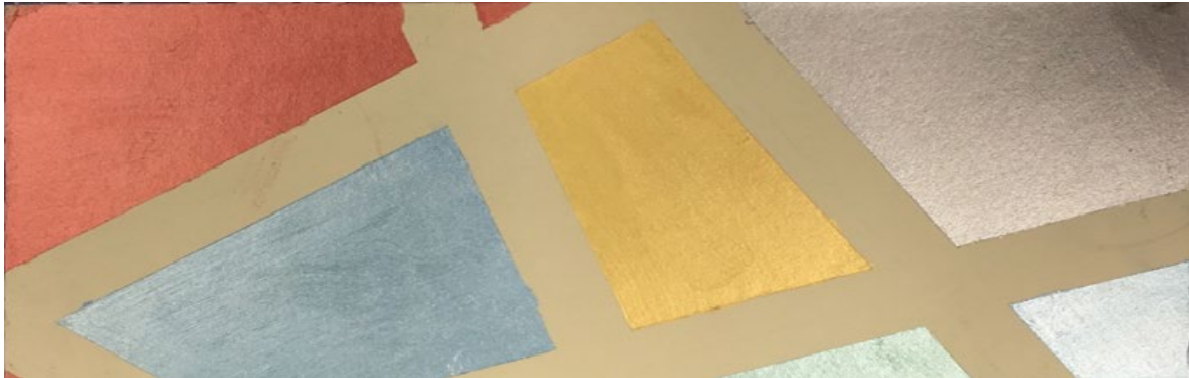




Welcome to the September 2026 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: an update on post-AGNI developments, two capacity conundrums in one case and 'over-litigation' in a PDOC case;
- (2) In the Property and Affairs Report: an update from the Property and Affairs Court User Group meeting and the OPG is recruiting lawyers;
- (3) In the Practice and Procedure Report: the Court of Appeal resets the approach to personal welfare deputies, and cross-border cases involving Scotland;
- (4) In the Mental Health Matters Report: recent cases concerning the relationship between the MHA and the MCA and an excoriating judgment on "detainability;"
- (5) In the Children's Capacity Report: AGNI and children and the Joint Committee on Human Rights reports on the human rights of children in care;
- (6) In the Wider Context Report: litigation capacity complexities, and recent medical guidance documents concerning consent, voluntarily stopping eating and drinking, and eating disorders and critical care.
- (7) In the Scotland Report: a Practice Note that has caused some consternation.

A reminder that that whilst Chambers have launched a new and zippy version of our [website](#) which may look unfamiliar, all the content that you might need – our Reports, our case-law summaries, and our guidance notes – can still be found via [here](#).

Editors

Alex Ruck Keene KC (Hon)
Victoria Butler-Cole KC
Neil Allen
Nicola Kohn
Katie Scott
Arianna Kelly
Annabel Lee
Alex Cisneros

Scottish Contributors

Adrian Ward
Jill Stavert

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.

Contents

AGNI and children.....	2
The Joint Committee on Human Rights and children in care	3

AGNI and children

The decision in *Re Mustafa (A Child)* [2026] 2159 (Fam) represents the first reported consideration of AGNI in relation to children. The child in question was 15 and subject (at that point) to an order authorising deprivation of liberty. The local authority sought to withdraw an application for an extension of the order; an application opposed by the Guardian on the basis that he should still be seen to be deprived of his liberty even after AGNI.

Mr Recorder Adrian Jack (sitting as a High Court Judge) considered that it was possible for consent can only be given by a Gillick competent child: "[a] child who is not Gillick competent may nonetheless have sufficient understanding for their views to be relevant as to whether they consent to aspects of deprivation of their liberty" (paragraph 39). However,

40. This, however, still leaves the issue as to whether Mustafa's apparent consent is, as the Guardian submits, "compliance by Mustafa rather than valid consent" and whether his apparent consent "is likely to be insecure, not of an enduring nature and likely to be revised and retracted." The Guardian is in my judgment right to point out that Mustafa may seek to withdraw any consent he has given, if he does not like particular restraints placed on him. Moreover in principle he can do this at

any time, even (or indeed especially) whilst physical restraint is being used on him. This observation, however, overlooks the fact that in some cases schools are entitled to use physical restraint on children regardless of the child's wishes.

Directing himself by reference to the analysis of the powers of schools to restrain children (both at common law and in statute) analysed in *Re FXS v Mulberry Bush Organisation Ltd* [2026] EWCA Civ 415, Mr Recorder Adrian Jack considered that:

14.¹ When I stand back at look at all the factors relevant to the assessment as to whether there is a deprivation of liberty, in my judgment there is no deprivation of liberty. Mustafa is, as the Guardian sets out at length, generally happy in his placement. Where the school uses physical restraint, it either has Mustafa's consent or it is entitled to use restraint under its common law powers. Either way, there is no deprivation of liberty such as to give rise to a violation of Article 5(1). An extension of the DOLs order is therefore neither necessary nor proportionate and I refuse to grant one.

The judgment indicates that the Guardian was contemplating an appeal. If no appeal is forthcoming, we lay down a marker that we consider that it is likely that both of the core

¹ Note, the paragraph numbering in the judgment has gone somewhat awry; this

paragraph comes later than those set out above.

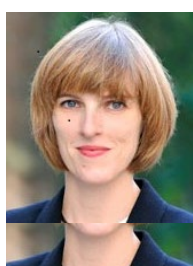
points set out above will be examined further in due course. There remains (to use a technical term) significant amount of 'fuzz' around whether *Gillick* has now in some way mutated to be the functional aspect of the MCA test. If it has, then the approach taken by the court in this case would appear to track the logic of *AGNI* impeccably. If it has not, but represents some rather more nebulous conception of the child's developmental abilities, it is perhaps not so obvious that the logic applies.

Whilst it is undoubtedly relevant that there are powers to restrain children at school that do not exist in relation to either those in other situations or to adults, it is perhaps not entirely obvious that the existence of a power to restrain gives the answer to the question before the court, which is whether the child is in a situation where (in legal terms) a power is required to serve as a defence to unlawfulness.

Shortly before the decision was handed down, the Nuffield Family Justice Observatory published a helpful blog by Camilla Parker KC (Hon) and Emma Smale on *Deprivation of Liberty and Children after AGNI*, available [here](#).

The Joint Committee on Human Rights and children in care

The JCHR has published a detailed and wide-ranging [report](#) on the human rights of children in care (which includes mention of *AGNI*). It includes detailed examination of and endorsement of the Law Commission's proposals for reform of disabled children's social care, to which we still await the Government's final response.



Editors and Contributors



Alex Ruck Keene KC (Hon): alex.ruckkeene@39essex.com

Alex has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court and European Court of Human Rights. He also writes extensively, has numerous academic affiliations, including as Professor of Practice at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click [here](#).



Victoria Butler-Cole KC: vb@39essex.com

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She is a former Chair of the Court of Protection Bar Association and a member of the Nuffield Council on Bioethics. To view full CV click [here](#).

Neil Allen: neil.allen@39essex.com

Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. He trains health, social care and legal professionals through his training company, LPS Law Ltd. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click [here](#).

Arianna Kelly: Arianna.kelly@39essex.com

Arianna practices in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in inherent jurisdiction matters. Arianna works extensively in the field of community care. She is a contributor to the Court of Protection Practice (LexisNexis). To view full CV, click [here](#).

Nicola Kohn: nicola.kohn@39essex.com

Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, ICBs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2022). To view full CV click [here](#).

Katie Scott: katie.scott@39essex.com

Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click [here](#).



Annabel Lee: annabel.lee@39essex.com

Annabel has a well-established practice in the Court of Protection covering all areas of health and welfare, property and affairs and cross-border matters. She is ranked as a leading junior for Court of Protection work in the main legal directories, and was shortlisted for Court of Protection and Community Care Junior of the Year in 2023. She is a contributor to the leading practitioners' text, the Court of Protection Practice (LexisNexis). To view full CV click [here](#).



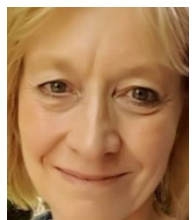
Alex Cisneros: alex.cisneros@39essex.com

Alex regularly appears in health and welfare and property and affairs cases in the Court of Protection. He has appeared in leading cases to do with deputyship and published a textbook about LPAs. His recent doctoral thesis explores the impact of changes to mental capacity law in England and Wales. To view a full CV, click [here](#).



Adrian Ward: adrian@adward.co.uk

Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.



Jill Stavert: j.stavert@napier.ac.uk

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click [here](#).

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 October. 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.

Sheraton Doyle
Director of Clerking
sheraton.doyle@39essex.com

Peter Campbell
Director of Clerking
peter.campbell@39essex.com

Chambers UK Bar
Court of Protection:
Health & Welfare
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Court of Protection and
Community Care
Top Tier Set

clerks@39essex.com • [DX: London/Chancery Lane 298](#) • 39essex.com

LONDON

81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER

82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE

Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR

#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085

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