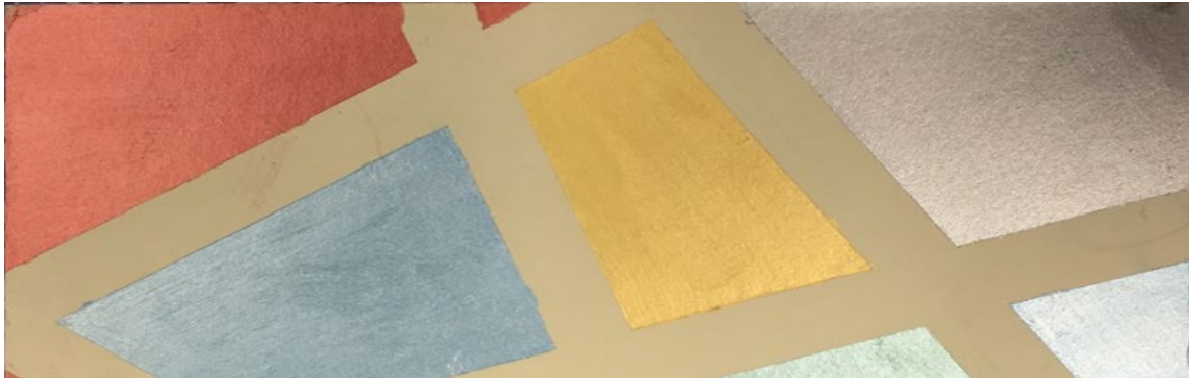




Welcome to the October 2026 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: capacity, presumptions and the Care Act 2014; and the most comprehensive first instance 'run' at AGNI so far;
- (2) In the Property and Affairs Report: deputies and direct payments, and the Court of Protection and the validity of wills;
- (3) In the Practice and Procedure Report: the AGNI effect starts to show in the statistics;
- (4) In the Mental Health Matters Report: HSSIB's investigation into mental health care in the emergency department;
- (5) In the Children's Capacity Report: desperate deprivation of liberty and consenting to confinement;
- (6) In the Wider Context Report: Anglo-Welsh legal differences and asserting your own capacity;
- (7) In the Scotland Report: what listening to children tells us about listening to adults.

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](#).

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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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Short note: desperation and deprivation of liberty

Essex County Council v MH & Ors [2026] EWHC 2328 (Fam) was an application heard by Theis J about ST, who was 15 years old. She had been in the care of the local authority since she was approximately 6 or 7 years old, and had experienced 20 placement moves. The local authority made an application in December 2025 to authorise her deprivation of liberty in the community. Echoing the call of many Family Division judges before her, Theis J lamented the "scandalous lack of provision" for children with complex behavioural needs and "repeat[ed] the call made by *McFarlane P* that the lack of availability of suitable placements 'requires action by His Majesty's Government collectively to support local authorities to meet their statutory needs'" (paragraph 10). Theis J gave an overview of her findings thus

11. Whilst recognising the challenges ST's behaviour has presented in terms of her self-harming and repeated absconding, the bleak picture presented by the evidence in this case has, in my judgment, demonstrated that her most basic needs have simply not been met whilst she has been in the care of the local authority.

12. That conclusion is evidenced by:
I

) The high number of placement moves ST has had. Over 20 moves in 8 years.

ii) ST's most recent placement was rated as being 'Inadequate' by Ofsted. The court was not informed of this on 30 December 2025 when it was asked to authorise the move to this placement.

iii) There was no effective system in place in the local authority to assess whether that placement met ST's needs. ST had been there for 4 weeks before anyone from the local authority visited her, or the placement.

iv) The appalling lack of educational provision ST has had. She has lost (at least) two critical academic years. The system, such as it is, has continued to pay for online tuition which it transpired during these proceedings had only had a 7% take up. There had been no effective review of that by the Virtual School system, no active consideration of looking at other ways to engage ST in education with the Head of the Virtual School Service stating that he is limited on what he can offer.

v) As regards therapy ST has had none and remains in the catch 22 position of not being considered suitable for it whilst not in a stable placement and being placed in placements where no such provision or support is available. This application has required 8 court hearings with detailed directions having

to be made at 6 of them to get anything like a full picture of what is going on for ST.

Theis J also noted the 'critical role' of ST's guardian in considering her welfare, and considered it was not until these proceedings that there had been a joined-up approach among the professionals working with ST. Theis J gave some general guidance for applications of this nature:

17. Going forward any court dealing with these applications should actively consider the following matters:

i) Has the court been informed of the Ofsted rating of any placement and, if not, why not.

ii) Has the allocated social worker been and visited the young person. If so, when and, if not, why not and what are the plans to do so.

iii) What are the education arrangements for the young person. Are they working and if they are not, what is proposed going forward.

iv) What are the arrangements for any mental health support and/or therapy. Are they working? If not, what is being considered to manage that?

v) Are there regular meetings of all those involved in the young person's placement to ensure the arrangements are kept under active review. If not, why not?

The application for a deprivation of liberty to be authorised in the inherent jurisdiction related to a highly restrictive setting, where ST was cared for on a 3:1 basis with physical restraint authorised and ST having her access to anything she could use to harm herself very limited. Following repeated placement breakdowns, she was cared

for in a setting rated 'Inadequate' by Ofsted. Efforts to either address the problems at the placement proceeded slowly and following searches, the alternative options were extremely limited. ST had been out of formal education for years (also not having any provision through virtual schools until statements were directed regarding her education). The judgment gives a painstaking timeline of how problems were addressed, piece by piece, over more than 6 months of proceedings.

Save for ST, who instructed her own representatives, all parties agreed that ST's deprivation of liberty should be authorised (the fact of her being deprived of liberty was uncontroversial under the AGNI judgment where she remained on 3:1 care, and the use of physical restraint was authorised, as well as number other measures to contain her and prevent her from self-harming).

Theis J authorised the deprivation of liberty as being in ST's best interests, but noted that:

81 [...] Until very recently there had not been proper monitoring of ST's placement. It has taken these proceedings to prevent any drift, produce an action plan and an effective care plan. There is now a pathway that provides a step down structure so ST can, at last, see what is on the horizon for her. The court can only hope that going forward the progress made during these proceedings regarding management of ST's needs will be carried forward.

However, Theis J also noted a reasoned critique by ST's guardian, which still expressed grave concerns about whether her mental health and education needs were being met.

84 [...] ST remains caught in a hopeless catch 22 situation where the care plan

sets out that therapy will not be offered to ST until she begins to show behaviours absent the therapy that such therapy is designed to support, made worse as those responsible for her education indicate an assessment of therapeutic needs are necessary to formulate the right education provision for ST but the local authority have pressed on searching for school provision without a therapeutic assessment.

85. It is hoped going forward the local authority, which includes the education authority and the mental health services, will now properly manage and meet ST's particular needs, rather than those needs continuing to be lost to a fragmented silo way of working to the detriment of ST's most basic welfare needs.

Short note: parental consent to confinement

Leeds Teaching Hospitals NHS Trust v LH [2025] EWHC 3661 (Fam) was decided in August 2025, but for some reason only came onto Bailii very recently. It was a medical treatment case determined at great speed, the application being for a declaration that it is lawful and in the best interest of a 10 year old boy, LH, to be conveyed to Leeds General Infirmary to receive chemotherapy, and to remain in hospital for up to 22 weeks to complete the full course of treatment, and to authorise the deprivation of LH's liberty as a consequence of the conveyance plan and during his admission to hospital. LH had a diagnosis of autistic spectrum disorder. As McKendrick J put it (at paragraph 6) "[h]e irrationally considers that he no longer has cancer because he cannot feel the lump, and he feels that the treatment is killing him. He is very distrustful of the information that is given to him by professionals." LH had barricaded himself in his

room and thrown objects at ambulance staff when they had tried to take him to hospital.

As McKendrick J identified at paragraph 17:

The issue, however, which is one which I raised with Mr Hadden at the outset, is why it is necessary for a High Court judge to consent to the treatment under the court's inherent jurisdiction in circumstances where I am clearly told in the evidence LH's parents both consent and support in full the plan, the conveyance, the treatment, the chemotherapy and the deprivation of liberty, if that is what it is, in hospital. I adjourned the hearing for 30 minutes to allow Mr Hadden to double check, and I was told when I came back, as is set out on the C66 and as set out clearly in Mr Hadden's position statement, both parents consent and support the plan that I am being asked to authorise. That gives rise to whether the clinicians and the nurses and the broader team who will convey LH from home to hospital and treat him with chemotherapy and keep him in hospital and provide him with all ancillary care can lawfully do so on the basis of the consent of LH's parents operating within the zone of parental responsibility.

Albeit on the basis of limited consideration and without the benefit of detailed argument, McKendrick J reached the firm view that the proposed course of action within the zone of parental responsibility.

24. I am prepared to assume for the purposes of this application that LH does not wish to go to hospital. He is scared and upset, and that is made worse by his ADHD. I accept Velcro and mechanical restraints may well be necessary, and the number of adults may well be required to put him into an ambulance and bring him to hospital, and I am prepared to accept he may

have to remain in hospital for around five months. The lawful consent to anyone involved in that process, in my judgement, flows from the consent provided by his parents in the exercise of their parental responsibility following the advice of the clinicians. It would be, in my judgement, a significant interference with the long established common law view of the role of parental responsibility for this court to say that clinicians required to come to court when they were in agreement with the parents to authorise medical treatment which is life-sustaining and urgent, even if it involves some level of restraint. It would be very surprising if one were to take a slightly younger child, for example a five-year-old, who may have a tantrum. Would it also be the case that some form of order would be required?

25. It may often be the case that coercion, encouragement and ultimately some form of restraint may well be used to encourage young children to go to hospital and remain in hospital for painful, unpleasant, frightening or scary medical procedures. But one has to consider the overall effect, not just in respect of medical treatment but more widely parental responsibility and the responsibility that the common law in Parliament gives to parents is a cornerstone of parenting, and any undermining of that goes against both long-standing common law traditions but also would, it seems to me, undermine important article 8 ECHR right to respect for private and family life, which is prized.

26. But there are also practical issues as well. If it were the case that life-sustaining treatment for a 10 year old required High Court authorisation and approval, it would place huge burdens on Cafcass to go out, report, meet families and children and come back. It would place huge burdens on the High

Court and significantly increase the number of cases brought to this court. It would confuse doctors and make it more likely that life-sustaining and urgent treatments are delayed as clinicians consult lawyers and think about whether they should or should not come to court.

27. The law is clear that parental responsibility operates to provide doctors with the necessary consent. In my judgment, in the facts of this case, with life-sustaining necessary cancer treatment for a 10 year old, even if some form of restraint is used and some form of deprivation of liberty, if that is what it is, it is well within the zone of LH's parents to consent to that and all involved in the conveyance, the deprivation of liberty, if that is what it is, and the treatments are operating, as I understand it, lawfully within the consent provided by his parents. Therefore, it is not necessary for there to be a best interest declaration or order under the High Court's inherent jurisdiction in respect of conveyance, treatment or deprivation of liberty. The fact of the long admission to hospital does not change that.

McKendrick J therefore allowed the Trust to withdraw the application.

It is an interesting question as to whether McKendrick J was correct in his conclusion on the law as it stood in August 2025, no appellate level case having actually decided precisely what role parental consent could play in authorising confinement for those under 10. In light of AGNI, it may well be that LH's situation would not even be said to amount to a confinement to which any form of consent might be required.

Short note: listening to, but not being driven by, the child

In *DM: Petitioner* [2026] UKSC 32 (also discussed in the Scottish section of this Report), the Supreme Court had to consider what weight the child's voice should have in applications under the 1980 Hague Convention, covering international child abduction. Article 13(b) of the Convention provides that provides that "the judicial [...] authority of the requested State is not bound to order the return of the child if the person [...] which opposes its return establishes that— [...] (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

As Lord Stephens and Lord Snowden (giving the sole – joint – reasoned judgment) put it at paragraph 1:

The issue is whether the views of H, who is the person in relation to whom a return order is sought, can be taken into account in assessing whether there is a grave risk that his return would expose him to psychological harm or otherwise place him in an intolerable situation.

Taking the opportunity (as is often the case now) to comment on an earlier judgment by Lady Hale,¹ Lords Stephen and Snowden identified that

91. First, there is no obligation on the child to express his or her views. Rather, in effect there is a presumption that the child will be given an opportunity to be heard.

92. Secondly, there would be no point hearing from a child if the court were

then to hold as a matter of law (as the Inner House did) that the child's views should be left out of account.

93. Thirdly, and in a similar vein, giving a child an opportunity to be heard is not to be confused with giving effect to the child's views. Although the child's views ought to be taken into account by the court, it may determine that they are of limited relevance or should be accorded little or no weight. An illustration on this appeal is that if H had expressed the view that he was strong enough to tolerate "extreme psychological harm" if M committed suicide, then, whilst that view should be taken into account, it is highly likely that no weight would be attached to it regardless of his age or maturity.

94. Fourthly, there is an important qualification to the presumption that the child is given the opportunity to be heard in effect in every Hague Convention case. The child should not be given the opportunity if it is inappropriate to do so having regard to the child's age or degree of maturity. Thalia Kruger in "International Child Abduction - The Inadequacies of the Law" (2011) at page 37 states that hearing the child is a sensitive issue that must be approached with care by all involved and that it is important not to place a burden on a child in the eye of a heavy family storm. In our view it is inappropriate to hear from the child either generally or on a specific matter if doing so is not in the child's best interests. Whether it is appropriate or inappropriate for the child to express a view on an issue is a matter for the judge to decide: though we would suggest that latitude should be exercised in favour of hearing from the child. The voice of the child should not

¹ In this case *In re D (A Child) (Abduction: Rights of custody)* [2006] UKHL 51.

be stifled by an overly paternalistic approach. Generally, it is in a child's best interests to respect and promote their autonomy to the extent that the child's maturity dictates by allowing the child to express a view.

95. Fifthly, the opportunity for the child to express a view is not limited to any particular aspect of an article 13 defence or indeed to any particular aspect of an application for the child's return under article 12. We disagree with the Lord Ordinary when he stated that "a distinction may fall to be drawn between physical and psychological harm, on the one hand, and of placing the child in an intolerable situation on the other." In *In re D* no such distinction was drawn. No such distinction is drawn in article 11(2) of Brussels II Revised Regulation (EC) No 2201/2003 or in articles 21 and 26 of Regulation (EU) No 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (OJ 2019 L178, p 1).

96. Furthermore, the Hague Conference on Private International Law (Conférence de La Haye de droit international privé) ("the HCCH") 1980 Child Abduction Convention, Guide to Good Practice Part VI Article 13(1)(b) ("the HCCH Guide") dated 2020, provides guidance to judges, central authorities, attorneys, and other practitioners working in the field of international family law and who are faced with the application of Article 13(1)(b) of the Hague Convention. As recorded by Christophe Bernasconi, the Secretary General, in the introduction to the HCCH Guide, it was approved by all the (then) 83 Members of the HCCH. The HCCH Guide at paras 6, 86, and 87 draws no distinction between physical and psychological harm, on the one hand,

and of placing the child in an intolerable situation on the other. It is not inconsistent with the HCCH Guide for a child to express views in relation to article 13(b) which could include views as to physical or psychological harm and what the child is prepared to tolerate.

97. Sixthly, in practice asking, in age-appropriate terms, a child about their views as to return will elicit information in relation to the taking parent's article 13(b) defence. If a child does not wish to return, the child may, for instance, give as the reason that one or other of the parents is physically violent or abusive. In practice it is artificial to draw a distinction between physical and psychological harm on the one hand and placing a child in an intolerable situation on the other.

Of wider relevance is the important distinction made at paragraph 93 between giving a child an opportunity to be heard and giving effect to the child's views. Albeit in a different context, this chimes with the very clear observations of Sir Andrew MacFarlane, the former President of the Family Court in *Re S (Wardship: Removal to Ghana)* [2025] EWCA Civ 1011 about the need equally to be clear about whether what is being sought from a child in any given situation is a decision (which, barring other factors, will be determinative), or an expression of their views to factor into a decision which would never be theirs to take.

Disabled Children's Social Care

In a [letter](#) sent on 3 September 2026, the Minister for Children and Families confirmed that there will be a delay in the formal response by the Government to the Law Commission's recommendations in relation to the reform of the law relating to disabled children's social care. He identified that:

Government has, and continues to, carefully review the responses to the Special Educational Needs and Disabilities (SEND) Reform: Putting Children and Young People First consultation, ahead of tabling legislation on this issue. Given the significant links between the Law Commission's recommendations in this area and the issues being considered through the recent SEND reform consultation and wider reform programme, aligning our response with this work will enable us to explain more clearly how the government's broader reforms address those recommendations.

I have therefore concluded that it would be preferable to delay, for a short period, the government's response to the Law Commission's report to provide us with the best opportunity to align with our response to the SEND Reform consultation and provide clarity on the way forward for children and families. This will support a more coherent and joined-up approach, allowing the government to provide a fuller response to the recommendations.

I recognise that this means we will not meet the response date set out in protocol. However, I believe this approach will provide greater clarity and consistency by allowing Government to consider related impacts on the SEND and Children's Social Care systems as a whole before responding.

I am nonetheless committed to publishing the government's response to the law commission within this calendar year.

As set out in the interim response, government remains committed to creating a simpler, more consistent and effective framework for disabled children's social care and will set out its

response once consideration of the related reforms has concluded.

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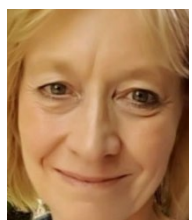
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Conferences

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 November. 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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