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Introduction

Imagine living a life by your own will, choices, desires and preferences – wise or unwise; choices constrained no doubt by your relationships, finances, abilities and other circumstances; choices that, had you the chance again, you may make differently, but your choices, nonetheless. Yet imagine a court having the power to overrule your choices or authorise others to do so. To decide where you can live and whether you are allowed to leave that place; to decide if and whom you can marry; if and with whom you can be intimate or have any contact; how your finances are handled and money spent; whether you can have a particular medical treatment; or, perhaps worse, whether you can have medical treatment forced on you against your wishes. And imagine if all this can be done, not because you have committed a crime, or done anything unlawful, but because you do not have the necessary level of mental functioning to reach the law's required level for decision-making – you lack the *mental capacity* to make the decision in question. These are the types of decisions the Court of Protection (CoP) makes every day. It is a jurisdiction relatively under-researched but one that can touch on every aspect of an adult's life in England and Wales. How the CoP does, and should, operate to achieve access to justice in mental capacity law is the focus of this book. This includes the extent to which CoP proceedings involve people affected by its decisions, the type of evidence it considers in reaching decisions on mental capacity and best interests, the ways in which its processes and spaces operate, and the use of alternative ways of resolving CoP disputes. In short, I argue that the CoP has not effectively achieved access to justice for the subject of proceedings (referred to throughout as the 'Person'),[1] particularly through its failure to sufficiently place their voice and participation at the centre of its work.

[1] The subject of proceedings is commonly referred to as 'P' in the literature and in case law, because of reference to 'P' within the Mental Capacity Act 2005 as the protected party in CoP proceedings. This terminology may be seen in various places in the book, and it is

While this book focuses on a specific court system in England and Wales, it draws on and contributes to a wider discussion regarding the success of different models internationally for courts in the specialist areas of mental capacity, adult guardianship and safeguarding law and practice. Some have advocated a different model from the formal court process that has been enacted in England and Wales. For example, the tribunal model has been argued to be more facilitative of participation and rights than the court system,[2] with Terry Carney and David Tait in their seminal book on adult guardianship showing how Australian courts 'remained largely inaccessible, both because of their procedures and limitations in jurisdiction'.[3] I make a similar argument in this book about the CoP's failure to fully achieve access to justice, and it is perhaps surprising how much of the criticism that Carney and Tait articulated in a different context more than two decades ago can still be applied to the CoP today. Despite these criticisms, court-based models are, to varying degrees, still in use internationally, not only in England and Wales but in Ireland,[4] New Zealand,[5] parts of North America[6] and Europe.[7] While my argument in this book is centred on a critique of access to justice in the CoP, I acknowledge that many improvements

terminology that I have used elsewhere in writing about this jurisdiction. However, where possible, I refer to the subject of proceedings as 'the Person' in this book due to the potentially dehumanising nature of referring to a person through a generic initial. I hope to remind readers that we are talking about a real person here rather than just an anonymous 'P'.

[2] T. Carney and D. Tait, *The Adult Guardianship Experiment: Tribunals and Popular Justice* (Sydney: The Federation Press, 1997).

[3] Ibid., p. 16.

[4] See Assisted Decision-Making (Capacity) Act 2015.

[5] See Protection of Personal and Property Rights Act 1998.

[6] See discussion at Carney and Tait, *The Adult Guardianship Experiment*, pp. 16–18; S. Halliday, *Autonomy and Pregnancy: A Comparative Analysis of Compelled Obstetric Intervention* (Abingdon: Routledge, 2016); also Ontario's Consent and Capacity Board discussed in S. Paul, A. Nakhost, V. Stergiopoulos, F. I. Matheson, A. I. F. Simpson and T. Guimond, 'Perceptions of key stakeholders on procedural justice in the Consent and Capacity Board of Ontario's hearings' (2020) 68 *International Journal of Law and Psychiatry* 1.

[7] For an insight into some of the issues across Europe, see: UN Office of the High Commissioner for Human Rights, *The System of Guardianship in Practice in the Republic of Moldova: Human Rights and Vulnerability of Persons Declared Incapacitated* (UN Office of the High Commissioner for Human Rights, 2013); M. Fallon-Kund, M. Coenen and J. E. Bickenbach, 'Balancing autonomy and protection: a qualitative analysis of court hearings dealing with protective measures' (2017) 53 *International Journal of Law and Psychiatry* 69; Validity, www.validity.ngo.

have been made, particularly through the leadership of Mr Justice MacFarlane (President) and Mr Justice Hayden (Vice President), as well as Senior Judge Hilder. These improvements have arguably been influenced by developments in different jurisdictions, the benefits of other models such as tribunals and the implementation of the United Nations Convention on the Rights of Persons with Disabilities (CRPD). For example, the CoP now routinely publishes judgments; as discussed in Chapter 3, procedural rules have been implemented to try to facilitate more flexible approaches to participation of the Person;[8] in Chapter 5, I explain that medical (or psychiatric) experts are not required by law to provide evidence on capacity or best interests; and, as outlined in Chapter 6, the CoP has been one of the most successful courts in securing open justice during the pandemic.[9] Therefore, while I argue that the CoP has not secured all of the required standards of access to justice, for a specialist court grappling with difficult challenges transcending law, disability, health and social welfare, it has made important strides towards this from which other jurisdictions may also be able to learn.

Justice ought to be accessible at every level though, not just in formal courts. What happens in the spaces outside court, in the (pre-)court processes and in the everyday understandings and interpretations of law is hugely important and has been at the centre of socio-legal scholarship.[10] What happens in these 'small places'[11] is influenced by what happens in those 'larger places' such as the courtroom. While there have been criticisms of legal scholarship for focusing too heavily on the work of courts instead of considering people's experiences of law in a wider sense or challenging the institutional power of law,[12] the work of

[8] See Court of Protection Rules 2017, rule 1.2.

[9] Although arguably this is due to the campaigning work of the Open Justice Court of Protection project, notwithstanding that the judiciary was sufficiently receptive and supportive to permit this.

[10] H. Genn, *Paths to Justice* (Oxford: Hart Publishing, 1999); H. Genn, *Judging Civil Justice* (Cambridge: Cambridge University Press, 2010); M. Mayo, G. Koessl, M. Scott and I. Slater, *Access to Justice for Disadvantaged Communities* (Bristol: Policy Press, 2015); R. Harding, *Regulating Sexuality: Legal Consciousness in Lesbian and Gay Lives* (Abingdon: Routledge, 2011); M.-A. Jacob, *Matching Organs with Donors: Legality and Kinship in Transplants* (Philadelphia: University of Pennsylvania Press, 2012).

[11] See E. Roosevelt, 'The great question: Remarks delivered at the United Nations in New York on March 27, 1958' (New York: United Nations, 1958). This is also the focus of Lucy Series' blog about mental capacity and community care law and practice, see L. Series, *The Small Places*, www.thesmallplaces.wordpress.com/about.

[12] C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989).

the CoP is an important site for socio-legal research. This is because, first, the far reach of the CoP, and its influence in those small places, justifies its exclusive focus in this book. Second, the CoP has historically had little scrutiny. While academic research and media interest in the CoP have been growing in recent years,[13] access to researchers, the media and the public only really expanded in 2016 following a successful transparency pilot,[14] despite the CoP's current framework commencing in 2007. Perhaps somewhat counter-intuitively, the CoP actually became more highly scrutinised than ever during the Covid-19 pandemic, mostly because of important activism undertaken to ensure open justice for virtual hearings.[15] Despite the increased transparency on the face of it, the CoP is still one of those relatively concealed 'small places' that has been hidden for too long. Third, it is a useful study of the challenges that arise in designing and operating a specialist court in this area. As noted earlier, different jurisdictions have done things differently, for example through a tribunal model, and so the CoP is a useful site of analysis to consider both the strengths and the weaknesses of such an approach. Finally, in particular types of CoP case (predominantly health and welfare), the court is the last judicial barrier against the state when it intervenes in an individual's life for reasons of mental incapacity. In property and affairs cases it may also be the final protection for a Person whose family members are subjecting them to exploitation or profligate litigation. It may well be the final opportunity (subject to the appeal courts) for an individual to prevent a decision being made that goes against their wishes. Conversely, the CoP can take decisions away from individuals, deny them their legal capacity[16] and undermine their ability to take part in a case that could change their

[13] L. Series, P. Fennell, L. Clements and J. Doughty, *Transparency in the Court of Protection* (Cardiff: Cardiff University Press, 2015); L. Series, P. Fennell and J. Doughty, *The Participation of P in Welfare Cases in the Court of Protection* (Cardiff: Cardiff University Press, 2017); A. Ruck Keene, N. B. Kane, S. Y. H. Kim and G. S. Owen, 'Taking capacity seriously? Ten years of mental capacity disputes before England's Court of Protection' (2019) 62 *International Journal of Law and Psychiatry* 56; P. Skowron, 'The relationship between autonomy and adult mental capacity in the law of England and Wales' (2019) 27 *Medical Law Review* 32.

[14] CoP Practice Direction – Transparency Pilot, followed by the rule changes in the Court of Protection Rules 2017.

[15] See the Open Justice Court of Protection Project led by Celia Kitzinger and Gillian Loomes-Quinn, www.openjusticecourtofprotection.org.

[16] Defined later, see E. Flynn, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (London: Routledge, 2015).

whole life. It is for these reasons that the CoP is subject to detailed and sustained analysis in this book.

Reimagining the Court of Protection

The aim of this book is to begin to reimagine the CoP as an institution that better secures access to justice for its subjects: to facilitate them to participate and give voice in proceedings; to be heard on an equal evidential footing; and to have the opportunity to shape the material and institutional practices of the court. This argument is achieved through a procedural justice framework of values, rather than analysing the substantive elements of mental capacity law in individual cases. By the end of the book, I will have suggested a new approach envisaging a CoP that is designed with the Person in mind, focused on the ways in which access to justice can be secured. In doing so, I am mindful of the realities with which the justice system, and the CoP in particular, is faced. A reality that is severely hampered by the pandemic response, a technological system that is underfunded and underdeveloped, and a funding crisis that has meant priorities have to be drawn between scarce resources.[17] Therefore, in developing the overarching argument of this book I reimagine in a radical way, yet in making specific recommendations I aim to ground these in possible realities, thus treading a difficult balance between an ideal future and concrete reforms.

In making this core argument to reimagine the CoP as an institution that better secures access to justice for its subjects, the book makes three key contributions. First, it provides original empirical data on the working of the CoP, providing a descriptive insight into CoP practice. Second, it contributes to and develops a theoretical approach to procedural justice. Third, it brings the theory and empirical data together to provide normative recommendations for reimagining the CoP to better achieve access to justice for the Person. I advance key arguments throughout to support these claims. I make a number of descriptive claims, based on socio-legal empirical data, which include the following:

[17] HM Courts and Tribunals Service Reform Programme Projects explained (2018), www.gov.uk/guidance/the-hmcts-reform-programme; N. Byrom, 'Digital justice: HMCTS data strategy and delivering access to justice' (October 2019), www.research.thelegaleducationfoundation.org/wp-content/uploads/2019/09/DigitalJusticeFINAL.pdf; R. Susskind, *Online Courts and the Future of Justice* (Oxford: Oxford University Press, 2019).

that the Person rarely participates or gives voice in CoP proceedings or in mediation practice; that there is a hierarchy of evidence in the practice of mental capacity law; that in discounting experiential evidence from the Person the CoP does not value a sufficiently wide paradigm of knowledge; and, finally, that the CoP has not been designed to place the Person at the centre of its practice.

Guided by the procedural justice values set out in Chapter 2, I focus on the intrinsic importance of the Person's role in CoP proceedings, as well as the instrumental and pragmatic benefits of securing procedural justice. The core normative aim of this book, then, is to reimagine the CoP as an institution that better secures access to justice for its subjects. A number of arguments are developed in each chapter that flow from this overarching aim. First, that the Person ought to be facilitated to give voice and participate directly. Second, that mediation ought to be used in ways that prioritise the interests and demands of the Person. Third, that greater evidential weight ought to be placed on experiential evidence, including that of the Person and those closest to them. Finally, that the CoP needs to be redesigned in material (and virtual) ways to facilitate access to justice and serve the needs of a much wider range of court users, including, and most importantly, the Person themself.

Mental Capacity, Disability and Access to Justice

The CoP existed prior to the enactment of the Mental Capacity Act 2005 (MCA) and the ratification of the CRPD.[18] Historically, the CoP's predecessor dealt primarily with issues relating to property and financial

[18] The jurisdiction of the CoP extends only to the MCA and therefore other jurisdictions, such as Scotland, Northern Ireland and beyond, are not included in this book given that the empirical data was collected at the CoP. While the MCA applies in English law and is the focus of this book, developments in other jurisdictions provide new ideas and approaches from which the English CoP might learn. For example, see E. Flynn and A. Arstein-Kerslake, 'Legislating personhood: realising the right to support in exercising legal capacity' (2014) 10 *International Journal of Law in Context* 81; A. Arstein-Kerslake, *Restoring Voice to People with Cognitive Disabilities: Realizing the Right to Equal Recognition before the Law* (Cambridge: Cambridge University Press, 2017); M. B. Simmons and P. M. Gooding, 'Spot the difference: shared decision-making and supported decision-making in mental health' (2017) 34 *Irish Journal of Psychological Medicine* 275; R. Harding, E. Taşcıoğlu and M. Furgalska, 'Supported will-making: a socio-legal study of experiences, values and potential in supporting testamentary capacity' (2019), www.legalcapacity.org.uk/wp-content/uploads/2019/09/SupportedWillMaking_FinalReport_2019_web.pdf.

affairs, particularly powers of attorney, statutory wills and the management of assets of people with impaired decision-making abilities. It is partly because of the CoP's history that its relationship with mental capacity and disability presents a number of issues for access to justice. As Weston explains, 'the CoP predates the MCA in name, concept, and in substantive parts of its role'.[19] Immediately prior to the enactment of the MCA, the CoP existed as a function of the Office of the Supreme Court, with jurisdiction over property and affairs matters for those people unable to manage such issues themselves.[20] Its current form therefore very much reflects this historical development, stemming from the Lunacy Court, *parens patriae* jurisdiction and, more recently, the Public Guardianship Office. For example, the focus on safeguarding the assets of a mentally ill person under the Lunacy Court may to some extent explain the presence of a protectionist attitude that still survives today.[21] As Stebbings argues, 'The modern legal framework for the protection of the property of the mentally ill was created in the Victorian period'.[22] In the twenty-first century, though, the CoP's jurisdiction is explicitly to deal with issues of mental capacity in relation to a much wider range of domains – property, finance, health and welfare.[23] It now combines a wide spectrum of powers, which were previously dispersed, into the hands of a single court, regionalised across various centres in England and Wales and in excess of 300 nominated CoP judges.[24] Despite this expansion, the CoP's work was, and actually still is in terms of numbers, vastly dominated by matters relating to property and finances, reflecting the predominance of its predecessor's work.[25]

[19] J. Weston, 'Managing mental incapacity in the 20th century: a history of the Court of Protection of England & Wales' (2020) 68 *International Journal of Law and Psychiatry* 101524.
[20] Under Mental Health Act 1983.
[21] Carney and Tait, *The Adult Guardianship Experiment*; C. Stebbings, 'Protecting the property of the mentally ill: the judicial solution in nineteenth century lunacy law' (2012) 71 *Cambridge Law Journal* 384.
[22] Stebbings, 'Protecting the property of the mentally ill', p. 407.
[23] Soon to be Liberty Protection Safeguards, see Mental Capacity (Amendment) Act 2019, R. Harding, 'Safeguarding freedom: the Liberty Protection Safeguards, social justice and the rule of law', Current Legal Problems lecture, 4 March 2021.
[24] See G. Langdon-Down, 'Facts of life', *Law Gazette*, 26 November 2018, www.lawgazette.co.uk/features/facts-of-life/5068423.article.
[25] Ministry of Justice, Family Court Statistics Quarterly: October to December 2020 (2020), www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2020.

More specifically, the majority of applications to the CoP concern applications for a property and affairs deputy, at 12,686 applications in 2020 out of a total of 30,635 applications to the CoP overall. This is followed by applications for a 'one-off' property and affairs order (6,161) and applications regarding Deprivation of Liberty (DOL) (4,932) – figures that are broadly consistent with the preceding twelve years of the CoP's work save for a drastic increase in DOL applications in 2015/16.[26] This is important to note because an authorised court officer, rather than a judge, can deal with certain types of non-contentious applications to the CoP, including applications for a property and affairs deputy, which makes up the bulk of the CoP's work. The potential for such a large portion of the CoP's work to bypass judges and to have very little by way of participatory involvement from the Person does raise questions for access to justice, not least given the potential for financial abuse to be missed given the subject matter of the applications. 'One-off' property and affairs orders are more likely to reach a judge as they will often be more complex and contested, and DOL applications do not fall within the authorised court officer's remit. As Practice Direction 2B makes clear,

> 2.2. An authorised court officer may not conduct a hearing and must refer to a judge any application or any question arising in any application which is contentious or which, in the opinion of the officer –
>
> (a) is complex;
> (b) requires a hearing; or
> (c) for any other reason ought to be considered by a judge.

In addition, Practice Direction 2B para. 4.1 has an important safeguard that enables the Person (or any other party or person affected) to have the order reconsidered by a judge, but this requires a degree of proactivity on behalf of the Person and there is a real risk that these 'non-contentious' matters receive relatively little scrutiny, even by the CoP's standards. The CoP's historical context, including its history in property and financial affairs, has often been overlooked, which 'reflects the facts that the CoP was not at any time during the twentieth century particularly well-known'.[27] This is noteworthy because while the MCA may have been a watershed moment and may have fundamentally changed the work of the CoP, the court itself did not change overnight in quite the

[26] Following the decisions in *P* v. *Cheshire West and others* [2014] UKSC 19 and *Re X (Court of Protection Practice)* [2015] EWCA Civ. 599.
[27] Weston, 'Managing mental incapacity in the 20th century', p. 1.

same way. This can be seen acutely in the property and affairs context, which I later show has incorporated an even less participatory approach.

One other example of the relevance of the CoP's history to its current practice is that the CoP was not originally set up with the subject of proceedings to be central – it developed at a time when paternalism, particularly from the medical profession, was still commonplace.[28] In fact, the whole purpose and function of the predecessor to the current CoP was to exercise jurisdiction in relation to alleged 'lunatics', which, if proven, would lead to a family member being given a right to control the property of the person and, ultimately, potentially commit that person to an asylum.[29] The links between the development of the CoP's jurisdiction and psychiatry are clear, and attitudes within psychiatry arguably seeped through into the work of the CoP's predecessor. For example, it is possible that its work expanded throughout the twentieth century because of the increasing medicalisation of mental difference. As more people were diagnosed with mental disorders and neurodiversity was medicalised, it is perhaps unsurprising that the work of a court tasked with dealing with people with mental disorders similarly expanded. Yet it also retains evidence of deference to the medical profession from both the property and affairs and the medical treatment dimension to its work.[30] Mental capacity law is also often seen as a subset of healthcare law, particularly within law schools and academic literature,[31] yet the need to move away from an overly deferential and medicalised analysis of mental capacity and best interests has been highlighted elsewhere.[32] In practice, however, CoP proceedings involve issues that impact upon and engage with disability issues much more centrally than the healthcare for which the CoP is known, and it is this issue of disability to which I now turn.

[28] In relation to paternalism and deference to the medical profession, see M. Brazier and J. Miola, 'Bye-bye Bolam: a medical litigation revolution?' (2000) 8 *Medical Law Review* 85; P. Case, 'Negotiating the domain of mental capacity: clinical judgement or judicial diagnosis?' (2016) 16 *Medical Law International* 174.

[29] See Weston, 'Managing mental incapacity in the 20th century'; C. Unsworth, 'Law and lunacy in psychiatry's "Golden Age"' (1993) 13 *Oxford Journal of Legal Studies* 479–507.

[30] Stebbings, 'Protecting the property of the mentally ill'.

[31] For example, it is primarily covered within medical law or healthcare law modules in university law schools and is featured most prominently in leading medical law textbooks.

[32] J. Coggon and J. Miola, 'Autonomy, liberty, and medical decision-making' (2011) 70 *Cambridge Law Journal* 523; J. Lindsey, 'Competing professional knowledge claims about mental capacity in the Court of Protection' (2020) 28 *Medical Law Review* 1.

Disability in Mental Capacity Law

In referring to disability in this book, I adopt the biopsychosocial model of disability, which is a bridge or interaction between the medical and social models of disability, acknowledging the incompleteness of each.[33] The medical model views disabilities as stemming from the individual and their particular dysfunction and advocate the provision of medical treatment as a response to disability. Disability theorists challenge the medical model on the basis that it is social structures and the environment that cause a person to experience disability.[34] The social model aims to move away from focusing on the Person's individual impairment to look towards the features in their social world that cause them to experience their impairment as a disability. Similarly, the social-ecological approach to disability considers the need for support where there is a mismatch between the individual's abilities and what they need to navigate society.[35] While the social model certainly provides a radical and enlightened way of understanding disability, some have also criticised it as providing an incomplete account.[36] For example, the social model of disability has not sufficiently accounted for cognitive or learning impairments that are not easily ameliorated through social responses. It has historically focused heavily on physical disability resulting from environmental structures and has been incredibly powerful in this regard. In doing this, though, the social model has failed to recognise the reality for many individuals with severe cognitive and learning impairments in particular, which is that changing their environment, even radically, will not completely remove the disabling experience that their condition presents. Even in optimum environmental conditions where they are fully supported to live life on an equal basis with others, individuals at the severe end of impairment may still experience their impairment

[33] R. J. Hull, 'Cheap listening – reflections on the concept of wrongful disability' (2006) 20 *Bioethics* 55; B. Clough, '"People like that": realising the social model in mental capacity jurisprudence' (2015) 23 *Medical Law Review* 53; J. N. Penney, 'The biopsychosocial model: redefining osteopathic philosophy?' (2013) 16 *International Journal of Osteopathic Medicine* 33–37.

[34] M. Oliver, *The Politics of Disablement* (Basingstoke: Macmillan, 1990).

[35] K. Shogren, M. Wehmeyer, J. Martinis and P. Blanck, *Supported Decision-making: Theory, Research, and Practice to Enhance Self-determination and Quality of Life* (Cambridge: Cambridge University Press, 2019).

[36] T. Shakespeare, *Disability Rights and Wrongs* (Abingdon: Routledge, 2006).