragraph 14 below will be sent by the Court to the Public Guardian.

¹ See section 49(2) of the Act.

5. In the case of a report which is to be made by a Court of Protection Visitor, the Public Guardian must ensure that a person is nominated from the panel of the General Visitors or the panel of Special Visitors, as appropriate.

6. The nomination of a Court of Protection Visitor should be made before the end of the period of 7 days beginning with the date on which the Public Guardian received a copy of the order.

Reports under arrangements made by a local authority or an NHS body

7. Wherever practicable, before making an application for an order requiring a report under section 49, a party to proceedings should use their best endeavours to:

(a) make contact with an appropriate person within the relevant local authority or NHS body so they are made aware that an

application is to be made; its purpose; and the issues or questions which are hoped to be addressed within the report;

(b) identify a named person or by reference to their office (“the senior officer”) within the relevant local authority or NHS body who will be able to receive the court order on its behalf; and

(c) enquire as to the reasonableness and time scales for providing the report should the court order it.

8. The party making the application must submit a draft letter of instructions for the purpose of accompanying the order.

9. The court will make enquiry of the party making the application as to what efforts have been made to comply with paragraph 7 above, and the response of the relevant local authority or NHS body, and will take this into consideration before making an order.

10. Where a report is to be prepared under arrangements made by a local authority or an NHS body², a copy of the approved order (which is binding, notwithstanding that it may not yet be sealed), the information described in paragraph 14 below and the accompanying letter of instruction will be served by either (i) the party who made the application for a section 49 report or (ii) in the event that no party made the application, by the party determined by the court to be the most appropriate party to arrange service on the senior officer as soon as is reasonably practicable but in any event within 48 hours of the making of the order.

² See section 49(3) of the Act

11. Upon receipt of the order the senior officer must ensure that—

(a) a person with appropriate expertise/knowledge is nominated to make the report; and

(b) the parties are notified of the name and contact details of the nominated person as soon as practicable.

12. The nomination should be made before the end of the period of 7 days beginning with the date on which the senior officer received a copy of the order.

13. The order must follow the format as set out in the Annex to this Practice Direction and specify the matters required to be addressed in paragraphs 9 and 10 therein.

Access to Information and interview P

14. The court will generally provide, or give permission to the party applying for the section 49 order to provide, to the person who is to produce a report

—
(a) a copy of the application form, its annexes and any supporting evidence as may be redacted by direction of the court;

(b) the name and contact details of P;

(c) the name and contact details of the parties;

(d) the name and contact details of any legal representative of a person specified in (b) or (c); and

(e) name and contact details of such other persons who are reasonably likely to be able to provide assistance to the nominated person for the completion of the report.

15. The court order requiring the report, the directions relating to it and the information described in paragraph 14 will generally be sent when the order is served by the party who is required to do so, by first class mail, electronic mail or by facsimile. If the circumstances warrant a different form of

communication, the documents and information will also be sent by first class mail, electronic mail or by facsimile at the first available opportunity.

16. *Section 49(7) of the Act sets out other documents relating to P which the Public Guardian or a Court of Protection Visitor may examine or take copies of for the purpose of making the report. Where appropriate, the order may also allow the same documents to be examined and copied by the nominated person who is to prepare the section 49 report under arrangements made by the relevant local authority or NHS body.*

17. *Sections 49(8) and (9) of the Act sets out that the Public Guardian or a Court of Protection Visitor may interview P in private. Where appropriate, the order may also allow P to be interviewed in private by the nominated person who is to prepare the section 49 report under arrangements made by the relevant local authority or NHS body.*

The contents of the report

18. *The person required to prepare a section 49 report must—*

- (a) prepare it having regard to the provisions of rule 14.24;*
- (b) produce it in the manner specified in this Practice Direction (subject to any directions given by the court); and*
- (c) produce it in accordance with the timetable set out in the court's directions.*

19. ***The report should contain four main sections. These are—***

- (a) the details of the person who prepared the report;***
- (b) the details of P;***
- (c) the matters and material considered in preparing the report;***
- and***
- (d) the conclusions reached.***

20. *In the first section (details of the person who prepared the report), the report should—*

- (a) state the full name of the person who prepared the report;*
- (b) state whether that person was appointed under section 49(2) or (3) of the Act;*
- (c) state whether that person is—*
 - (i) the Public Guardian;*
 - (ii) a General Visitor;*
 - (iii) a Special Visitor;*
 - (iv) an officer, employee or other person nominated by a local authority; or*
 - (v) an officer, employee, or other person nominated by an NHS body;*
- (d) state that person's occupation or employment (for example, social worker employed by a local authority or general practitioner in private practice); and*
- (e) list that person's qualifications and experience.*

21. *In the second section (P's details), the report should (unless an order to the contrary pursuant to rule 5.11 has been made)—*

- (a) state P's full name, date of birth and present place of residence;*
- (b) state P's nationality, racial origin, cultural background and religious persuasion (if appropriate);*
- (c) identify P's immediate family (specifying their relationship to P and contact details);*
- (d) identify any other person who has a significant role in P's life (for example, a close friend or a carer) specifying their role and contact details; and*
- (e) give a summary of P's medical history.*

22. *In the third section (matters and material considered), the report should*

(a) *list any interview conducted with P (specifying time and place);*

³*The person preparing the report should ensure that any notes made during the interview with P are kept so that the notes are available for production to the court if necessary.*

⁴*The person preparing the report should ensure that any notes made during the interview with any person other than P are kept so that the notes are available for production to the court if necessary.*

(b) *list any interview conducted with one or more persons other than P (specifying time and place)⁴;*

(c) *state—*

(i) *whether any examination of P was conducted by a Special Visitor under section 49(9) of the Act; and*

(ii) *the name and qualifications of any person who assisted with any such examination;*

(d) *give a summary of any key events in P's life which appear to have a direct bearing on the matters to be dealt with in the report;*

(e) *set out the details of any of the following material which was relied on in the preparation of the report—*

(i) *any literature or other material;*

(ii) *any records obtained under section 49(7) of the Act;*

(f) *set out the details of facts and opinions relied on in the preparation of the report (ensuring that there is a clear distinction between the two);*

(g) *where there is a range of opinion on an issue addressed in the report—*

(i) *summarise the range of opinion,*

(ii) *state the views held by the person who prepared the report and give reasons for them; and*

(h) *indicate which of the facts are within the knowledge of the person who prepared the report.*

23. *In the fourth section (conclusions), the report should—*

(a) *identify any issues or questions which were specified in the directions given by the court as being matters in which the court had a particular interest;*

(b) *address clearly such issues or questions;*

(c) *state clearly all conclusions reached by the person who prepared the report;*

(d) *state clearly the recommendations made by the person who prepared the report; and*

(e) *contain a statement of truth in the following terms—*

“I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are, and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.”

ANNEX

Order for section 49 report

Requirement for section 49 report

1. *A report is required pursuant to section 49 of the Mental Capacity Act 2005 in relation to [insert name of P], under Court of Protection case number [insert case number].*

Person required to prepare the report (the author)

2. *The report must be prepared by [the Public Guardian] [a Court of Protection Visitor who is a General Visitor] [a Court of Protection Visitor who is a Special Visitor] [a person nominated by the local authority] [XX, a person nominated by the local authority and considered by them to have the appropriate expertise/knowledge to provide the report][a person nominated by the NHS body][YY, a person nominated by the NHS body and considered by them to have the appropriate expertise/knowledge to provide the report].*
3. *[In the case of a report to be prepared by [a Special Visitor, the Visitor] [a medically qualified practitioner, the practitioner] may carry out in private a [medical] [psychiatric] [psychological] examination of P's capacity or condition].*

Producing the report

4. *[The report must be made to the court in writing]. [The report must be made orally to the court].*
5. *The report must be produced on or before [insert date].*
6. *[Where the report is made in writing, it must be delivered to the court by [first class post][electronic mail][facsimile].*

Context of report

7. *The court has received an application for the following [order/direction/declaration]:*

[insert brief details of application, for example,

(a) XY be [appointed][removed] as the [deputy][attorney] for property and affairs/personal welfare for [insert the name of P];

(b) [insert the name of P] lacks mental capacity to [insert decision, for example conduct the proceedings/ objects to...../ decide where to reside];

(a) it is in the best interests of [insert the name of P] that [insert issue];¹

1 This is only appropriate where an order is being sought.

2 See comments of the President in Re: MN [2015] EWCA 411 "it is to be noted that section 15(1)(c) does not confer any general power to make bare declarations as to best interests; it is very precise in defining the power in terms of declarations as to 'lawfulness'."

(b) it is lawful in respect of [insert name of P] that [insert issue].²

Content of report

9. *Subject to any directions given under paragraph 11, the report must contain all the material required by relevant practice direction and be prepared in the form there specified.*

10. *The court is particularly interested in the following issues or questions and these must also be addressed in the report:*

[for example

(a) whether [insert the name of P] has capacity in accordance with sections 2 and 3 of the Mental Capacity Act 2005, to [insert issue, for example, object to/conduct proceedings/decide where to live];

(b) if [he/she] lacks capacity, ascertain to the extent it is practicable and appropriate [his/her] present wishes and feelings and the beliefs and values that would be likely to influence [him/her] with regard to [insert the matter to which the application relates];

(c) if [he/she] lacks capacity, ascertain [his/her] present wishes and feelings as to how [his /her] participation could be secured by the

appointment of a representative pursuant to Rule 1.2 of the Court of Protection Rules 2017;

(d) whether [he/she] should have the opportunity to address (directly or indirectly) the judge determining the application and the circumstances in which that should occur;

(e) describe [insert the name of P]'s circumstances;

(f) what services and support would be provided to [insert the name of P]/funded for [insert the name of P] by [insert the name of the public body];

(g) whether what is sought by the application could be effectively achieved in a way which is less restrictive of [insert name of P]'s rights and freedom;

(h) the Public Guardian's views as to].

11. The report need not address the following:

[(a) ;

(b)].

Persons to whom report is likely to be disclosed

12. The report is to be prepared on the assumption that the court will pursuant to rule 14.24(4) of the Court of Protection Rules 2017 send a copy of it to the parties and such other persons as the court may direct. The court further directs that the report be sent to [insert the name of P][members of P's family][XX County Council/ NHS Hospital Trust/ Clinical Commissioning Group/Local Health Board][the parties only] [the parties and their legal representatives] [such other persons as the court may direct].
]

Persons to contact

13. The author of the report is authorised to contact and seek to interview the following person(s) for the purpose of preparing the report, with their contact details provided with this order:

(a) [insert the name of P] [in private][in the presence of XX];

(b)[the parties];

(c)[their legal representatives];

(d) [Others which may include for example, family, care and health providers].

14. The author of the report [may interview [insert the name of P] in private] [may not interview [insert the name of P]].

Access to records

15. For the purpose of enabling the author to prepare the report, [he/she] is authorised to examine and have a copy of the following, which relate to [insert the name of P] and are relevant to the application:

[for example,

(a) a copy of the application form, its annexes and any supporting evidence [such papers may be redacted as required by the court];

(b) any health record;

(c) any record of, or held by, a local authority and compiled in connection with a social services function, and

(d) any record held by a person registered under Part 2 of the Care Standards Act

2000 or Chapter 2 of Part 1 of the Health and Social Care Act 2008.]

Where a report is made under arrangements by a local authority or NHS Body

16. [The party who made the application for a section 49 report] [the party the court decides is the most appropriate] shall serve a copy of the order on [the senior officer who will accept this order on behalf of the [insert name of public body] and who will inform the court of the name of the person who will prepare the report] [XX being the person identified as having the appropriate expertise/knowledge to provide the report] within 7 days of service of this order, notwithstanding that in the event the order has not been sealed by the court, it shall be binding.

Record of lack of representation

17. Pursuant to rule 1.2(5) of the Court of Protection Rules 2017, the Court records that [insert name of P] has been directed to be joined as a party but such joinder has not occurred because no litigation friend or accredited legal representative has been appointed because [insert reasons].

Other directions

18. [(a) This order having been made without a hearing or without notice to any person affected by it; P, any party to the proceedings and any person affected by this order may apply to the court within 21 days of the order being served for reconsideration of this order pursuant to rule 13.4 of the Court of Protection Rules 2017 by filing an application notice (Form COP9) in accordance with Part 10 of those Rules]

[or]

[(a) This order having been made [at an attended hearing] (or if urgent) [at an urgent hearing] leave to any person adversely affected by this order to apply to the court within 7 days of the order being served, to set aside, vary or stay the relevant disputed provision of this order by filing an application notice (Form COP9) in accordance with Part 10 of the Court of Protection Rules 2017];

[(b)].

10. On the 26th October 2022, District Judge Hennessy handed down a written judgment. In her judgment, she explained her reasoning for granting the application for a direction for the Trust to file a report pursuant to section 49. The District Judge invited representations as to the precise wording and these were agreed by the parties in the terms set out in her judgment. The approach to the exercise of jurisdiction under section 49 MCA was described by the Judge in these terms:

“18. I do have a very wide discretion pursuant to section 49 to call for information from, amongst other people, a local authority or an NHS body dealing with such matters relating to P as the court may direct. I must operate that section firstly, in accordance with the overriding objective of the rules of the Court of Protection ... and with regard to PD 14E. The PD lists common factors that I may consider. Many are plainly not relevant to this case but my view is that factors (d), (e) and (g) are ones that I must consider.

19. Very plainly if I do make a direction for section 49 report from an NHS Trust, I am always calling upon their resources in order to prepare that report. In this respect, resources are not just financial.

Clinicians will be called upon to spend their time preparing and writing the report. The reality is that, if it is a report about a party with whom they are very familiar with and are engaged in treating, it may reasonably be said that the preparation of the report is less resource intensive than if they have a lesser degree of familiarity. It also seems to be self-evident that an NHS body can only provide a report relating to information which is within their remit. If any information that is required is properly within the remit of the local authority, then fairly self-evidently it is the local authority who should provide that information.”

11. Mr Patel KC and Ms Clark, acting on behalf of the County Council have conveniently summarised the judge’s already succinct conclusions in their skeleton argument, which I am happy to adopt. Thus:

(i) “as a matter of principle the information described is information within the remit of an NHS trust”;

(ii) “requiring a section 49 report to be carried out falls within the definition of the provision of services”

(iii) “the public body is reasonably expected to have recent knowledge of P”

(iv) paragraph 3(e) of PD 14E also seems to apply in that “the Trust is likely to be relevant to the decisions which the court is being asked to make;

(v) paragraph 3(g) of PD 14E also seems to apply, “information is required to inform the best interest decision to be made in relation to P by this court”.

“22. All of the above, in my view, points very firmly to there being a section 49 report in this case. Given that is the situation, and whilst I acknowledge the burden that this puts on the purse and resources of the author of those reports, I do not think there is a realistic alternative. All of the information is well within the remit of the Trust. A multi-disciplinary approach to this is needed which, doubtless includes social care (and that is excluded from the direction) but the Trust have a role to play. For example, there is an apparent acceptance by the parties (as opposed to the Trust) that community mental health support is required.”

12. It is not necessary to rehearse Mr Fullwood’s extensive arguments in full. They can be conveniently summarised. It is contended that the District Judge fell into error in the manner in which she considered and identified the relevant factors, including those set out in Practice Direction 14E, when evaluating the appropriate framework for the order.

13. Practice Direction 14E provides:

“3. The following are common factors which the court may consider when deciding whether to order a section 49 report—

- (a) where P objects to the substantive application or wishes to be heard by the court and does not qualify for legal aid;*
- (b) where it has not been possible to appoint a litigation friend or rule 1.2 representative, including where the court has made a direction under rule 1.2(5);*
- (c) where a party is a litigant in person and does not qualify for legal aid;*
- (d) where the public body has recent knowledge of P; or it is reasonably expected that they have recent knowledge of P; or should have knowledge due to their statutory responsibilities under housing, social and/or health care legislation;*
- (e) the role of the public body is likely to be relevant to the decisions which the court will be asked to make;*
- (f) the application relates to an attorney or deputy and involves the exercise of the functions of the Public Guardian;*
- (g) evidence before the court does not adequately confirm the position regarding P's capacity or where it is borderline; or if information is required to inform any best interests decision to be made in relation to P by the court."*

14. Mr Fullwood contends that greater regard should have been paid to the fact that JMC qualifies for and is in receipt of legal aid and is represented by a Litigation Friend. Though he acknowledged that the Trust had the most recent knowledge of JMC, it is emphasised that JMC had disengaged as a patient and their involvement discontinued on 1st April 2020. It is further argued that the Judge ought to have, at least, considered directing the Local Authority to provide a comprehensive care assessment and support plan, identifying their duties and proposals to support JMC to identify an alternative accommodation with a support package, pursuant to section 35 of the Social Services and Well-being (Wales) Act 2014; applying the Care and Support (Eligibility)(Wales) Regulations 2015. Regulation 3(a) provides that the criteria is satisfied if the needs arise from the adult's "*physical or mental ill-health, age, disability, dependence on alcohol or drugs or other similar circumstances*". Though this latter point is developed, it requires no amplification here.
15. In relation to PD14E, Mr Fullwood contends that the Judge's observation, to the effect that many of the factors were not relevant, failed to take into account that some, at least, potentially were. The information required by the Judge was not, as I understand it, disputed but the essence of the point advanced in appeal is that responsibility for providing that information had migrated to the GP and not to the Trust. The wider panoply of JMC's needs, though they were initially in the focus of the Trust, it is also contended, have now essentially, through the lapse of time, become eclipsed by the Local Authority's own prevailing duties. Mr Fullwood structured this point in these terms:

"In this case the Trust initially accepted a referral to assess and provide reports in relation to JMC. However, on 1 April 2020 it decided to discharge him from their service on clinical grounds. That was a proper decision that was not challenged and could not be challenged other than on public law grounds. Thereafter, JMC has been referred on at least two subsequent occasions but on each occasion the Trust has decided not offer services to him based on proper clinical grounds."

16. Accordingly, it is argued, that the Court is directing the Trust to provide services that it has decided are not appropriate. If that were in fact the case, then manifestly, it would be wrong in law, see: *N v A CCG* [2017] UKSC 22.
17. The application for permission to appeal is opposed by the Trust and the Accredited Legal Representative (ALR) on behalf of JMC.
18. It is important to identify some clear general principles. Firstly, section 49 of the MCA manifestly conveys upon the Court a broad discretion, when deciding to request a report and in respect of the scope of it. Inevitably, however, such a discretion is not to be regarded as unfettered. Thus, the Court is confined to considering questions directly relating to P. Here, the proceedings concern a determination of best interests under section 21(A) of the MCA, as a facet of the standard authorisation. It is well established that proceedings brought pursuant to section 21(A) are the mechanism by which the State must achieve compliance with Article 5 ECHR concerning P's deprivation of liberty at a relevant care facility. Article 5(4) ECHR requires that review, in the sense of keeping in scope the continued lawfulness of any detention, should always take place speedily. As Mr Patel has emphasised, the character of the Court of Protection jurisdiction is non-adversarial, inquisitorial, sui generis. Such a jurisdiction will always require a broad margin of discretion in eliciting information it considers **necessary** to illuminate the question in focus.
19. Secondly, as I have already foreshadowed, the Court must have regard to the Practice Direction 14E. In particular, paragraph 3 identifies a list of "common factors" which the Court may consider. Proceedings in the Court of Protection are invariably highly fact specific. It is for this reason that the common factors identified in the Practice Direction are permissive and not mandatory.
20. Section 49 MCA is a case management power. The approach to the exercise of these powers has been commented upon by the Court of Appeal in a number of cases, each of which has emphasised that the circumstances in which an Appellate Court will intervene on a case management decision are to be regarded as very rare indeed. As this application has shown, such applications are a catalyst to satellite litigation and delay. Sir James Munby (P) made the following observations in *Re TG (A Child)* [2013] EWCA Civ 5, [2013] 1 FLR 1250 at [34] and [38]:

"... the Court of Appeal has recently re-emphasised the importance of supporting first-instance judges who make robust but fair case-management decisions: Depripaska v. Cherney [2012] EWCA Civ 1235, paras [18], [30], and Stokors SA v IG Markets Ltd [2012] EWCA Civ 1706, paras [25], [45], [46]. Of course, the Court of Appeal must and will intervene when it is proper to do so. However, it must be understood that in the case of appeals from case management decisions the circumstances in which it can interfere is limited. The Court of Appeal can interfere only if satisfied that the judge erred in principle, took into account irrelevant matters, failed to take into account relevant matters, or came to a decision so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge: Royal & Sun Alliance Insurance plc v T & N Limited [2002] EWCA Civ 1964, paras [37]-[38], [47], Walbrook Trustee (Jersey) Ltd v Fattal [2008] EWCA Civ 427, para [33], and Stokors SA v IG Markets Ltd [2012] EWCA Civ 1706, para [46]. This is not a question of judicial comity; there are sound pragmatic reasons for this approach. First, as Arden LJ

pointed out in Royal & Sun Alliance Insurance plc v T & N Limited [2002] EWCA Civ 1964, para [47]:

‘Case management should not be interrupted by interim appeals as this will lead to satellite litigation and delays in the litigation process.’

21. In *Piglowska v Piglowski*, [1999] 1 WLR 1360, 1372, Lord Hoffmann made the following and now frequently cited observations:

“Reasons for judgment will always be capable of having been better expressed ... reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself.”

22. In my December 2022 Guidance (see para. 8 above), I identified the circumstances in which a section 49 request would ‘paradigmatically’ be made. It would be a misreading of that guidance to interpret a paradigm as if it were a rigid and unchanging template. That is not what is contemplated by the wording of section 49 nor, of course, is it what the word means (i.e., a pattern or a model). The circumstances DJ Hennessy was considering were different from those contemplated in my document, though there are some similar features. What, in my assessment of her judgment, the District Judge was seeking to achieve, was the most effective route to the most reliable evidence she could identify as likely to assist her in determining how JMC’s best interests could effectively be met.
23. The District Judge came to the conclusion that the Trust had sufficiently recent knowledge of JMC to make them the focus of the enquiry. In my judgment, she was entitled, on the available evidence, to reach that conclusion and having done so, her selection of section 49 as the appropriate route is unimpeachable. The other factors discussed by Mr Fullwood such as the availability of legal aid etc., gain no traction against this factual backdrop. Indeed, logically, the availability or otherwise of legal aid should have no bearing on the selected framework for ordering a report.
24. Mr Fullwood had also contended that an order under section 49, effectively triggered a direction to the Trust to provide services. A prototype of this argument was advanced before the District Judge and remodelled before me. With respect, I can see no mileage in the argument at all. Section 49 is a route by which information is acquired, it has nothing at all to do with the provision of NHS services. That would be to distort the plain words of the statute.
25. Rule 20.14(3) Court of Protection Rules 2017 provides that an appeal may only be granted against a decision at first instance where the decision was:
- (a) *wrong; or*
 - (b) *unjust, because of a serious procedural or other irregularity in the proceedings before the first instance judge.*

26. For the Court to grant permission to appeal, it must engage in the test as set out in rule 20.8 CoPR 2017:

- (a) The court consider that the appeal would have a real prospect of success; or*
- (b) There is some other compelling reason why the appeal should be heard.*

27. I am satisfied that argument has not demonstrated any real prospect of success, having regard to the breadth of the discretion available under the aegis of section 49. Moreover, I entirely agree with Ms Sharron, on behalf of the ALR, that the information required for the Court is most appropriately claimed by a section 49 direction against the Trust. Ms Sharron articulates the position in this way in her skeleton argument:

“In this case, not only can the relevant information be provided by the relevant NHS Trust under section 49, but there are a number of reasons why such a report is more appropriate than an expert instruction, namely:

- (i) The Trust has pre-existing knowledge of JMC and has already provided two detailed reports to the court in respect of JMC and the appropriate care and treatment for him, having regard to his ARBD. The clinical guidelines in relation to the treatment of ARBD cut across both health and care and require a holistic and multi-disciplinary approach;*
- (ii) The Trust promised to provide a further report to the court developing its analysis as to whether JMC’s current placement was clinically suitable, having regard to his ARBD, which was the basis on which the previous proceedings finalised. The further report never materialised and the analysis in respect of whether the placement can meet JMC’s particular needs, arising out of his ARBD, is not complete.*
- (iii) The Trust is able to make recommendations in relation to local provision and interventions which it is aware of within the region;*
- (iv) The Trust is able to offer a longitudinal and multi-disciplinary view regarding JMC’s needs, as opposed to an ‘snapshot’ expert assessment being taken by an individual from out of area.*

28. I agree with each of points made above. Ultimately, and for the reasons that I have set out, they strip this application of any real prospect of success. Accordingly, permission to appeal is refused.