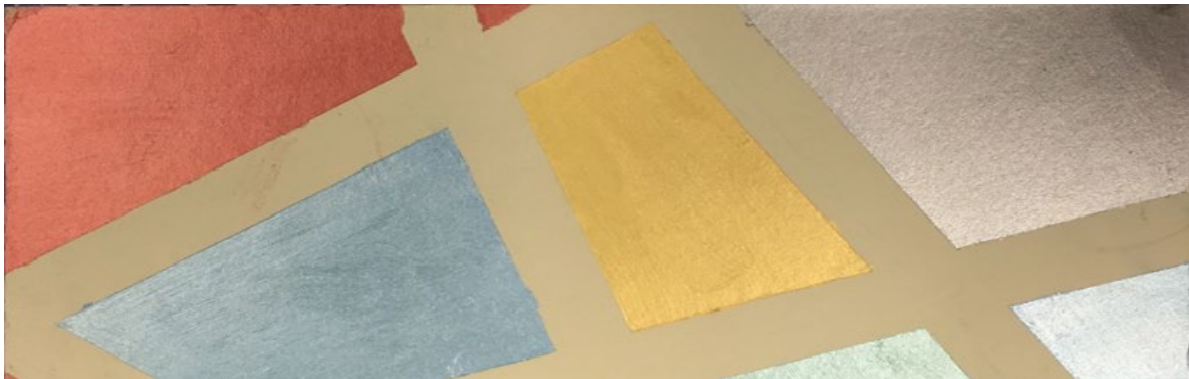




Welcome to the October 2026 Mental Capacity Report. Highlights this month include:

- (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.

Contents

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY	2
Capacity, presumptions and the Care Act 2014	2
AGNI – the most comprehensive first instance 'run' at it so far	5
Short note: can (lack of) valid consent create a confinement?	12
AGNI wider developments	13
Short note: best interests determination without reliable wishes and feelings	13
PROPERTY AND AFFAIRS	15
Direct payments and deputies	15
Short note: certification incompetency	20
The Court of Protection and the validity of wills	22
PRACTICE AND PROCEDURE	27
Court of Protection statistics	27
MENTAL HEALTH MATTERS	28
Mental health crisis care: care of patients in emergency departments	28
CHILDREN'S CAPACITY	30
Short note: desperation and deprivation of liberty	30
Short note: parental consent to confinement ..	32
Short note: listening to, but not being driven by, the child	33
Disabled Children's Social Care	35
THE WIDER CONTEXT	37
Assisted dying	37
Differences between English and Welsh law ...	37

Standard of proof for the short-form inquest conclusion of unlawful killing	37
Short note: asserting your own capacity	37
SCOTLAND	39

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

Capacity, presumptions and the Care Act 2014

R (TDB) v London Borough of Haringey (Mind intervening) [2026] EWCA Civ 1184 (Court of Appeal (Bean, Baker and May LJ))

Other proceedings – judicial review

Summary¹

T was 25 with diagnoses of autism, ADHD, a speech and language disorder and personality disorder. In October 2024 his solicitor wrote to the local authority about his long-standing difficulties with relationships and sexual boundaries, and asked for input from a psychologist and from learning disability and autism specialists. The Care Act needs assessment completed on 13 December 2024 recorded that "*T lacks capacity in understanding relationships/sexual relationships and boundaries of relationships,*" although this information came from the placement provider; the assessor had not assessed capacity herself (paragraph 19).

The legality of the Care Act assessment was challenged principally because no capacity assessment had been undertaken before his needs assessment was completed. This was

¹ Tor, Alex and Annabel having been in this case, they have not contributed to this note.

originally dismissed ([2025] EWHC 2014 (Admin)) because the assessors had proceeded on the basis that T lacked capacity about healthy sexual relationships, T was *"entitled to the important presumption of capacity,"* and nothing suggested cause for concern about his capacity *"to make a specific decision after appropriate support has been offered."*

The Court of Appeal allowed the appeal. Baker LJ (with whom May LJ and Bean LJ agreed) held:

... whenever there is a reason to doubt the capacity of a person whose needs for care and support are being assessed under the Care Act, a capacity assessment under the MCA must be carried out by an appropriately qualified professional before the Care Act assessment of needs is completed.
(paragraph 91)

This was *"clear from the provisions of the Act itself as well as the guidance"* (paragraph 92). Well-being under s.1(2) (control over day-to-day life, participation, personal relationships) cannot be evaluated without considering capacity; the s.1(3) matters require *"a clear understanding of the individual's capacity to make decisions in the various domains in which his well-being is under consideration;"* ss.9(5)(c), 11 and 25(3) refer to capacity expressly; the regulation 3 duties in the Care and Support (Assessment) Regulations 2014 depend on it; and paragraphs 6.32 and 10.63 of the Statutory Guidance reinforce the point (paragraphs 93–97). The capacity assessment must comply with ss.1–3 MCA and with paragraphs 4.34, 4.35, 4.38 and 4.42 of the Code of Practice (paragraph 98).

On the facts, there was clear evidence of incapacity in at least one respect, cited in the assessment itself, and *"plainly reason to believe"* that T might lack capacity in other areas (paragraph 100). Baker LJ agreed with the argument advanced on T's behalf that the

positive behaviour support response was *"not a proper assessment of need nor an adequate analysis of how to meet it:"* without a capacity assessment the local authority could not judge whether that level of support was appropriate (paragraph 101).

Baker J rejected the argument that there was no decision for T to make (and no need to consider his capacity): his relationships, contact with others and internet use were all in issue (paragraph 103). And the duty to arrange independent advocacy under s.67 of the Care Act did not remove the need to assess capacity; s.67 is about involvement in the Care Act assessment process, and *"has no relevance to the question whether the individual has capacity to make decisions about aspects of his life"* (paragraph 104).

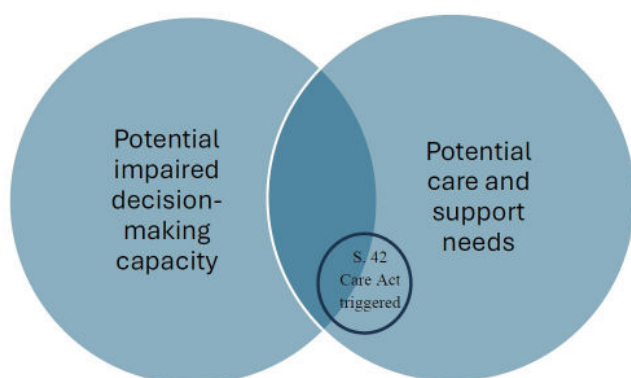
Neither the presumption in s.1(2) MCA nor the practicable steps principle in s.1(3) is *"a reason for deciding not to assess capacity when it is in doubt"* (paragraph 105, endorsing Swift J in *Royal Bank of Scotland plc v AB*). Baker LJ added that the decision not to assess may have been influenced by the view that T did not have a learning disability. But s.2(1) MCA refers to impairment or disturbance, not disability, and a formal diagnosis is not required (paragraph 106, endorsing *North Bristol NHS Trust v R* [2023] EWCOP 5 at [48]).

On ground 2, Baker LJ emphasised that regulation 5 of the 2014 Regulations is mandatory. While recognising *"the very considerable skill and expertise"* of the social worker, the Court held that, given T's complex diagnoses and needs, the local authority ought to have sought the advice of a psychiatrist or psychologist in conducting the Care Act assessment process. The failure to seek psychology input was irrational, and the judge had not engaged with the specific input sought (paragraphs 109–110).

The assessment was quashed. Subject to further submissions, the Court would not order a fresh Care Act assessment, because decisions about T's care were now before the Court of Protection so "It is for that court to decide on any further assessments" (paragraph 111).

Comment

Baker LJ found it "puzzling" that this point had not arisen for consideration in the nineteen years since the MCA came into force. Mind's submissions (set out at paragraphs 84 and 85 of the judgment) set out how capacity can be relevant to consideration of needs under the Care Act 2014, both substantively and procedurally. Those submissions also included a Venn diagram (not reproduced in the judgment, but which Mind have given permission for us to reproduce):



("Potential impaired decision-making capacity" means "the person may lack capacity to make a relevant decision or decisions applying the test under the MCA 2005").

As to the type of decisions which the capacity assessor may need to address, paragraph 104 refers to capacity "to make decisions relevant to his needs" and paragraph 94 refers to the "individual's capacity to make decisions in the various domains in which his well-being is under consideration."

Importantly and to correct a misunderstanding that we have seen the judgment does not say 'assess capacity first; eligible needs second'. Rather, it says that the capacity assessment must happen before the needs assessment is completed. This is because the person's decision-making capacity could be relevant at different stages, both to the identification and characterisation of needs and how they are to be met and may need to be revisited during the care planning stage.

In terms of who assesses capacity, this must be an "appropriately qualified professional". Paragraphs 4.38 and 4.42 of the MCA Code refer to the person proposing to make the decision or take the action, with professional advice where the decision is complex. Similarly, paragraph 10.63 of the Care Act Guidance refers to "a social worker or other suitably qualified professional".

The Court noted at paragraph 99 that:

There is, of course a risk that this judgment may impose an additional layer of work on local authorities, and some extra costs. But the purpose of assessing capacity is to improve the chances of arriving at a more accurate assessment of the individual's needs. That can only be to the benefit of the individual and in due course should lead to a more efficient and effective use of the local authority's resources.

In terms of needs assessments, the Care Act guidance at paragraphs 6.85–6.90 (reflecting Regulation 5 of the Care Act regulations) provide that assessors must have the "skills, knowledge and competence" to do the assessment, which can include (but is not limited to) registered social workers, occupational therapists and rehabilitation officers. Importantly, and the judgment makes clear, part of the skill set of an assessor is recognising when they need to consult with a person with specialist expertise where required.

AGNI – the most comprehensive first instance 'run' at it so far

AR (*Whether restrictions amount to a deprivation of liberty*) [2026] EWCOP 45 (T2) (HHJ Burrows)

Article 5 – deprivation of liberty

Summary

HHJ Burrows has handed down the most comprehensive first instance 'run' at AGNI to date, AR (*Whether restrictions amount to a deprivation of liberty*) [2026] EWCOP 45 (T2), concerning (as he identified at paragraph 1):

a young man I shall call AR. He is diagnosed as suffering from moderate to severe learning disability and autistic spectrum disorder. He is a man of 25 years who lived for most of his life with his parents. However, since May 2025, AR has lived in a placement, initially by way of respite care, but now on a more permanent footing. Although there has been disagreement between the LA and AR's parents in this case, it seems agreed that where he presently lives meets his needs, and I am not being asked to order his return home.

HHJ Burrows was at pains to note at paragraph 14 that:

We are in the early days following the Supreme Court's recent judgment in A Reference by the Attorney General for Northern Ireland of a Devolution Issue under Paragraph 34 of Schedule 10 to the Northern Ireland Act 1998 [2026] UKSC 16 (which I will refer to as the Northern Ireland case, or the NI case), as Ms Flanagan stated on a number of occasions, noting that we are awaiting "guidance" from the Courts. I am not sure there can be much guidance as to the use of a test that is fact and therefore case specific and multifactorial. It is certainly not my aim

(or job) to give guidance. What I ought to do, however, is to explain how I think the NI case impacts on AR.

It might be thought that HHJ Burrows was quite well placed to give such an explanation, having (in a previous life) been junior Counsel for the Official Solicitor in Cheshire West, and hence a very hardened veteran of what sometimes has felt like the deprivation of liberty wars.

Having set the scene by reference by reference to the basics of the jurisdiction, HHJ Burrows set out the entirety of Article 5 ECHR

19. [...] just to demonstrate its scope. That is because if, as the Supreme Court says in the NI case, the paradigm example of deprivation of liberty is the prisoner in his cell, the Article's scope strays some distance from that paradigm, particularly in relation to children and those persons of "unsound mind". The NI case makes it clear that it is only those who are closer to that paradigm that should properly be found to be deprived of their liberty.

As he noted:

20. It is, however, also important to note that the purpose of Article 5 is essentially protective. It ensures procedural protection for those who are vulnerable to arbitrary detention. This may be due to the commission, or the suspicion of the commission of a criminal offence. Or maybe unlawful entry into the country. Or carrying contagious diseases. Or being a vagrant. It also includes dysregulated children and young people, a cohort presently of a significant size. It also includes those whose unsoundness of mind ranges from the elderly person in a state of advanced dementia, or a person with a severe brain injury, to the floridly psychotic, the suicidally depressed,

homicidal psychopaths and the learning disabled or autistic young person.

21. Those Article 5 is designed to protect are various. Hence, although the idea of a paradigm example of deprivation of liberty may appear helpful, it may also lead to highly restrictive regimes in a community setting appearing not to involve deprivation of liberty, because there are no bars on the windows, no 10-metre-high fence around the placement, and the terminology used may reflect a homely setting rather than a penal one.

HHJ Burrows then set out an elegant precis² of how the Supreme Court in *AGNI* reached its conclusion, and an admirably concise summary of what he considered to be the relevant principles, namely:

- *Non-secure environments matter. Living in a family home, foster placement, supported living or ordinary home is highly relevant and may point away from deprivation of liberty.*
- *Purpose matters. Protective and therapeutic restrictions are relevant and distinguishable from punitive confinement.*
- *Relative normality matters. The more the placement and care plan resembles ordinary life for a person in P's circumstances, the less likely it is to constitute a deprivation of liberty.*
- *Protective motivation matters. Although not decisive, restrictions imposed for care and safety rather*

than punishment weigh against a finding of deprivation of liberty.

- *Objection and consent matter profoundly. A person may lack decision-specific MCA capacity yet still possess sufficient factual understanding to express valid consent for Article 5 purposes. Genuine contentment, acceptance or tacit consent may negate the subjective element of deprivation of liberty. Mere acquiescence, however, may not suffice.*

What HHJ Burrows does not say, but would have been very aware, is that each of these principles represents a very different take on deprivation of liberty than in *Cheshire West*.³

Applying this to the facts of AR's case, HHJ Burrows held as follows (reminding ourselves that this is a fact-specific exercise, rather than a 'cookie cutter' to be applied):

64. Counsel submit this is a finely balanced case. I am not sure that is right. Looking at the matter globally and adopting the evaluative approach mandated by the NI case, I conclude that AR's circumstances do not amount to objective confinement for the purposes of Article 5.

65. In my judgment, and applying the NI case, the following matters are decisive.

- (a) *AR suffers from a condition that will always require a significant level of supervision. There is a need in his case to ensure a good level of routine and predictability so as to ensure his relative happiness.*

² With light editorialising, noting, for instance, that all bar one of the Strasbourg cases considered in *AGNI* had been cited before the Supreme Court in *Cheshire West*.

³ For more about this, and why this might be so, see the [podcast](#) that Alex did for Community Care, and also this [blog](#) for the British Institute of Human Rights.

- (b) AR will always require restrictions on his movement. He will never be "free to leave" wherever he safely resides, and significant control has to be placed on his movements in and out of his residence.
- (c) Management of his behaviour will always require a high level of supervision and control, including when necessary, restraint.
- (d) Although he is not at his family home, he is at a place which he is able to treat as his own and to personalise his environment. He is able to make friends, and engage in activities in and out of the placement.
- (e) These restrictions are in place for his own good, and are intended to ensure the best outcome for him.
- (f) Although his residence at the placement involves restrictions, they are far away from the paradigm of the prisoner in his cell, or, for that matter the mental patient in his secure unit.
- (g) These arrangements are relatively normal.

66. One issue I raised in argument was the extent to which his parents' issue with his placement was relevant to the issue of Article 5. The importance of this issue was somewhat diminished by the parents' acceptance that AR should remain where he is. However, there is still a dispute over contact. This raises two issues. First, what if AR's parents had submitted that he ought to come home immediately? The consensus at the bar was that objection from anyone other than P is not relevant to whether P was deprived of his liberty. I accept that, although clearly such an objection can have knock-on effects into the care plan

(restrictions on contact, for instance) that can increase the intensity of the restrictions imposed on P. Now that a very wide range of matters need to be taken into account in determining whether Article 5 applies, it is important to recognise that contact is now more significant as a factor when determining whether P is deprived of his liberty.

67. That leads to the second point. There will be restrictions on contact with AR's parents, at least initially. These restrictions are relevant to the issue of deprivation of liberty. However, in the context of this case, it seems to me that contact is able to take place, and the availability of contact may increase in line with the order I make. There may be situations where restrictions on contact with friends and family may be such as to change the character of the placement away from a home and closer to a place of detention. This is, in my judgment, not one of them.

68. The decisive features in this case are the protective purpose of the restrictions, the relative normality of the placement, the extent of community participation and the absence of institutional or custodial characteristics. AR is not deprived of his liberty. Article 5 is not engaged.

As he recognised, this conclusion meant that HHJ Burrows did not need to go on to consider the 'subjective limb.' However, he continued at paragraph 69: "given the novelty of the issue and the care with which it was argued before me, I consider it appropriate to express a view." Although any such view was clearly obiter (i.e. did not form any part of the reasoning underpinning the decision), I set out his observations here in full as they provide an indication of how it could be possible to interrogate this issue:

70. As the Supreme Court said at [151] of the NI case (emphasis added):

The discussion above assists us to analyse the series of Strasbourg cases which were particularly relied upon by the parties to this reference. The principle which emerges from the authorities is as follows. An individual without legal capacity, but who is conscious of their environment and has a basic understanding of their living circumstances in a secure care environment, so that they can in some suitable way express their view about their situation, who manifests their acceptance of that situation, should have their opinion respected when an assessment is made whether they are suffering a deprivation of liberty under article 5. Their subjective attitude, as so expressed, carries significant, indeed usually decisive weight, according to the criteria set out in Storck. Conversely, if such a person manifests a view that they do not accept that situation, that opinion should also be respected and will usually lead to the conclusion (if the objective circumstances indicate that they are detained) that they are subject to a deprivation of liberty.

71. The Supreme Court also made the following comments at [160] when discussing Shtukatur (emphasis added):

The [ECtHR] held that there had been a deprivation of liberty under article 5(1). The objective element of the test for deprivation of liberty was clearly made out (the applicant was confined for several months, not free to leave and his contacts with the outside world were seriously restricted). As regards the subjective element,

the respondent government maintained that the applicant's detention had been voluntary, because his legal guardian had consented to it, whereas the applicant "referred to his own perception of the situation" (para 107). The court recognised that the applicant lacked de jure capacity to decide for himself, but found that he was de facto able to understand his situation, as his own behaviour showed, and judged by reference to that he had not validly consented to his confinement and there had been a deprivation of liberty, paras 108–109.

72. This approach carries with it some forensic difficulties. Is evidence required as to agreement and disagreement, and can it be challenged? What about the situation where P's position changes from time to time? Who decides? Presumably it's the Court? Nonetheless, it seems to me that a Court, when approaching this expanded definition of the subjective element under the MCA must always err on the side of caution, and provide Article 5 rights if there is any serious doubt that P consents (and is lacking in MCA capacity, of course).

73. This appears to be the view of the Supreme Court in NI. Although the judgment is extremely long, and establishing any succinct guidance is very difficult, there are some passages on this subject that can assist. In the discussion of consent in the ECHR cases (Nielsen, Stanev, HM v Switzerland, DD v Lithuania and HL v UK) paragraph [191] of the NI case is helpful in this regard:

We recognise that there may be considerable evidential difficulties in ascertaining whether a person who is severely autistic or who

has other profound cognitive disabilities is content with and not objecting to their living arrangements. Inevitably there will be a wide spectrum of cases, with cases at one end where eliciting evidence of positive expressions of wishes and feelings about the care placement will be impossible, and at the other end, cases (like MIG's and MEG's in Cheshire West, and the applicant's attitude to the Lielberze home in Mihailovs) where a tacit positive indication of wishes and feelings showing contentment with the arrangements can be ascertained. In the latter cases, such evidence is relevant and should not be excluded from consideration. The cases between the two ends of the spectrum will create varying degrees of difficulty and will require anxious consideration to determine what effect the applicable restrictions are having and what attitude the affected individual has to them. ***As we have said, it may be that if nothing more than mere compliance or acquiescence is a feature of the case, that is not enough. If the individual is capable of expressing a view and there is serious doubt about their attitude, no inference should be drawn.***

74. Dr Radcliffe's evidence demonstrates that AR has a moderate to severe learning disability and autistic spectrum disorder which result in profound difficulties in communication, adaptive functioning and independent decision-making. Dr Radcliffe concludes that AR requires constant access to support across all areas of daily living and is presently unable to live independently. Whilst AR is capable of expressing simple likes, dislikes and preferences through his own

communication methods, there is no evidence that he possesses a developed understanding of the legal, practical or social arrangements underpinning his placement. Rather, Dr Radcliffe's evidence suggests that AR's experience of the placement is mediated through immediate and concrete matters, such as whether he feels safe, whether routines are predictable, and whether those around him are responsive to his needs.

75. That does not, however, mean that his wishes and feelings are unreal or unreliable. On the contrary, Dr Radcliffe places considerable emphasis upon the importance of understanding and responding to AR's emotional experience. He considers that AR is capable of demonstrating preferences, expressing enjoyment, signalling distress and communicating attachment to important people and places. The evidence therefore supports the proposition that AR's wishes and feelings are genuine and should be accorded significant respect when assessing his welfare. In particular, Dr Radcliffe identifies the importance of ensuring that AR feels safe, secure and emotionally contained within his environment and notes the positive impact which the stability of the current placement appears to have had upon his wellbeing.

76. The more difficult question is whether those abilities amount to the form of understanding required for valid consent as contemplated in the NI case. In my judgment, Dr Radcliffe's evidence does not clearly establish that they do. Whilst AR is capable of expressing preferences and emotional responses, there is little evidence that he understands the nature of the choice between living at the placement and living elsewhere, the restrictions which operate within the placement, or that he

has sufficient appreciation of those arrangements to make an autonomous decision either accepting or rejecting them. His ability to communicate contentment or dissatisfaction is real, but that is not necessarily the same as understanding the nature of the arrangements to which that contentment relates.

77. Accordingly, whilst Dr Radcliffe's evidence supports the conclusion that considerable weight should be given to AR's wishes and feelings, it provides only limited support for a finding that AR is affirmatively consenting to the arrangements in the sense contemplated by the NI case.

78. For all the above reasons, I conclude:

- AR is not deprived of his liberty, and his placement does not engage Article 5 of the ECHR.
- This is because of what I shall refer to as the objective element.
- I do not find in AR's case that he would be able to give valid consent if he were deprived of his liberty.

HHJ Burrows then went on to consider Article 8.

79. The parties were all in agreement that AR's Article 8 rights are engaged by the care plan I am asked to approve. The LA, to their credit, recognise that there is a conflict between them, the provider and AR's family. That is something that needs to be kept under review. AR's voice needs to be heard and his interests represented. If Article 5 applied, of course, there would be an obligation on the LA to bring the matter back before the Court periodically, probably annually: see Salford City Council v J (or Re GJ and BJ) [2008] EWHC 1097 (Fam) Mr Justice Munby.

80. However, in this case, although the Court has no express obligation under the Convention to build a review into the final order, clearly there is a matter left open by the order I propose to make, and AR's rights may still need to be protected by the involvement of the Court.

81. The Supreme Court in the NI case recognised that many individuals who are not deprived of their liberty for the purposes of Article 5 will nevertheless be subject to significant restrictions upon their autonomy and private life. The Court emphasised that such persons are not left without protection. Restrictions upon residence, care, contact and personal autonomy may engage Article 8 ECHR and remain subject to review through the Mental Capacity Act 2005, the jurisdiction of the Court of Protection and the statutory duties imposed upon public authorities. The premise underlying that analysis is that these alternative safeguards provide meaningful protection for those whose circumstances fall short of a deprivation of liberty within Article 5.

82. One of the difficulties with the way the NI case reached the Supreme Court, as a reference from the AG of Northern Ireland, is that the Court was not concerned with a real case, with evidence of how restrictions impacted on actual people, and with a first instance and appellate history of how the law dealt with the problems faced by those vulnerable people, their families and professionals at the "coal face".

No doubt reflecting his previous experience, HHJ Burrows pointed to the first instance judgment in Cheshire West, which established (in essence)

that all was not as it seemed on the papers. He continued:

87. The problem with the removal of Article 5 rights for people like AR, as my judgment will entail, is to ensure how those rights will be kept under review in the absence of Schedule A1 protections, a r 1.2 representative (perhaps), the periodic review to the Court of Protection, or the entitlement to advocates.

88. In this case, however, the LA has decided to fund an advocate (a Care Act advocate) for a period of 12 months to ensure AR's rights are observed, particularly on contact, but also to ensure that the restrictions are reviewed.

89. This is welcome, particularly as AR's parents are not represented and need to deal with someone who is not representing the LA. They feel excluded from their son's care in these proceedings.

90. The question is what, if anything, is the role for the Court? I think there is no application from the parties that the Court should adjourn this application until near to the end of the 12 months and then restore, perhaps after a round table meeting and further position statements. That would not be attractive to the Court. If there is a need for a review, then the review should be directed, and that probably means directing the LA to bring proceedings in around 12 months time for the Court to review the situation as it then is. The other alternative is to direct that if there is any dispute between the parties in around 12 months time, then the LA should then bring the case back to Court.

91. In this case, I see no reason to order a review. It is not necessary to protect

AR's Article 8 rights. Those rights will be protected by the involvement of the LA (with its duties) his family, and his advocate. If before the end of the 12 months it is thought that his rights may be at risk because of there being a dispute over the care plan at that point, then is the time when an application should be made to the Court for the resolution of a dispute.

Comment

In addition to the comments interspersed above, we would add four things:

- (1) As HHJ Burrows was at pains to emphasise, consideration of deprivation of liberty is both multi-factorial and case-specific. This means that it is not possible (nor, indeed would it be legally correct: see [this video](#)) to take the outcome of this case and transpose it, without more, to other situations which might appear similar. It is therefore extremely useful as a judgment which helps providers and supervisory bodies get themselves into the AGNI zone; it is, however, not a shortcut to thinking about whether a particular situation gives rise to deprivation of liberty;
- (2) It is of no little importance that HHJ Burrows adopted the staged approach of considering the objective limb first: there seems in some quarters to be a tendency to rush first to considering 'valid consent' issues without actually asking the rather important question of 'consent to what?';
- (3) HHJ Burrows was – rightly – at pains to draw attention to the need to have a careful eye to the reality of the protections that are said to be in other parts of the law. We have referred elsewhere to the 'promise' that DHSC might be said to have made to the Supreme Court about those protections: this

case gives a clear example of what it means for that promise to be made concrete on the facts of an individual case;

- (4) Whilst it is clearly laudable that the local authority acted in the way that it did, it is not obvious on the face of the judgment under what statutory power "Care Act advocate" came to be appointed. There is no standalone power simply to appoint an advocate for "rights protections reasons;" on the face of it, it appears difficult to see how the criteria in s.67 Care Act would have been met. An advocate can (and, in some circumstances must) be appointed to meet assessed needs for care and support;⁴ however, a need for an advocate for rights protection is very unlikely to satisfy the eligibility criteria under the Care Act and the associated regulations. It might be thought that a standalone power to appoint advocates under the Care Act (and, indeed, the Mental Capacity Act 2005) would be a 'good thing.'

Short note: can (lack of) valid consent create a confinement?

Re SM [2026] EWCOP 46 (T2) is another Tier 2 decision (this time of HHJ Sue Williscroft) as to whether a person previously deemed to be deprived of their liberty for the purposes of A5 ECHR remains so following the Supreme Court's decision in AGNI. SM had diagnoses of severe learning disability, catatonia, major depression and autism. So far as can be ascertained from the judgment, she was living in the community with 2:1 support at all times. Searches for alternative accommodation had been carried out as SM had said she did not like her home, but

nothing suitable had been found. She was said to have a history of self-harm and harm to others as well as property damage. She was not subject to physical restraint at such times, with her skilled and familiar staff able to calm or distract her. SM had said she only wanted 1:1 support and wanted to live with other people.

The judge decided SM was not deprived of her liberty. She would require the same level of supervision wherever she lived as a result of her disabilities. Her expressed wish to live somewhere else was not constant, and in any event her mother thought that she could complain wherever she lived. The care provided to her was support rather than containment. The judge disagreed with SM's ALR that SM experienced the arrangements as imposing a major intrusion into her life, and found that "*in reality it would appear she welcomes the support she has,*" as she only occasionally said that she hated the arrangements for her care. In any event, the judge dismissed a submission that if SM experienced the arrangements as coercive, that could result in Article 5 being engaged even if another person subject to the same restrictions was content with them, saying that such an analysis "*suggest wishes can change the real lived experience into something different.*"

The judge accepted the submissions of the local authority and SM's ALR that SM was not providing valid consent to her care arrangements, although this question was not strictly relevant given the finding that there was no objective confinement.

It appears from the judgment that SM was objecting to her care arrangements, at least from time to time. While SM's legal representatives

⁴ Advocacy is mentioned in s.8(1)(a) as an example of what may be provided to meet needs under ss.18-20 Care Act 2014.

considered that she was objecting to those arrangements and experienced them as intrusive, the judge rejected this interpretation, based largely it seems on the suggestion that SM would not be happy even if the arrangements were altered. The judge's conclusions about the relevance of SM's objections – had they been found to exist as a matter of fact – are somewhat difficult to reconcile with the following clear statement from the Supreme Court in AGNI at paragraph 187: *"The effect of restrictions on an individual is liable to differ according to whether they are content with or object to their living arrangements, and it is therefore relevant to consider the effect of the living arrangements on them."* The Supreme Court were satisfied that the lived experience of the person was a crucial factor in the case-by-case assessment of whether A5 was engaged.

AGNI/wider developments

Whilst we await the publication of further guidance from the DHSC, the Minister of State for Social Care has responded to the Joint Committee on Human Rights' letter of 8 July in which the Committee asking (in effect) what steps they were going to take in the aftermath of the judgment. The letter emphasised that a key safeguard relating to valid consent:

is that determinations should be made on the facts of the individual case. The Government does not expect superficial or rushed assessments. Local authorities, NHS bodies and providers remain responsible for ensuring that assessments are conducted

appropriately and in accordance with their legal obligations.

In relation to children, the letter also noted that:

While this was not a children's law case and did not concern the deprivation of liberty of children,⁵ Article 5 applies to both adults and children. The government remains committed to protecting the rights of vulnerable children and local authorities have a duty to safeguard and promote the welfare of every looked after child. In exceptional circumstances, this might include placing restrictions on the child where this is required to keep the child safe. Those involved in the child's care must continue to ensure the relevant court approval is obtained where restrictions amount to a deprivation of liberty.

Alex maintains a resources page on AGNI to be found [here](#).

Short note: best interests determination without reliable wishes and feelings

In *Re MP* [2026] EWCOP 36 (T3), Lieven J had to consider whether continuation of CANH was in the best interests of MP, a young Greek Orthodox man who suffered a catastrophic brain injury at 18 (he was 19 by the time of the hearing). There was a medical consensus that MP was at the lowest level of the spectrum and the reports all describe him as being in a vegetative state. He did not respond to external stimuli save in a reflexive manner, such that "he has no ability to interact and has no meaningful life" (paragraph 64). Lieven J identified that she was "afraid that

⁵ This is not strictly correct. The NI reference expressly concerned those aged 16 and 17, and the Supreme Court in paragraph 1 of the judgment made clear that, for purposes of the judgment, 'adults' means those aged 16 and over (in circumstances where, for other

purposes, childhood runs to age 18. There is a real question as to whether *Re D* (concerning the application of *Cheshire West* to those aged 16 and 17) remains good law.

the parents are seeing and interpreting what they desperately hope for, namely signs of consciousness. This is neither unusual nor surprising, but it is still immensely sad. However, in my view the medical evidence on MP having no consciousness is overwhelming" (paragraph 67). She considered that the burdens of treatment on MP were significant, and that caselaw was clear that burdens remained regardless of whether MP experienced them or not. Lieven J accepted that MP was a devout young man with a strong Orthodox Christian faith, continuing that:

72. His family feel strongly that MP would have wished to be kept alive, and that he should only be allowed to die a natural death. The difficulty with assessing wishes and feelings in a case such as this is that there is no evidence to suggest MP ever contemplated being in his current situation. It is very different from a case where P was elderly or suffered from a degenerative disease, where they may have thought about what they would wish to happen. In this case, before the accident MP was a healthy 18-year-old with everything to look forward to, then tragically in a moment he had suffered a catastrophic brain injury.

73. It is therefore not possible to know with any confidence whether MP would have wished to have continued living in his massively diminished state. The Court of Appeal is clear that in those circumstances I should not speculate.⁶ In any event, there is in my view a limit to the weight that can be ascribed to wishes and feelings which

could only have been given in totally different circumstances, and with no idea of the reality of the life that MP is now facing.

Perhaps inevitably, therefore, Lieven J reached the conclusion that it was not in MP's best interests for CANH to be continued.

⁶ A reference to *PW v Chelsea and Westminster Hospital NHS Foundation Trust & Ors* [2018] EWCA Civ 1067 at paragraph 53.

PROPERTY AND AFFAIRS

Direct payments and deputies

Re Various Applications in respect of 'Direct Payments' [2026] EWCOP 42 (T2) (HHJ Hilder)

Deputies – property and affairs – costs

Summary⁷

In *Lumb v NHS Humber & North Yorkshire ICB* [2024] EWCOP 57 (T2), HHJ Hilder held that managing direct payments under the National Health Service (Direct Payments) Regulations 2013 did not fall within the 'general authority' of a property and affairs deputy, because complying with those Regulations required some decisions of a welfare type to be made. She held that the Court of Protection could confer authority to manage such payments, but that authority would have to draw on both the welfare and the property and affairs 'streams' of its jurisdiction.

Those who hoped that *Lumb* would turn out to be a one-off, confined to NHS direct payments, will be disappointed by HHJ Hilder's 70-page judgment in this case. That judgment has already prompted the Senior Courts Costs Office (SCCO) to issue guidance of its own, discussed at the end of this summary.

Seven professional deputies from four firms brought the applications. All were already managing direct payments in what they considered to be their capacity as deputies, and none was willing to do so outside a deputyship appointment. They "*unanimously contend[ed] that the Lumb decision was wrong in its conclusion that welfare-decisions are involved in the process of managing Direct Payments in*

accordance with regulatory requirements", and sought retrospective and prospective authority, if they did not already have it (paragraph 3). The applications were heard together but not joined. The Public Guardian was joined as respondent, and the Official Solicitor acted as *amicus curiae*.

HHJ Hilder referred to the person benefitting from the payments as P, to the public body which "foots the bill" as F, and to the person who receives and manages the payments as R. That identification is continued here.

The fundamental dispute

The deputies' core argument was that the role of R is "operational." On this view, R implements a care plan decided on by the public body, and the role is ancillary to property and affairs authority, falling within the proposition in *Re ACC* [2020] EWCOP 9 at paragraph 53.7(c) that a property and affairs deputy's authority "*does encompass the application of P's funds to meet the costs of care arrangements*." The Public Guardian and the Official Solicitor both considered that some welfare-type authority was required, save possibly in the case of certain SEN nominees.

HHJ Hilder first concluded that, even if the deputies were acting purely operationally (which she doubted, noting the disputes about adequacy of funding in which several had become involved), management of direct payments could not fall within the 'general authority':

65. With the benefit of extensive argument, it seems to me difficult to say that management of Direct Payments within a regulatory scheme is an 'ordinary' part of managing property and affairs. Even viewed as a purely administrative function, 'operational'

⁷ Tor and Arianna having been involved in the case, they have not contributed to this note.

management of Direct Payments is a specific, distinct responsibility, easily identifiable, and involving complexities which are not of a 'day to day' type – such as deployment of funds within specific constraints, engagement with the paying public authority to satisfy that authority that the constraints are observed, and the repayment obligations. These (and other) aspects of managing Direct Payments are not 'ordinary' features of managing an estate, large or small. [...]

[...]

67. Further and relatedly, I agree with the Public Guardian that, whether or not the applicant deputies have indeed been acting purely 'operationally', such description does not answer the fundamental dispute in these proceedings, which is what the role of R properly requires. If Direct Payments are to be managed via deputyship, the authority conferred by the Court of Protection must be sufficient to enable the Deputy to discharge the role fully as conceived by the relevant regulations, not how the applicant deputies say they have interpreted it to date.

HHJ Hilder declined to depart from *Lumb* in relation to the NHS Regulations. However, she recognised that the other three schemes are "much less prescriptive" about what is required of R. Ultimately though, the judge found that all of them are underpinned by the same 'choice' agenda. Paragraph 10.2 of the Care and Support Statutory Guidance was, she said, "particularly challenging to the approach of the applicant deputies" (paragraph 72(a)). Having looked at the care plans in each of the seven cases, she concluded:

73. [...] I cannot agree with the applicant deputies that they are 'prescriptive' to the point of rendering R's role simply a

question of applying funds as directed. There is a great deal of leeway remaining as to how the specified extent of support is made manifest. The applicant deputies themselves acknowledge that this is the key advantage to Direct Payments. As the Official Solicitor notes, perhaps the decisions involved are not 'high level' and are being made in collaboration with others. Nonetheless, Rs are still making welfare-type decisions when, in accepting the role at all, they indicate their judgment that Direct Payments are an appropriate way of meeting P's needs for care and support; and thereafter, when they actually deploy the Direct Payments.

74. I am concerned, with the Public Guardian, that a purely 'operational' interpretation of the role of R fails to recognise the underlying purpose of Direct Payments, renders the 'choice' agenda illusory, and thereby does P a disservice.

75. So I conclude that, in all of the Direct Payment schemes currently under consideration, some authority beyond what is incorporated in the 'general' authority of a property and affairs deputy, and beyond simply 'operational' management of money, is required if Direct Payments are to be managed within deputyship.

The 24 questions

HHJ Hilder then answered 24 questions that the parties had agreed. In summary:

Can deputies be authorised at all (Q1–Q2)? Yes, but only for P aged 16 or over. Acting as R involves some welfare-type decision-making. Since s.2(5) MCA 2005 prevents welfare powers being exercised in relation to under-16s, "[i]t is the substance of the authorisation that matters, and welfare-type decisions for under 16s are not the

province of the Court of Protection" (paragraph 83).

For younger Ps, such as children who sustained brain injuries at birth, public bodies, families and case managers may therefore need to consider the alternative identified in *Lumb*, under which a case manager acts as R.

Under the NHS and Care Act Regulations, a deputy cannot simply "stand in the shoes of P" to request direct payments. Instead, the deputy must use the route provided by the regulations for an incapacitated person. Under the SEN and Children Act Regulations, however, an appropriately authorised deputy can make the request for a P aged over 16.

What does standard authority cover (Q3–Q5)? Very little in relation to direct payments. A standard-terms property and affairs deputy is not generally authorised to request direct payments, negotiate whether they are sufficient, or use and manage them. The exception is the preparation of employment contracts for directly employed carers, which has been within general authority since *Re ACC*.

HHJ Hilder rejected the deputies' attempt to rely on *Re ACC* as authority for two broader tasks: negotiating public funding and arranging private care packages. As she put it, "*negotiating sufficiency*" cannot sensibly be described as an administrative task" (paragraph 94).

What form of authority is required (Q6–Q10)? The authority is a mixture of property and affairs and health and welfare powers. A trust corporation cannot therefore be given the authority, because s.19(1)(b) MCA 2005 permits a trust corporation to be appointed only in relation to property and affairs. Nor would it be appropriate to confer the authority on an individual director of a trust corporation deputy,

given the practical difficulties of having two decision-makers.

HHJ Hilder set out model wording in Schedule 1 to the judgment:

The deputy is authorised to consent to, receive and manage Direct Payments made for the benefit of [P] by any statutory body, in accordance with the requirements of relevant regulations. In order to give effect to this authority the Deputy is in particular authorised to:

(i) request a statutory body to carry out an assessment of [P]'s needs;

(ii) request a Personal Budget or a Personal Health Budget for P;

(iii) request Direct Payments as a means of a statutory body meeting its obligations to provide care and/or support for [P];

(iv) make representations to the statutory body making or proposing to make Direct Payments for the benefit of [P] as to i. whether [P]'s welfare would be best promoted by that statutory body making direct payments or not, and/or ii. whether the statutory body's decision as to the level of direct payments or nature of the services included in any care plan is sufficient for [P];

(v) exercise any rights which are available to the recipient of Direct Payments within the relevant regulations to seek and/or participate in a review or re-consideration of the statutory body's decision(s) or care plan;

(vi) to use or apply the Direct Payments, which may include by way of direct employment of carers, in the best interests of [P] and subject to compliance with any conditions applicable as specified by the relevant

statutory body or/or the relevant regulations.

(For the avoidance of doubt, nothing in this order authorises the deputy to appeal, or instigate proceedings for judicial review of, any decision made by the statutory body in respect of Direct Payments without further order of the Court.)

Where this authority is included in a new deputyship order, the words "AND MANAGEMENT OF DIRECT PAYMENTS" should be added to the title. An existing deputy can instead apply for a free-standing order.

Agency, indemnity and remuneration (Q11–Q12). A deputy can act as principal when employing carers. This enables the deputy to meet the requirements of the NHS and SEN Regulations while remaining entitled to an indemnity from P's estate under s.19(6). The usual rules on expenses and remuneration continue to apply.

HHJ Hilder nevertheless repeated her observation in *Lumb* that a capacitous person receiving direct payments would not ordinarily pay someone to manage them. It is therefore difficult, at least as a starting point, to see why P should bear the cost of doing so.

Case managers (Q13). A standard property and affairs deputy cannot appoint a case manager as R under the regulatory schemes. The case manager must obtain that role independently. The deputy can, however, engage a case manager and pay them from P's funds to manage the direct payments. The deputies told the court, with some candour, that very few case managers were willing to take on this role.

Applications and best interests (Q14–Q15). An application should address the alternatives and P's best interests. Schedule 2 to the judgment

identifies 13 matters that should be addressed in the evidence. Before applying, a deputy should consider whether someone else could act as R and ask F whether it will meet the deputy's costs. F's response is not, however, a precondition to making the application.

HHJ Hilder was emphatic that deputyship management is not a "last resort." Where more than one person could act as R, the decision should be made in P's best interests, "*without hierarchy other than that which follows from the regulations themselves*" (paragraph 151). Relevant considerations include familiarity with P, the cost to P, and administrative competence and convenience.

F does not need to be formally notified. HHJ Hilder endorsed an agreed, non-exhaustive list of best interests factors but declined to set a financial threshold below which an application would automatically be disproportionate. As she explained, "*[s]uch thresholds always age poorly as costs rise over time*" (paragraph 162).

Retrospective authority and costs (Q16–Q21). Deputies who have managed direct payments without specific authority, and charged for doing so, must seek retrospective authorisation. Such an application is "in substance an application for relief from liability" (paragraph 164).

A current deputy does not need to seek ratification of a former deputy's management. The deputy should, however, consider whether it would be in P's best interests to apply to recover the former deputy's costs.

As to the relevant cut-off date, HHJ Hilder held:

170. [...] The Lumb [2024] decision was the first occasion when the Court was called upon to consider, and deputies were put on notice of the Court's view as to, the scope of deputyship authority

required for management of Direct Payments. In my view, the proportionate approach is to regard the date of the Lumb judgment – 11th October 2024 – as the long-stop date from which applications for retrospective authority are required in respect of cases involving Direct Payments from any of the various schemes.

Accordingly, the answer to Q19 was that, subject to case-specific factors arising from the judgment, retrospective approval is not required for steps taken or costs incurred before 11 October 2024.

For costs already finally assessed by the SCCO, the answer to Q20 was 'no': it is neither necessary nor proportionate to seek to reopen the assessment. The only available route would be an appeal out of time, and *"it is likely to be a rare case in which it is in P's best interests to reopen an assessment"* (paragraph 175).

Bills already awaiting assessment should not be withdrawn. Instead, HHJ Hilder suggested that deputies notify the SCCO which outstanding bills contain claims requiring retrospective authorisation.

The costs of managing direct payments should be identified on a "but for" basis. Thus, for example, the employment costs of a care team that was already privately employed before direct payments began are not costs incurred in managing the direct payments.

Supervision (Q22–Q24). Full welfare supervision by the OPG is not required. The welfare elements of the authority are "circumscribed by the relevant regulations" (paragraph 192). The deputy's supervision report should nevertheless explain what decisions have been made about direct payments and why.

The OPG estimated that around 750 property and affairs deputies are currently involved in

managing direct payments (paragraph 189). Its supervision extends only to deputyship functions. It does not, therefore, supervise a person who manages direct payments in their personal capacity.

HHJ Hilder concluded with an observation of wider significance:

201. It is within the jurisdiction of the Court of Protection to appoint a deputy with authority to make decisions of a type which involve a mixture of both the property and affairs, and the health and welfare, streams of the Court's jurisdiction. The separation of work streams in the Mental Capacity Act 2005 and in court processes is only a matter of workability and convenience. It does not reflect how people lead their lives, and it does not restrict the Court's ability to respond to lived experience.

The individual applications were not finally determined. The parties were invited to agree a draft order setting out the further directions required in light of the judgment.

The SCCO guidance

As HHJ Hilder anticipated, the SCCO has now issued its own guidance, Senior Courts Costs Office Guidance. It proceeds on the basis that retrospective authority is required where a deputy has claimed costs for managing direct payments from 11 October 2024 onwards. Where a final costs certificate has already been issued, it simply refers practitioners to Q20 of the judgment. Otherwise the guidance provides clarity on what would happen.

Comment

HHJ Hilder's central reasoning is hard to fault. Direct payments exist to give choice and control to the person receiving care, or to someone properly authorised to act for them. If whoever

controls the payments is treated as doing no more than paying for a care package someone else has designed, that choice becomes "illusory". The deputies' own case also contained a tension. They wanted to manage direct payments because of the flexibility and continuity of care those payments allow. But someone has to exercise that flexibility, and doing so inevitably involves judgements about how P is cared for.

Paragraph 201 is a welcome recognition that the line between property and affairs and health and welfare is drawn for administrative convenience, not because people live their lives that way. It may prove relevant wherever the two jurisdictions overlap, and deputies and the OPG will need to think through its implications. The judgment does not expressly address s.16(4) MCA 2005. However, the tightly drawn model wording, and the emphasis on the welfare element being "circumscribed by the relevant regulations", go some way to meeting any concern that welfare decision-making is being handed to deputies too readily.

The practical consequences are nonetheless considerable:

- On the OPG's estimate, some 750 property and affairs deputyships involve direct payments. Each will need specific prospective authority and, for the period from 11 October 2024, may need retrospective authority as well. The cost will generally fall on P's estate.
- Trust corporation deputies, common in the personal injury field, cannot hold the authority at all. They will have to hand the role to an individual deputy or rely on the case manager route in Q13. The deputies' evidence was that few case managers are willing to take that role on.

- Deputyship is not available for under-16s, so solutions will have to be found outside the court, along the lines identified in Lumb.

The SCCO guidance sensibly follows HHJ Hilder's suggestion at paragraph 179 that affected bills be paused rather than withdrawn. Two points arise:

- The guidance treats 11 October 2024 as a bright line. The judgment, however, qualified its answer to Q19 with the words "unless there are case-specific factors which become apparent in light of this judgment". Deputies should not treat the guidance as conclusive on whether earlier periods need retrospective authority.
- It is to be hoped that the model wording and the Schedule 2 checklist will allow most applications that now need to be made to be dealt with quickly on the papers. Deputies can help by applying promptly and addressing Schedule 2 in full from the outset.

Finally, HHJ Hilder was clear that management of direct payments by a deputy is not a "last resort." Where more than one person could act as R, choosing between them is itself a best interests decision, with no hierarchy beyond what the regulations provide. The judgment undoubtedly adds a significant procedural burden. Its purpose, though, is to ensure, in the Official Solicitor's words, that *"the machinery of the MCA does not have the effect of inhibiting or restricting choice of individuals in so important a domain as care provision."*

Short note: certification incompetency

In a case which clearly troubled Senior Judge Hilder, not least because of the fact that the issue was only identified almost by chance, she has found that:

(1) a Mr Robert Cornford was not a person competent to act as certificate provider;

(2) Robert Cornford did not actually satisfy himself of matters about which a certificate provider is required to satisfy themselves; and

(3) the process of execution of the instruments did not comply with legal requirements.

Re AR, HR & MH [2026] EWCOP 47 (T2) represented the determination of three test cases brought by the Public Guardian, with 24 other matters 'on hold' pending the outcome of the proceedings. The judgment merits reading in full because Senior Judge Hilder set out the whole sorry saga in some detail. This was, in part, because Mr Cornford was acting in person, but in part also to highlight the fact that, for instance, the Society of Will Writers – whom Mr Cornford was for a period of time, and made play of – at least at the material time did not check whether those wishing to be accredited by it had a criminal conviction (as Mr Cornford had, under a previous name, for fraud). As Senior Judge Hilder laconically put it: "in my view, if the Society of Will Writers wishes to be taken seriously in its stated purpose, this procedural lacuna is an obvious matter to address" (at paragraph 61).

Of wider interest, perhaps, is the confirmation by Senior Judge that, for a person acting as a 'professional' certificate provider (i.e. rather than one providing the certificate on the basis of personal knowledge of the donor for at least two years), it is for that provider reasonably to consider that they are competent to do so (paragraph 20); in the instant case, Senior Judge Hilder was satisfied that that Mr Cornford was manifestly not competent when discharging that professional function.

As regards the question of what a certificate provider must do to satisfy themselves of the required matters,

It is of course necessary to retain a sense of proportionality. Reliance on his 'acquaintanceship' with AR and HR over a sustained period, knowing them both to be health professionals with a good level of understanding about lasting powers of attorney, is perhaps sufficient; but simply asking MH if he was under pressure, whilst his daughters were making a cup of tea close by, is too cursory. At best, Mr. Cornford made assumptions. More probably, he simply did not consider the substance of what he was certifying. He treated all cases as the same ('generic'), which is why he cannot give individual explanation of steps he took in respect of individual donors.

As Senior Judge Hilder noted, her conclusions in respect of what actually happened in respect of the certifications in question "should be to put beyond doubt that the OPG and the Court expect certificate providers to take their duties seriously, and to be able to demonstrate that they have done so" (paragraph 78).

Senior Judge Hilder also made clear that using "Do Note Date" stickers in relation to LPAs is profoundly problematic:

85. It is clear and undisputed that Mr. Cornford routinely told donors for whom he acted as certificate provider that the date could and would be added administratively at some point after the signatures had all been collected. He followed a practice of using 'Do Not Date' stickers. I agree with the Public Guardian that the only logical purpose of such an approach is to preserve the possibility of signatures being added in an order deemed convenient, as opposed to the order which meets the legal requirement. Inevitably, it means that Mr Cornford was knowingly submitting to the OPG – or allowing to be submitted by the administrative part

of the organisation through which he worked – incorrect documents.

86. The donors and attorneys acknowledge that they went along with the 'Do Not Date' process, because they relied on the 'expertise' of Mr. Cornford – who was charging for the service, at least as part of a package.

87. That being the evidence, the Court cannot be satisfied that any of the instruments currently under consideration were executed in the correct order. In so far as the final account of AR and HR allows for the possibility of the correct order having been followed, the reliability of their account is undermined by earlier versions. In respect of MH, I prefer the account of his daughters to the account of Mr. Cornford, given that they did this process only once, whilst he is unable to produce any contemporaneous evidence to support his 'generic' answers and positively supported entering an entirely fictitious date for all signatures.

88. On the balance of probabilities, I conclude that the process of executing all six instruments currently under consideration failed to comply with the legal requirements of Regulation 9. Accordingly, pursuant to paragraph 18(a) of Schedule 1 of the Act, I must direct the Public Guardian to cancel their registration.

The Court of Protection and the validity of wills

Croll v Estate of Margaret Mary Thorpe Deceased & Or [2026] EWHC 2232 (Ch) (Chancery Division (Master Clark))

Summary

This decision of Master Clark, given in a probate claim with a "*long-running and bitterly acrimonious history*," is an important reminder of two things: (1) the limits of the Court of Protection's jurisdiction over wills that P has already made; and (2) the limited status of findings made by the Court of Protection in subsequent proceedings.

Mr Thorpe suffered a stroke in 2017. In 2021, he went to live with his daughter, the claimant, and subsequently granted LPAs for property and affairs and health and welfare in favour of the claimant and her two daughters. He also made a new will, leaving his estate to the claimant, or to her children if she predeceased him. His previous will left his estate to his wife, or equally to their three children.

In September 2021, at the claimant's instigation, divorce proceedings were brought in Mr Thorpe's name against Mrs Thorpe. A capacity assessment commissioned by his divorce solicitors in May 2022 recorded a MoCA score of 8/30 and concluded that he lacked capacity to conduct the proceedings.

Three applications were subsequently made to the Court of Protection:

- the OPG applied to set aside the LPAs;
- the claimant and one of her daughters applied to be appointed as deputies for property and affairs; and

- the second defendant, Jackie, applied for a declaration that the LPAs were invalid because Mr Thorpe lacked capacity to execute them, together with *"the revocation of the 2021 will and the 'reinstatement' of the 2001 will."*

Mrs Thorpe was not a party to any of these applications.

The applications were heard over three days in November 2023 by HHJ Robin Tolson KC, alongside the divorce proceedings and an application for a non-molestation injunction. In his judgment dated 18 December 2023, the judge did not identify the validity of the 2021 will as an issue requiring determination. He found that Mr Thorpe lacked capacity to execute the LPAs and that the claimant had improperly influenced him. He also addressed the will at paragraph 51:

"I must mention the position of [Mr Thorpe]'s will. The will cannot stand. No medical professional assessed [Mr Thorpe] at the time but a lucid moment for [Mr Thorpe] seems impossible on this evidence."

HHJ Robin Tolson KC indicated that the 2001 will might need updating, and that a statutory will might therefore need to be made. His order of 19 December 2023, however, went further, both reciting that the 2021 will was invalid and providing:

IT IS DECLARED PURSUANT TO SECTION 15 OF THE MENTAL CAPACITY ACT 2005:

...

6. That [Mr Thorpe] lacked testamentary capacity to execute a Will in 2021

7. That the Will executed in 2021 is invalid.

On 11 January 2024, the Official Solicitor declined the court's invitation to act as Mr Thorpe's litigation friend. She raised a concern that s.15 appeared to permit the Court of Protection to make declarations only about a person's present capacity. She also drew attention to the statement in *Re M (Statutory Will) [2009] EWHC 2525 (Fam)* that "the Court of Protection has no jurisdiction to rule on the validity or invalidity of any will."

In an email on 15 January 2024, the judge acknowledged the point. He said that "the most appropriate course is now to remove that recital". The order was not, however, amended. In October 2025, the judge declined to amend it, on the basis that he was *functus officio*.

Mr Thorpe died on 7 February 2024, before any steps had been taken towards a statutory will. Mrs Thorpe died in May 2025. The claimant then brought a claim to propound the 2021 will.

The first defendant was Mrs Thorpe's estate (as the beneficiary under the 2001 will), which Jackie and her brother Peter were appointed to represent. The defendants challenged the 2021 will on the grounds of lack of testamentary capacity, want of knowledge and approval, undue influence and fraudulent calumny. They applied to strike out the claim, or for summary judgment, on the basis that it was inconsistent with the Court of Protection's final judgment and order. All parties were acting in person.

Master Clark dismissed the application in this case. She began from the principle that estoppels only bind the parties to the earlier proceedings and their privies:

33. However, these principles only apply where the parties to the subsequent proceedings were parties to the earlier proceedings. Judgments are only conclusive as to the issues decided as between the parties and their privies

(persons treated as having the same legal interest).

As to the Court of Protection's jurisdiction, having set out s.15 MCA 2005, she held:

38. *The wording of the section clearly, in my judgment, limits the scope of the declarations pursuant to it to the relevant person's capacity at the date of the declaration. It does not extend to declarations as to past capacity. The decision referred to in the Official Solicitor's letter dated 11 January 2024 – Re M (Statutory Will) [2009] EWHC 2525 (Fam), [2011] 1 W.L.R. 344 – records at [44(i)] the judge's endorsement that the Court of Protection has no jurisdiction to rule on the validity or invalidity of any will. [...] His endorsement, although not strictly necessary for the purpose of deciding the case before him, is to be treated as highly persuasive. In any event, the claimant has a real prospect of success in showing that the COP's jurisdiction is limited in this way.*

Having noted that a will is ambulatory and has no effect until the testator's death, she concluded:

40. *In my judgment, the COP judge's decision cannot give rise to an issue estoppel binding Mrs Thorpe's estate.*

41. *Mrs Thorpe was not a party to the COP applications. The factual findings of the COP judge in relation to those applications do not therefore bind the claimant in a claim as against Mrs Thorpe, or the defendants, who stand in her shoes in their representative capacity as her executors; nor are they admissible as evidence in this claim.*

42. *In any event, in making declarations in his order in respect of Mr Thorpe's testamentary capacity in 2021 and the validity of the 2021 will, the judge, in my*

judgment, lacked jurisdiction to do so for two reasons. First, (as the judge himself acknowledged) he had no jurisdiction under section 15 of the 2005 Act to make declarations as to capacity in the past. Secondly, and additionally, at the date of his decision, Mr Thorpe was still alive. The 2021 will had not yet taken effect and remained revocable. Issues as to the validity of the will as an effective testamentary disposition had therefore not yet crystallised; and, when they did, would be properly determinable in a probate claim, not in the COP. Whilst this lack of jurisdiction may not affect the position as between the parties to the COP proceedings, it is at least arguable with a real prospect of success that it prevents an issue estoppel from arising.

The same applied to the judge's findings in the divorce proceedings, to which the claimant had not been a party. The defendants' application was therefore dismissed. Master Clark was careful to add, though, that this "does not mean that they will not ultimately be successful in defending the claim," and that Williams J's comments were "a strong indication of the likely outcome of this claim" (paragraph 44).

Comment

Although it appears to have caused considerable stir, the decision contains nothing that should surprise those familiar with the Court of Protection's statutory will jurisdiction, but it is a useful reminder of the limits of that jurisdiction. Two points about Master Clark's first reason are worth drawing out.

1. First, the present-tense reading of s.15(1)(a) and (b) ("has or lacks capacity") is consistent with the statutory language. Section 15(1)(c) looks backwards ("any act done, or yet to be done"), but it concerns acts done *in relation to P*, not P's own past acts. Where

Parliament wanted the Court of Protection to look back at P's capacity at a particular moment, it said so: s.22 empowers the court to determine whether the requirements for the creation of an LPA were met. That is why HHJ Tolson KC's findings about Mr Thorpe's capacity to execute the LPAs were, and remained, squarely within jurisdiction. There is no equivalent provision for wills.

2. Second, the decision underlines, perhaps uncomfortably for some families, that findings of fact made by the Court of Protection do not bind those who were not parties, and are not even admissible as evidence against them in later civil proceedings. That is simply the ordinary rule set out in *Phipson* at 43-77, but it may come as a surprise to those who assume that a hard-fought Court of Protection hearing has settled matters "for good". The evidence underlying the findings can, of course, be deployed afresh. Given Williams J's observations, one suspects that the defendants may yet succeed at trial. It should also be remembered that this was a summary application.

The interaction with VAC v JAD

Master Clark was not referred to *VAC v JAD & Ors* [2010] EWHC 2159 (Ch) (also reported as *Re D (Statutory Will)*), a decision of HHJ Hodge QC sitting in the Court of Protection. That case, however, provides useful context for *Croll*, and illustrates what the Court of Protection could have done differently.

In *VAC*, Mrs D had made a number of wills, the validity of the two most recent of which was seriously disputed. Her daughter applied for a statutory will.

HHJ Hodge QC held that the Court of Protection should not itself determine whether the disputed

wills were valid. It could, however, take the doubts about those wills into account when deciding whether a statutory will was in Mrs D's best interests. In particular, an earlier will could be relevant to the wishes and feelings evidence under s.4(6)(a) MCA 2005, although no weight should be given to a will shown to have been made when P lacked capacity. The court therefore declined to rule on the validity of the later wills but, because there were serious doubts about them, authorised a statutory will which essentially reproduced the terms of the earlier 1995 will.

VAC and *Croll* therefore fit together in three important respects.

1. Both decisions recognise that the Court of Protection does not determine the validity of an existing will;
2. This does not mean that the Court of Protection must ignore concerns about an existing will. *VAC* shows that those concerns may be relevant when the court is deciding whether to authorise a statutory will. The distinction is between considering the existing will in order to decide a question within the Court of Protection's jurisdiction and making a declaration that the will is invalid.
3. *VAC* illustrates the route by which the Court of Protection could have addressed the underlying problem. It could not revoke the 2021 will or reinstate the 2001 will. It could, however, authorise a statutory will which revoked the earlier wills and, if appropriate, reproduced the terms of the 2001 will.

The practical point is therefore relatively simple. If serious doubts about P's existing will arise while P is alive, the Court of Protection should not seek to determine whether the will is valid. Instead, the court should consider whether

a statutory will application is appropriate. That application should involve the appropriate parties (see Practice Direction 9F) and, particularly where P is seriously ill or elderly, be dealt with promptly. Otherwise, questions about the existing will will ultimately have to be determined by the probate court after P's death.

PRACTICE AND PROCEDURE

Court of Protection statistics

The most recent statistics for the Court of Protection have now been published for the period April to June 2026.

In headline terms, they show an increase in applications made and decrease in orders under the Mental Capacity Act 2005 over the 3 months. There were 10,647 applications made in April to June 2026 (up by 10%) (28% of related to applications for appointment of a property and affairs deputy) and 14,540 orders made (down by 5%).

In relation to deprivation of liberty, and bearing in mind that AGNI was decided at the start of June, an early data point as to its impact can be seen in the fact that the 1,864 applications relating to deprivation of liberty under the Mental Capacity Act 2005 represented a decrease of 13% on the number made in the same quarter in 2025.⁸ There was also a decrease by 13% in the orders made for deprivation of liberty over the same period from 6,344 to 5,507. It is likely that we will see a continued – significant – decrease in applications for community DoL orders, and the position in relation to s.21A applications will be more mixed.

⁸ Unfortunately, the underlying data table does not show the breakdown of those applications.

MENTAL HEALTH MATTERS

Mental health crisis care: care of patients in emergency departments

The Health Services Safety Investigations Body (HSSIB) has published its second report into crisis care in emergency departments (following an interim report in April 2026). Mental health crisis care: care of patients in emergency departments makes a number of findings on the experience of people experiencing mental health crises in emergency departments. It notes that while people in mental health crisis constitute only 3% of ED attendances, but typically remain there twice as long as other patients. The report finds that:

- The experiences of people experiencing mental health crisis in ED can increase their distress, deterioration and risk to others.
- 'Safety risks were not experienced equally. Protected characteristics, communication and sensory needs, neurodevelopmental needs, trauma, previous experiences and wider circumstances could affect how people experienced the ED environment, how their distress and needs were understood, and how able they were to participate in care and decision making.
- Children and young people could experience prolonged waits in EDs or paediatric settings while assessments continued, when responsibility for care was unresolved, or while suitable onward provision was sought.
- EDs were often not designed or resourced to provide prolonged therapeutic mental health crisis care. Dedicated mental health spaces varied in availability, design and suitability, and there were no nationally defined service standards or built environment standards. Some mental health assessment rooms did

not meet Royal College of Psychiatrists' Psychiatric Liaison Accreditation Network standards.'

The report finds that ED staff did not always have the skills and training to care for people in mental health crises. *"Liaison psychiatry provision was variable, with differences in staffing resources, commissioning and delivery of Core 24 standards limiting timely mental health input in EDs. Limited availability of approved mental health professionals (AMHPs) and Section 12 doctors, particularly out of hours, delayed Mental Health Act assessments and exposed gaps in national oversight of statutory workforce capacity and resilience."* And *"[f]amilies and carers were not consistently involved in a person's assessment, safety planning or discharge decisions in EDs, and information shared by family members was not always used to support safety."* The exclusion of families was not always recognised.

There were significant gaps in interagency working. Information often was not consistently shared between public bodies, and ED staff and liaison psychiatrists did not have all relevant information about patients. *"Interfaces between services including police, ambulance, drug and alcohol, social care, voluntary sector and other services were inconsistent, increasing operational risk and leaving EDs managing needs beyond their intended role. Section 136 pathways were not always supported by clear ownership across police, health and local authority services, timely access to health-based alternatives, shared risk management, effective transfer of care or sustained multi-agency learning. This is reported to have become more challenging following Right Care, Right Person implementation."*

HSSIB made the following recommendations:

- HSSIB recommends that the Department of Health and Social Care/NHS England works with relevant national stakeholders, to set

out and support national minimum operational service standards and built design expectations for emergency departments. This will help reduce unwarranted variation and meet the therapeutic needs of individuals who attend emergency departments in a mental health crisis.

- HSSIB recommends that the Department of Health and Social Care/NHS England works with relevant national stakeholders, to ensure people in mental health crisis in emergency departments are kept safe by addressing the findings of this report. This programme of work should provide further support and/or guidance to address:
- clear expectations for roles, responsibilities and accountability for clinically appropriate, co-ordinated Mental Health Act assessment pathways;
- effective shared care, governance and escalation arrangements and processes to identify, escalate and review delays related to assessment, bed availability and onward care;
- arrangements to assess, plan for and assure the capacity, capability and resilience of the workforce, including access to relevant specialist and statutory professionals;
- agreed measures and reporting arrangements to monitor workforce and pathway pressures, evaluate improvement actions, identify variation in access, waiting, experience, use of restrictive interventions, and address inequalities between population groups.

This will support safe care by addressing issues in relation to clinical ownership, transfer of care, governance and escalation of patients in mental health crisis in emergency departments.

HSSIB also made observations that "[o]rganisations with responsibilities for regulation, oversight and assurance of urgent and emergency mental health crisis care can improve patient safety by using the findings of this report to review how they monitor the safety and effectiveness of care for people in mental health crisis who attend emergency departments" and "[o]rganisations with responsibilities for regulation, oversight and assurance of mental health crisis care can improve patient safety by reviewing the extent to which patients, families and carers are involved in care and decision making for people in mental health crisis who attend emergency departments. Understanding why family and carer involvement is not consistently achieved will help organisations identify opportunities to improve assessment, safety planning and discharge processes, to help keep people safe."

CHILDREN'S CAPACITY

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,⁹ 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 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*

⁹ In this case *In re D (A Child) (Abduction: Rights of custody)* [2006] UKHL 51.

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.

THE WIDER CONTEXT

Assisted dying

Lauren Edwards MP's attempt to bring back a materially identical Bill to that proposed by Kim Leadbeater MP was defeated in the House of Commons on 11 September at Second Reading.

Differences between English and Welsh law

The Law Society of England and Wales has produced an exceptionally helpful practice note on the (increasing) differences between the law in England and that in Wales across a whole range of matters. It is available [here](#).

Standard of proof for the short-form inquest conclusion of unlawful killing

The Ministry of Justice is consulting on whether it would be appropriate to consider changing the standard of proof for the short form inquest conclusion of unlawful killing from the civil to the criminal standard. This would reverse the effect of the Supreme Court decision in *R (Maughan) v Her Majesty's Senior Coroner for Oxfordshire* [2020] UKSC 46, although the MOJ emphasises that the consultation is not proposing to make any changes to the position in relation to suicide, the primary focus of case before the Supreme Court.

For more details and to respond (the deadline being 7 December 2026), see [here](#).

Short note: asserting your own capacity

KDS v EUI Ltd [2026] EWHC 2329 (KB) concerned a man, KDS, who suffered traumatic brain injuries in a road traffic accident in 2022; the claim related to a personal injury claim against the deceased defendant driver. KDS considered that he had capacity to conduct the proceedings and instruct his solicitors. When the claim was

issue, a 'professional litigation friend' was acting on behalf of KDS, pursuant to a certificate of suitability and report of a neuropsychiatrist stating that KDS lack capacity; however, no court order was made appointing the litigation friend.

Shortly after proceedings were filed, the Claimant filed his own application for the determination of capacity as a preliminary issue, supported by a witness statement from the solicitor he wished to instruct. Updated medical evidence was obtained and a hearing was to be held in August 2026. KDS did not wish to attend a hearing or make direct representations at his own preference; his legal team filed written submissions and put written questions to the medical expert, and the matter was determined on the papers. KDS asserted that he had capacity; his litigation friend took a neutral position; the Defendant essentially put KDS to proof.

The court was without detailed witness evidence from the KDS's family, but did have significant medical evidence which had been filed (which reached mixed conclusions as to whether KDS had or lacked litigation capacity, with evidence largely focusing on his ability to use and weigh information). The updating report prepared after the Claimant's application appeared to have been detailed and comprehensive, and informed by collateral information from records and KDS's family. Some of the key findings were summarised at paragraphs 30-31:

30 [...] ...Whilst recognising that the Claimant understands the roles of the various parties involved in the litigation and is capable of liaising with his solicitors, she concludes that his poor understanding of the nature and extent of his injuries, and of the way in which they affect his functioning, demonstrates a significant lack of insight. She accepts that the Claimant is capable of making straightforward day-

to-day decisions. However, complex decisions arising within litigation of this nature, involving substantial documentation and nuanced considerations, would require significant support. Dr Obinwa concludes that, if information is presented in manageable segments and reasonable adjustments are made, including the provision of regular breaks, the Claimant may be able to understand that information at the time it is explained to him.

31. [...] the Claimant's emotional difficulties, for which the litigation itself acts as a trigger, create substantial barriers to his ability to retain and process the complex information required for effective participation in these proceedings. In her opinion, he "will struggle to hold the information in mind, manipulate it in order to consider the pros and cons, and also to consider the consequences of his decision". She concludes that the Claimant is unable adequately to process, use and weigh

the information relevant to the decisions that arise in the litigation so as to make informed choices. It is following that careful and balanced analysis that she concludes that the Claimant lacks capacity to litigate.

HHJ Howells reminded himself of the presumption of the capacity, but considered the significant expert evidence in the matter, particularly the updated report prepared after KDS's application. HHJ Howells was clear that this conclusion did not mean that KDS could not make decisions in his daily life, and that litigation was itself a significant stressor, and contributed to his lack of capacity in a complex and high value claim. The judgment¹⁰ noted that his legal representatives should keep his capacity under review.

¹⁰ Which makes an interesting contrast with the decision in *TLA v Chelsea and Westminster Hospital NHS Foundation Trust* [2026] EWHC 1751 (KB) covered in the September Report, the different outcomes turning in

large part upon the quality of the expert evidence before the court.

SCOTLAND

Care should be taken in applying law applicable to children, and decisions of courts under such law, to adults for the purposes of application of adult incapacity law. Care should likewise be taken in assessing the applicability to Scotland of provisions and precedents of English law, even when they are referred to in Scottish cases. If however such care is taken, the lessons for Scots adult incapacity law can be instructive and relevant.

The decision of the UK Supreme Court issued on 9th September 2026 in the case of *DM Petitioner*, [2026] UKSC 32; 2026 SLT 867, is a decision in a Scottish case under the Child Abduction and Custody Act 1985, which incorporates Hague Convention on the Civil Aspects of International Child Abduction 1980. A single judgment was issued jointly by Lord Stephens (the only Northern Ireland lawyer currently on the Supreme Court bench) and Lord Snowden. The remaining members of the five-judge bench convened for this case, Lord Reed, Lady Simler and Lord Doherty, concurred. At the centre of the case was "H", described as a 14-year-old adolescent at the commencement of the proceedings. The judgment refers to H's father and mother as "F" and "M" respectively, M being designated "DM, Petitioner" in the title of the case. The judgment identifies four issues addressed by the court. In introducing the first issue, the court narrated that:

"Several decisions of the House of Lords and of this court establish that the child can be heard and the child's views ought to be taken into account. Doing this is consistent with, for instance, article 12 of the United Nations Convention on the Rights of the Child (1989) (Cm 1976) "the UNCRC")."

That first issue was whether the views of a child, in this case H, could be taken into account in the circumstances of the case. This article suggests the extent to which the judgment might be helpful in questions of whether an adult should be heard in proceedings under the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act"), and in relation to the interpretation of the requirement of section 1(4) of that Act that "account shall be taken" of the present and past wishes and feelings of the adult (section 1(4)(a)), and of the views of others (section 1(4)(b), (c) and (d)).

In relation to children, the provisions of the UN Convention on the Rights of the Child are applicable, incorporated into Scots law by the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 ("UNCRC"). Article 12 of that Convention reads as follows:

"Article 12

"1 States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

"2 For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

It is notable that UNCRC and sections 1(4)(b), (c) and (d) of the 2000 Act refer to "views", whereas section 1(4)(a) of the 2000 Act refers to "present and past wishes and feelings". However, all of the provisions of section 1(4) are bracketed under the requirement "account shall be taken

of", therefore it would appear reasonable to suggest that the Supreme Court would be unlikely to differentiate between children and adults if it were asked to address similar questions in relation to obligations under the 2000 Act.

A further comparison relevant to the question addressed in this article is between the law of England & Wales, and the law of Scotland, on hearing an adult (customarily "the adult" in Scotland, and "P" in England & Wales) and taking account of the adult's wishes and feelings. The Mental Capacity Act 2005 ("the 2005 Act") goes further on these topics. It seems reasonable to suggest that in doing so it does not differentiate England & Wales from the provisions of the 2000 Act, but rather goes further in suggesting what for us should represent practice, and possibly a necessary interpretation of the law, in proper application of the Scottish provisions.

Relevant provisions of the 2005 Act are these:

"4(4) He [the person making a best interests determination] must, so far as reasonably practicable, permit and encourage the person [P] to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him."

"(6) He must consider, so far as is reasonably ascertainable –

(a) the person's past and present wishes and feelings (and in particular any relevant written statement made by him when he had capacity)"

Briefly, one would suggest that, for the purposes of this article, "consider" can be equated to "taking account of". The judgment in DM Petitioner does not consider the obligation in article 12.4 of the UN Convention on the Rights

of Persons with Disabilities to "respect" the will and preferences of persons with disabilities.

Drawing all of this together, it is a reasonable conclusion that the following extract from the decision in DM Petitioner can be taken, with the substitution of "the adult" for "the child", as being applicable to proceedings under the 2000 Act in Scotland:

"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."

For more on DM Petitioner, see the Children's Capacity section of this Report.

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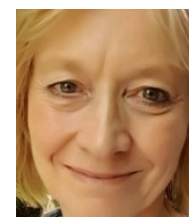
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Conferences

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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