



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

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

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

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

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Hearing views and taking account of them

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.

Adrian D Ward

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

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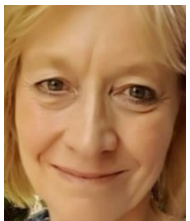
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Conferences

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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