



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

- (1) In the Health, Welfare and Deprivation of Liberty Report: the court is not a rubber stamp for clinicians and what does it mean to represent P's interests;
- (2) In the Property and Affairs Report: Professional Deputy Costs, and paying drug debts for P;
- (3) In the Practice and Procedure Report: capacity to conduct proceedings and the costs of inadequate disclosure;
- (4) In the Mental Health Matters Report: capacity to conduct Tribunal proceeding, and the independent investigation into the care and treatment of Valdo Calocane;
- (5) In the Children's Capacity Report: looking at other options before using the inherent jurisdiction to authorize a deprivation of liberty;
- (6) In the Wider Context Report: what happens if you never had litigation capacity and new books;
- (7) In the Scotland Report: AWI reform and the UK Protocol on Judicial Cooperation.

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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### Deprivation of liberty and children: considering all of the options before invoking the inherent jurisdiction

*A Local Authority v LB & Ors* [2025] EWHC 1264 (Fam) (David Lock KC, sitting as a DHCJ)

Article 5 ECHR – Children and young persons

#### Summary

The local authority sought continuation of an order to authorise the deprivation of liberty of a 15 year old under a care order in a placement. She wanted to return to live with her mother.

#### (i) Exploring s.25 accommodation

Rather than considering whether LB met the criteria for a secure accommodation order under s.25 Children Act 1989, and if so whether such accommodation was available, the local authority applied under the inherent jurisdiction. DHCJ Lock held:

*12. I consider that, consistent with the approach taken by the Supreme Court in Re T, s25 accommodation and DOLS orders should not be seen as alternatives to be used by local authorities at their option. Where a child could be accommodated in secure accommodation under the s25 route, that option should be used where available. Use of the inherent jurisdiction should thus be limited to cases where a local authority provides clear evidence to explain why the s25 statutory framework, with its protections for the child, has not been used.*

#### (ii) Permission for inherent jurisdiction

Permission to invoke the inherent jurisdiction requires, inter alia, “reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm”: s100(4) Children Act 1989. In this case there was no evidence of any such harm when she previously went back to live with her mother:

*16 ... I consider that evidence has to be provided which allows the court to confidently conclude that the child is "likely to suffer significant harm" on the facts of a case. It is not sufficient for the court to be provided with general concerns about the parents or even the risks to which the child would be exposed if she were to return home because the court needs to be satisfied, bearing in mind the test in s31(10) of the Children Act 1989, if any harm is likely to be significant.*

The court adjourned the application for the social workers to provide further evidence on the statutory test.

#### (iii) Grounds for detention

Article 5(1)(d) ECHR permits “the detention of a minor by lawful order for the purpose of educational supervision”. On the other hand, the local authority accepted that, at least to date, the basis relied upon was a welfare reason and, as the court decided, “depriving a child of their liberty for pure welfare reasons or to prevent a child absconding could not come within article 5(1)” (para 20). After discussing the relevant ECtHR and domestic case law on educational supervision, DHCJ Lock held:

*25. I fully accept that the term "educational supervision" in article 5(1) has to be widely interpreted and is far wider than formal*

*classroom based education. However, whilst educational supervision encompasses a wide concept, in my judgment it cannot be wholly equated with a child's welfare and restrictions and a deprivation of liberty cannot be justified under this part of the convention primarily to prevent a child absconding. A Local Authority is fully entitled to advance a case to say that a child has been accommodated in a specific placement where the purpose of the placement is to provide educational support to the child across a wide range of life skills and to show that sufficient resources have been allocated to the placement so as to ensure that the education is a central focus of the placement. As part of that case, it could show that appropriate trained staff have been allocated so as to ensure that this educational provision is delivered. It is also open to a Local Authority to provide evidence to show that (a) in the particular circumstances of the case, this educational support can only be delivered to the child if the child is subject to restrictions on his or her liberty, (b) that those restrictions amount to a deprivation of the child's liberty and (c) that this is both necessary and proportionate. However, absent such evidence, I do not see how a court could properly conclude in a case like the present that the matter comes within article 5(1)(d) as interpreted by the ECtHR in the various cases set out above.*

first, before contemplating recourse to the inherent jurisdiction. And, if permission is granted, it helpfully sets out the educational evidence required if detention on the grounds of educational supervision is to be made out.

Given the lack of evidence justifying it, there could be no authorisation to deprive liberty on this ground, and the case was adjourned for two weeks for further evidence.

### Comment

This case makes clear that "best interests" or "welfare reasons" cannot justify a child's deprivation of liberty under Article 5(1). It emphasises the importance of applying one's social work mind to the statutory scheme in s.25

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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.

Neil is running the following courses, with tickets available [here](#):

- BIA/DoLS refresher training: 26 June 2025, 16 July 2025.
- DoLS Authoriser Training: 4 July 2025
- AMHP/MHA 1983 Legal Update: 10 July 2025

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.

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Our next edition will be out in July. 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](mailto:marketing@39essex.com).

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