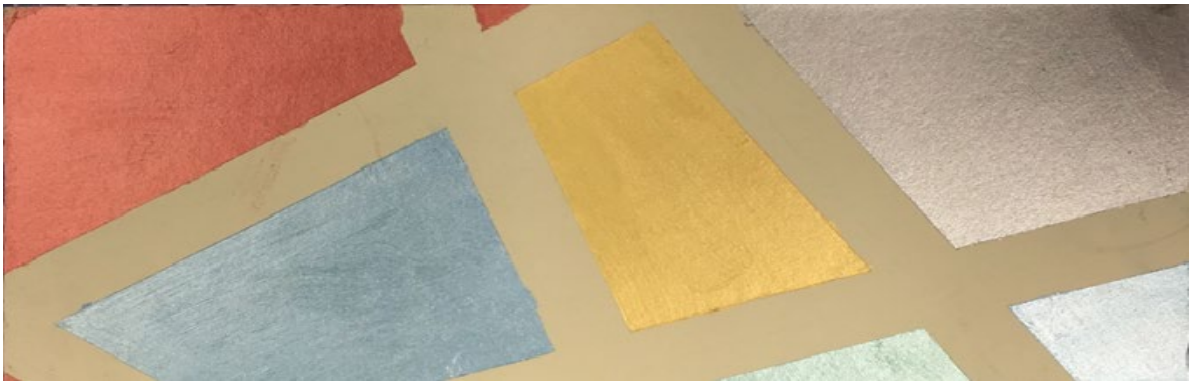


Welcome to the March 2025 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: insight into the proper place of insight, best interests decision-making and good clinical governance, and anorexia and the changing calculus of decision-making;

(2) In the Property and Affairs Report: the Court of Protection's (international) jurisdiction over children;

(3) In the Practice and Procedure Report: fees changes relating to the Court of Protection and the OPG guidance on disclosing visitors' reports;

(4) In the Mental Health Matters Report: the Mental Health Bill progresses and the independent investigation into the care and treatment of Valdo Calocane;

(5) In the Children's Capacity Report: why the report is named as it is, the Court of Appeal confirms that local authorities cannot consent to the confinement of children in care, and guidance for judges writing to children;

(6) In the Wider Context Report: the updated Code of Practice on diagnosing death and restraint in Northern Ireland.

(7) In the Scotland Report: no hard news, but the way ahead for AWI reform becomes clearer, and unhelpful uncertainty about powers of attorney.

The progress of the Terminally Ill Adults (End of Life) Bill can be followed on Alex's resources page here.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

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What's in a name?

The surgeon Robert Wheeler emailed upon receipt of our first Children's Capacity report in February to question its title, to query whether it should be called the Children's Capability Report:

> *since for the under 16s clinicians rely on the child's presumption of incompetence being rebutted if they have sufficient maturity and intelligence whilst adhering to the presumption of capacity (unless demonstrably absent) thereafter.*

We are always very grateful for feedback, and Robert's point is entirely correct – but one reason for calling it the Children's Capacity Report is to remind readers that children, ultimately, do not enjoy **legal** capacity on the same basis as adults, by virtue of the fact that they remain children.

Re J – appeal allowed

The Court of Appeal, comprising Sir Andrew McFarlane, Lady Justice King and Lord Justice Singh, confirmed at the hearing of the appeal on 5 February 2025 that Lieven J was wrong in *Re J: Local Authority consent to Deprivation of Liberty* [2024] EWHC 1690 (Fam) to conclude that a local authority could provide the required consent in the exercise of its corporate parental responsibility.

Although the court's reasoning is to follow, this is an important clarification, taking immediate effect, that the direction taken by Lieven J was wrong and must not be followed.

President of the Family Division publishes guidance on writing to children

Sir Andrew McFarlane has published guidance, developed with the Family Justice Young People's Board, for judges writing to children to explain their judgments. As he notes in his foreword:

> *The publication of this toolkit for judges writing to children is a most welcome event. The benefit of judges communicating with the child at the centre of proceedings has long been recognised, yet few of us have ever written to a child to explain our decision in their case. There is an understandable judicial reluctance in this regard, partly because of the realisation that the letter will be important and there is a fear of saying the 'wrong thing'. In addition, judges may be worried that it will take a good deal of time to get the letter 'right', coupled with the well-known inertia that comes from staring at a blank page, without a template or previous experience to guide the writer.*
>
> *As is made plain throughout by direct quotation from children, a child is entitled to be given an accurate and informative account of what was decided, and why, from the judge who made the decision. This will be important for the young person in understanding that their wishes and*

> *feelings have been taken into account by the court, and in supporting them to accept or make sense of the decision as they move forward with their life thereafter.*
>
> *This very readable 'toolkit' does a great deal to break down the factors that may have inhibited judges in the past. To get past 'blank page' inertia, the content of a typical letter is built up, sentence by sentence, with suggestions, explanations and examples, and the whole is rounded off with worked up examples.*
>
> *I am very grateful to all who have been involved in developing this most valuable resource, but I would particularly like to thank the young people who have contributed. Their endorsement of what is said here should give judges solid confidence that, if they follow these guidelines, they are likely to produce a message that will be of real and lasting value to the young person who has been the centre of their concern.*
>
> *My hope is that, like many things, once judges have used this toolkit and have written to children in a few cases, doing so will rapidly become the norm and no longer a task to be avoided. I would urge all judges to read this guide and to use it from now on in their cases. The publication of the toolkit has the potential to change the culture and to make the sending of a short letter from the judge the norm in all substantive cases; I earnestly hope that it does indeed do so.*

Whilst we would never fall into the trap of suggesting that those before the Court of Protection are to be equated with children, we would urge judges involved in Court of Protection cases to consider writing more often to P to explain what they have done,[1] and why – and to draw upon this toolkit where appropriate.

Deprivation of liberty, children, care orders, and overlooked caselaw: a tangle for the Court of Appeal

West Sussex County Council v AB & Anor [2025] EWCA Civ 132 (Court of Appeal (Sir Andrew McFarlane, King and Zacaroli LJJ))

Article 5 – deprivation of liberty – children and young persons

Summary

This case concerned a 17 year old woman with complex needs. As Sir Andrew McFarlane, giving the judgment of the Court of Appeal identified:

> *1.*[…] *Despite the impressive care and commitment of her mother ['AB'], it is accepted that she is, and has been for some time, beyond parental control. Since July 2023, the local authority has had authority under a series of deprivation of liberty orders ['DOLs orders'] to protect her and others from harm by restricting CD's liberty. In November 2023, the local authority applied for a care order under Children Act 1989, s 31 ['CA 1989'] and, from that time, CD was the subject of an interim care order.*
>
> *2. An unusual feature of the case is that, despite the substantial challenges presented to those seeking to care for and support CD, and partly because no alternative placement could be found, she has been accommodated in her*

[1] See, for an example of good judicial practice here, *Re RK (Capacity; Contact; Inherent Jurisdiction*) [2023] EWCOP 37.

> *mother's home for the past 11 months. AB works full time and, in any event, additional carers are required for CD. As a result care is provided in AB's home by a rota of professional carers, with at least two carers being on duty at any one time 24 hours per day.*

In June 2024, a deputy High Court judge placed CD in the care of the local authority under a final care order. The local authority and AB appealed:

> *3.* […] *The appellants assert that, in circumstances where CD's entire care package is authorised and regulated within the DOLs order, and where the authority and other agencies have statutory duties to provide the care that CD needs, a care order was neither necessary nor proportionate.*

The children's guardian opposed the appeal.

Sir Andrew McFarlane was at pains to make clear that:

> *4.* […] *the appeal is mounted solely on grounds of proportionality, based on the specific facts of this unusual case and the approach of the judge in his judgment. No discrete matter of law arises for determination. It is not unusual for a DOLs order to be combined with a care order, and there is no legal impediment to doing so. I would also stress that, whilst CD is accommodated at home, the circumstances of this case are separate and distinct from those that are normally encountered when a child is placed at home under a care order and which were the subject of this court's decision in Re JW (Child at home under Care Order) [2023] EWCA Civ 944. In the Re JW cohort of cases, a child in care is placed at home often with minimal monitoring or interaction with the social services. The contrast with the present case, where at least two carers are permanently present in the family home, is stark. Nothing that is said with respect to the approach to the specific circumstances of the present case can have any direct relevance to the more ordinary 'care order at home' cases being considered in Re JW.*

Sir Andrew McFarlane was transparent about the change of mind that he had undergone:

> *29. Prior to the commencement of the appeal hearing, I was of the view that the order of this most experienced Family judge, whose profound concern for the future well-being of a most vulnerable young person was fully justified, and should be upheld. In the event, I was persuaded that the appeal should be allowed for the following reasons*
>
> *30. Firstly, as is accepted by all parties to the appeal, the judge was in error as a matter of law in justifying the imposition of a care order as a means of obliging or galvanizing the local authority into delivering the agreed care plan. As paragraph 37 of Re JW repeats, it has long been held that a care order should not be used solely to encourage a local authority to do that which it is already statutorily obliged to do.*
>
> *31. The judge was obviously justified in seeking to maximise the prospects for the multi-faceted and multi-agency care plan to be delivered in full to meet the needs of this most vulnerable young person in the coming year. But, as a matter of law, where the authority has, and accepts that it has, a statutory duty to deliver the care plan, the making of a care order does not impose any additional requirement upon it. It is a fundamental principle that, once a full care order is made, the court does not have jurisdiction to review the operation of a care plan (A v Liverpool City Council [House of Lords] [1982] AC 363)*

or require a local authority to adhere to key elements in any care plan (Re S and Re W (Care Order: Implementation of Care Plan) [2002] UKHL 10 – the 'starred care plan' case). Thus, should it wish to, a local authority may, on the day following the making of a care order, amend or fundamentally alter the care plan that has been approved by the court, subject only to the risk of an application to discharge the care order or judicial review proceedings.

32. Additionally, as Hale J (as she then was) held in Oxfordshire County Council v L [1998] 1 FLR 70, whilst it was open to a court to make an order other than that for which a local authority has applied, there must be 'cogent and strong reasons' for doing so. In the present case the reasons given for justifying the making of a care order, against the wishes of the local authority, cannot be couched in such terms.

33. Finally, on this point, and in contrast to most care cases, the court does have a continuing role in monitoring the delivery of the care plan for CD through the ongoing DOLs process. This was an important element in the balance to be struck on the issue of whether or not to make a care order, yet it was not referred to in the judgment.

34. In relation to the second area of the case identified by the judge as supporting the making of a care order, namely the potential for AB to change her position and move away from cooperating fully with the care plan, there was some evidence justifying the judge's concern. But, as the evidence underlying the submissions made to this court on behalf of the local authority demonstrates, such falling off as there had been in the past was comparatively minor and, in any event, had to be set against the very substantial body of evidence of established and sustained support from AB over a significant period. Although there must always be a risk of AB, or any parent, withdrawing cooperation, when set against the evidence as a whole, this was not a likely outcome and not one which, on its own, justified the imposition of a care order.

35. The judge rightly pointed to CD's imminent 17th birthday, with the consequence that, if there were no continuing care order in place, no care order may thereafter be made with respect to her [CA 1989, s 31(3)]. The judge had 'significant concern' that the local authority would, in the event of AB withdrawing from cooperation with the care plan, look to protect CD by issuing fresh care proceedings yet be unable to do so post-17. That level of concern did not, however, justify the making of a care order in case there should be a falling away in AB's support. Firstly, because, as I have already held, this was not a likely eventuality. Secondly, the local authority's proposal to issue fresh care proceedings was, with respect, misplaced. It would not be necessary to apply for a fresh care order where, as here, there were ongoing High Court proceedings supporting the DOLs order. In the event of a change in AB's support, any dispute, or variation of the care plan, could and should be dealt with within the DOLs process or any subsequent Court of Protection proceedings. Where a local authority is authorised by the High Court under a DOLs order to deliver care to a young person in a particular manner, there will be few circumstances where their position would be enhanced by any additional power that would come from having parental responsibility and the ability to control AB's exercise of parental responsibility under a care order.

36. A further factor bearing on the choice between making a care order or not arises from the concern that both AB

> *and the professionals had as to the impact on CD's behaviour were she to discover, or be told, that she was, once again, a child in care. This was not an insignificant factor in the welfare balance, given CD's vulnerability and the very volatile nature of her behaviour. It was, to my eyes, striking that for some 8 months during which CD had been the subject of an interim care order, the professionals and her mother had agreed that she should not be told that that was the case. It is no small thing for a 16 year old not to be told information of that nature, and the degree of professional and maternal concern about CD's likely reaction can be gauged from their decision not to do so. Against that background, it is hard to understand the judge's characterisation of that degree of professional concern as 'conjecture'. This was a factor which, as Ms Hancock submitted, was of significance and to which insufficient consideration was given.*
>
> *37. Drawing matters together, and whilst fully understanding the judge's focus on doing all that he could to ensure the delivery of all aspects of this complex care package to support CD, I have concluded that the making of a care order was not justified. If My Lady and My Lord agree, the consequence is that the appeal must be allowed and the care order set aside.* (emphasis added)

In a postscript to the judgment, Sir Andrew McFarlane noted that:

> *38. At a stage when our draft judgments were shortly to be circulated to counsel, the court became aware for the first time of a relevant decision by Lieven J: Re JR (Deprivation of Liberty: Care Order: Principles of Care) [2024] EWHC 564 (Fam); [2024] 2 FLR 856.*

In that case, Lieven J had been invited to continue a longstanding DoL authorisation with respect to a 16 year old boy who was placed in a therapeutic placement. For the previous 3 years, JR had been accommodated by the local authority with the agreement of his adopted parents under s.20 CA 1989, s 20. Whilst the local authority had issued an application for a care order in October 2023, no interim care order had been made. By the time of the final hearing before Lieven J, the local authority (with the support of JR's parents) sought leave to withdraw the care order application. Having heard full argument, Lieven J refused the application to withdraw and made a final care order on the basis that it was necessary and proportionate to do so.

Sir Andrew McFarlane was concerned that Counsel had been unaware of the decision at any point, either at first instance, or before the Court of Appeal, and noted at paragraph 42:

> *In all cases, but particularly in a case such as this where detailed submissions of law are to be made, it is the responsibility of specialist counsel to use due diligence in their research for any relevant decisions. Courts are entitled to rely upon counsel in this regard, and it is disappointing that in the present case there seems to have been failure across the board to notice the Re JR decision.*

Luckily, perhaps:

> *43.* […] *Having now considered the position, my view is that the analysis that I have undertaken in this judgment remains the appropriate one on the facts of this case. I also consider that Lieven J's analysis and decision in Re JR were justified and correct on the facts of that case. The level of parental divergence, from time to time, from the local authority's plans in Re JR was of a*

> *wholly different order to the altogether more modest disagreement in the present case. In addition, as Lieven J's judgment makes plain, the degree to which the local authority could be relied upon to afford priority to implementing the care plan was questionable, whereas in the present case that was not a significant issue. Re JR is an example of a case where a care order was justified alongside a DOLs authorisation, whereas, for the reasons that I have given, it was not justified in the case of CD.*

Comment

This case is an important reminder that it is entirely possible for a child to be deprived of liberty in their own home. It is also perhaps not surprising that Sir Andrew McFarlane made a point of identifying that an order made under the inherent jurisdiction authorising deprivation of liberty means that the court "*has a continuing role in monitoring the delivery of* [a] *care plan*." The week prior, he had sat on the Court of Appeal allowing the appeal against the decision of Lieven J in *Re J: Local Authority consent to Deprivation of Liberty* [2024] EWHC 1690 (Fam), a notable feature of the hearing being the concern of all three members of the court at the implications of confinements being 'carved out' of Article 5 and the ongoing checks and balances it requires.

The point about the lack of knowledge of relevant cases is one that repeatedly occurs in the area of deprivation of liberty, and we do regularly come back to the trenchant (extra-judicial) observations of Sir James Munby in 2018:

> *that these cases lie at the intersection of three different bodies of domestic law – mental health law, mental capacity law and family law – where judicial decision-making is spread over a variety of courts and tribunals which, by and large, are served by different sections of the legal professions too few of whom are familiar with all three bodies of law. The existence of these institutional and professional silos has bedevilled this area of the law at least since the earliest days of the Bournewood litigation. One day, someone will write a critical, analytical history of all this – and it will not, I fear, present an altogether reassuring picture.*

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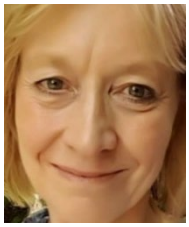
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Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Alex also does a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in April. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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