

Editorial: The third strand: Sir James Munby and the inherent jurisdiction

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The death of Sir James Munby on 1 January 2026 has, rightly, garnered a series of eloquent obituaries. The former President of the Family Division in England and Wales will be remembered for his dedication to procedural justice in proceedings relating to children, his willingness to challenge manifest failings in respect of children's mental health provision and his drive to making the Family Court a more transparent forum.

In his obituary of Sir James, Sir Nicholas [Mostyn \(2026\)](#), noted, "the reader collects from his judgments a strong attachment to the interests of the weak, powerless, and dispossessed, whether they were failed asylum seekers awaiting deportation, coerced wives or seriously unwell adults and children. A recurring theme is the defence of the weak against a monolithic, unthinking state".

(<https://financialremediesjournal.com/sir-james-munby-obituary/>)

Whilst Sir Nicholas Mostyn toured through some of the judgements given by Sir James in respect of financial remedies, Polly [Morgan \(2026\)](#) took to the Transparency Project's website to explore, "a few of his greatest hits in the area of child law".

(<https://transparencyproject.org.uk/sir-james-munbys-greatest-hits-an-appreciation-of-his-work/>)

There can be no doubt that the legacy of Sir James Munby will continue to be felt by those who practice in family law for years to come. One decision which deserves the focus of the readership of JAP is [Re SA \(Vulnerable Adult with Capacity: Marriage\) \(2005\)](#) EWHC 2942 (Fam).

The decision in *Re SA* was handed down on 15 December 2005. The date is important. The judgement predates the Mental Capacity Act (2005) coming into force. Likewise, it was mentioned in debates in Parliament before the Forced Marriage (Civil Protection) Act (2007) was passed. Notable too is the fact that *Re SA* has been cited positively on many occasions since those pieces of legislation have come into force.

The decision in *Re SA* related to a young woman who had recently turned 18. Before reaching her adulthood, the court had, to use Sir James Munby's own words, "exercised its inherent *parens patriae* and wardship jurisdictions to protect her from the risk of an unsuitable arranged marriage". The question in 2005 was what the court should do once she had become an adult. In 2026, SA's case would be looked at through the prism of the Mental Capacity Act 2005 and through the Family Law Act 1996, amended by the Forced Marriage (Civil Protection) Act 2007. However, these were not available to Sir James Munby at the time of *Re SA*. The question at the heart of the case was, "whether the inherent jurisdiction in relation to adults can be exercised for the protection of vulnerable adults who

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do not, as such, lack capacity". Sir James answered, definitively in the affirmative. Whether that answer was correct (or to what extent it was) continues to be debated.

It is important to explain the concept of the inherent jurisdiction in the context of adult protection. Sir James described it this way in *Re SA*, at paragraph 79 of his judgement:

[...] *The inherent jurisdiction can be invoked wherever a vulnerable adult is, or is reasonably believed to be, for some reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent. The cause may be, but is not for this purpose limited to, mental disorder or mental illness. A vulnerable adult who does not suffer from any kind of mental incapacity may nonetheless be entitled to the protection of the inherent jurisdiction if he is, or is reasonably believed to be, incapacitated from making the relevant decision by reason of such things as constraint, coercion, undue influence or other vitiating factors.*

The controversial aspect is that *Re SA* allows the invocation of the inherent jurisdiction of the High Court in circumstances where a person does not have any form of disability but rather instead, that they are vulnerable ([Hewson, 2013](#)).

Paragraphs 82 and 83 of *Re SA* outline vulnerability

82. In the context of the inherent jurisdiction I would treat as a vulnerable adult someone who, whether or not mentally incapacitated, and whether or not suffering from any mental illness or mental disorder, is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation, or who is deaf, blind or dumb, or who is substantially handicapped by illness, injury or congenital deformity. This, I emphasise, is not and is not intended to be a definition. It is descriptive, not definitive; indicative rather than prescriptive.

83. The inherent jurisdiction is not confined to those who are vulnerable adults, however that expression is understood, nor is a vulnerable adult amenable as such to the jurisdiction. The significance in this context of the concept of a vulnerable adult is pragmatic and evidential: it is simply that an adult who is vulnerable is more likely to fall into the category of the incapacitated in relation to whom the inherent jurisdiction is exercisable than an adult who is not vulnerable. So, it is likely to be easier to persuade the court that there is a case calling for investigation where the adult is apparently vulnerable than where the adult is not on the face of it vulnerable. That is all.

Where Sir James Munby led in *Re SA*, the Court of Appeal followed in [DL v A Local Authority & Ors \[2012\] EWCA Civ 253](#). Again, the date is important, by the time the Court of Appeal handed down their judgement, the Mental Capacity Act 2005 was in force, but section 42 of the Care Act 2014 and section 126 of the Social Services and Well-being (Wales) Act 2014 were not.

In *DL*, Lord Justice McFarlane (now the President of the Family Division) described the core issue in the case as being, at paragraph 1:

The focus of this appeal is a single point of law. The point relates to the extent to which the inherent jurisdiction of the High Court may be deployed following the implementation of the Mental Capacity Act 2005 for the protection of adults who are perceived to be vulnerable. The issue does not concern those cases that fall within the MCA 2005, and which proceed in the Court of Protection. The question for consideration is whether, despite the extensive territory now occupied by the MCA 2005, a jurisdictional hinterland exists outside its borders to deal with cases of 'vulnerable adults' who fall outside that Act, and which are determined under the inherent jurisdiction.

In *DL*, the argument was mounted that the Mental Capacity Act 2005 was designed to provide a comprehensive statutory code for those who lacked capacity to make decisions

for themselves. It was contended that if a person does not fall within the provisions of the Mental Capacity Act 2005 that the court has no jurisdiction to act in respect of that person.

Ultimately, that argument was rejected. The analysis of Sir James Munby had survived the passing of the Mental Capacity Act 2005 and had the endorsement of the Court of Appeal which recognised that there was a category of vulnerable person who may not be safeguarded by statute. The shortest of the judgements came from Lord Justice Maurice Kay who stated, at paragraph 79:

Where a person lacks capacity in the sense of s2(1) of the MCA 2005, he has the protection provided by that statute. A person at the other end of the scale, who has that capacity and is not otherwise vulnerable, is able to protect himself against unscrupulous manipulation, if necessary by obtaining an injunction against his oppressor. This case is concerned with a category of people who, in reality, have neither of those remedies available for their protection. It would be most unfortunate if, by reference to their personal autonomy, they were to be beyond the reach of judicial protection. For the reasons given by my Lords, they are not. The inherent jurisdiction continues to exist. I have nothing to add as to its scope.

On 10 December 2020, Sir James Munby delivered a lecture to the Court of Protection Bar Association. Within that lecture, Sir James gave a detailed exposition of the use and history of the inherent jurisdiction of the High Court. Having addressed the use of the inherent jurisdiction in respect of children and incapacitous adults he turned to the third strand of person for whom it may be invoked: vulnerable adults. He went on to endorse the concept that the purpose of the inherent jurisdiction in respect of vulnerable adults was to create circumstances where that adult exercised their own decision-making capacity.

Sir James pulled through the authorities and said authoritatively that:

[...] the court cannot in exercise of the inherent jurisdiction in relation to vulnerable adults either (a) grant an injunction preventing the vulnerable adult from doing anything which would otherwise be lawful or (b) make an order depriving him of his liberty. If the jurisdiction is to be exercised with recourse to injunctions, those injunctions must be directed against the abuser, not his vulnerable victim.

Sir James, with unknowing prescience, reminded practitioners that:

It is a very strong thing to remove someone unwillingly from the house in which they have lived for a long time and which for them is "home." Some residential placement may be 'safer', but if being removed from everything he has known and still wants has the effect that he simply loses the will to live, what 'good' is being achieved? What good is safety and better quality care if someone simply dies of a broken heart – and we know that this can and does happen?

One of the most recent decisions to cite *Re SA* is [Hywel Dda University Health Board v P \[2024\] EWCOP 70 \(T3\)](#). In that case, Mrs Justice Morgan was faced with an application to remove P from her home in circumstances where P's mother was said to be preventing statutory services from assessing and treating P. Having found that there was insufficient evidence of P's incapacity to make orders for P's removal under the Mental Capacity Act 2005, Mrs Justice Morgan made facilitative orders under the inherent jurisdiction so that P could remain living with her mother whilst assessments were conducted.

By grappling with the third strand of the inherent jurisdiction, Sir James Munby has created a space to protect the decision-making of those adults who are denied the ability to make autonomous choices by the actions of others. An irony, demonstrated by the Hywel Dda case, is that the inherent jurisdiction is now often used to secure access to vulnerable adults so that their mental capacity can be properly assessed. The inherent jurisdiction in respect of vulnerable adults does not only supplement the statutory regime as is explored in DL but it also supports it. Whilst Sir James will be rightly memorialised for his work in respect of children, financial remedies and incapacitated adults, so too should he be remembered for

his work recognising and providing protection for those in our society who cannot make decisions for themselves due to the actions of others.

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References

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Mostyn, N. (2026), "Sir James Munby: an obituary", available at: <https://financialremediesjournal.com/sir-james-munby-obituary/>

Further reading

Munby, J. (2020), "Whither the inherent jurisdiction? How did we get here? Where are we now? Where are we going? ", available at: www.cpba.org.uk/wp-content/uploads/2020/12/2020COPBA.pdf

Cases

DL v A Local Authority & Ors (2012), *EWCA Civ 253*.

Hywel Dda University Health Board v P (2024), *EW COP 70 (T3)*.

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