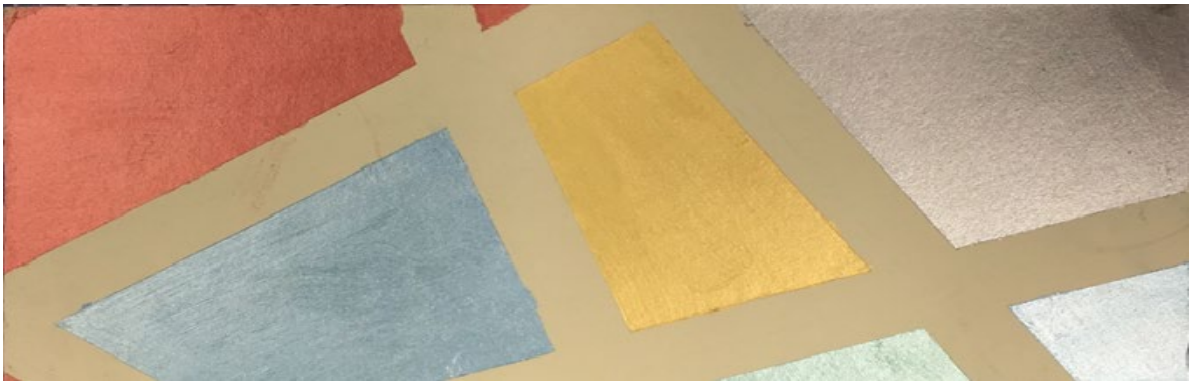
CHILDREN'S CAPACITY
November 2026 | Issue 165



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

(1) In the Health, Welfare and Deprivation of Liberty Report: key themes from post-AGNI caselaw to date, and two medical treatment decisions showing doctors getting it right;

(2) In the Property and Affairs Report: self-dealing in the rearview mirror, dismay at deputy delegation and blithe ignorance of the obligations on a deputy as regards settlement of monies;

(3) In the Practice and Procedure Report: personal welfare orders after HB;

(4) In the Mental Health Matters Report: the Mental health conditions, ADHD and autism prevalence review; and Royal College of Psychiatrists on coercion and human rights;

(5) In the Children's Capacity Report: information-sharing as regards children, and new procedural rules relating to children in ECtHR cases;

(6) In the Wider Context Report: deprivation of liberty before Strasbourg, guidance on eating and drinking at acknowledged risk, and an important change of position relating to Jehovah's Witnesses;

(7) In the Scotland Report: the death of a Bill that never was, and a new appointment for the Mental Welfare Commission.

With huge thanks to Neil Allen, we have set up a running table of post-AGNI cases allowing rapid identification of the types of scenarios being considered, and the results. The case-tracker can be found here, a page where we also host an 'AGNI annex' summarising and commenting on the cases decided in October.

All our other content that you might need – our Reports, our case-law summaries, and our guidance notes – can be found via here.

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

Scottish Contributors
Adrian Ward
Jill Stavert

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

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Children and information sharing

The DfE has published statutory guidance on information-sharing, entitled *Statutory information sharing duty guidance for practitioners and organisations providing safeguarding and welfare services for children and young people*. The guidance sets out duties pursuant to s.16LA Children Act 2004, which applies where certain individuals:

> *(a) hold* […] *information about a child or information about another individual that relates to the child, and*
>
> *(b) consider* […] *that the information is relevant to safeguarding or promoting the welfare of the child.*

A child is defined as anyone under the age of 18. The relevant individuals are (as summarised in the guidance):

- *Section 11(1) Children Act 2004 organisations (e.g. local authorities, Integrated Care Boards, NHS Trusts, the police, prison and probation services, youth justice services, and youth custody services)*
- *Designated childcare or education agencies for the purposes of section 16E3 Children Act 2004*
- *Providers delivering services pursuant to arrangements made by the above for functions relating to safeguarding and promoting welfare. This includes GPs, dentists, and other primary care providers.*

If it would not be more detrimental to disclose the information, those individuals can be under a duty to disclose that information. S.16LA(6) states that the individuals to whom it applies must have regard to guidance published by the Secretary of State; the guidance notes that '[o]rganisations and practitioners to whom the information sharing duty does not apply may find this guidance helpful for best practice, and for understanding how the statutory safeguarding framework, which they contribute information to, operates.'

The guidance summarises its key message concisely:

> *The information sharing duty applies to information that may help another relevant person exercise their functions, including assess risk, make a decision, provide support or take action to safeguard and promote the welfare of a child. Where the information sharing duty applies, organisations must share information with another organisation, or the requestor, if it is considered that sharing may help the recipient's relevant functions, including assess need, make a decision, provide support or take action to safeguard and promote the welfare of a child, including when a child potentially poses a risk to others. The information sharing duty does not apply in extremely limited circumstances*

where a practitioner, acting on behalf of their organisation, determine through professional judgement that sharing information would be more detrimental to the child than not sharing […]

The information sharing duty does not replace existing safeguarding procedures. Instead, it makes clear that legislation supports and enables the sharing of information for the purposes of safeguarding and promoting the welfare of children. This means when practitioners share information, they can now do so with confidence, even where practitioners may have previously been concerned that statutory or local thresholds were not met. When a practitioner has information to share, the type of information will determine how it should be shared – for example, whether it should be passed on as a referral or shared with another appropriate agency […]

The obligation to share under the information sharing duty, as set out below, applies to scenarios that arise after its commencement on 30 September 2026. Organisations are not required to retrospectively apply the duty to decisions on whether to share information that predates commencement but may choose to do so where need is identified, or there are ongoing concerns that have not previously been shared […]

The common law duty of confidentiality (CLDoC) does not apply to information shared in compliance with the information sharing duty, meaning that confidential patient information can be shared without consent under the CLDoC, and without the need to consider whether sharing is in the overriding public interest […]

The guidance also clearly sets out the limited circumstances in which information should not be shared due to the detriment to the child (and what circumstances do not fall within that exception):

Instances where sharing information may be more detrimental than not sharing would usually relate to at least one of the following:

- *The child being placed at immediate risk of harm by the information being shared;*
- *Interfering with a police investigation, such that the consequence is likely to be of greater detriment to a child, including placing another child at increased risk of harm – ordinarily this will not be the case; as both police information and police intelligence can and should be shared where it may assist another organisation to safeguard or promote the welfare of children. Relevant insights contained within intelligence can be shared in an appropriate, proportionate or sanitised form;*
- *Contravention of the Family Procedure Rules, or order of the Family Court or Family Division of the High Court*

Information must still be shared if concerns solely relate to:

- *Not having consent from the child/family to share information – this includes both consent under data protection law (see Chapter 3: 'Consent'), and consent to share information usually bound by the common law duty of confidentiality (see Chapter 3: 'Common Law Duty of Confidentiality').*

- *A parent being unhappy, on principle, that information was shared, or fear of criticism or complaint – the law supports the sharing of information where the information sharing duty applies, and by doing so, practitioners are fulfilling their professional responsibilities.*

- *A practitioner feeling unsure or uncomfortable – in such instances, practitioners should seek prompt advice from their manager, Caldicott Guardian or the organisation's safeguarding lead and refer to the relevant professional standards.*

- *Data protection – A child's safety and welfare is a paramount concern, and information should not usually need to be withheld for data protection purposes. Practitioners may wish to consult their Data Protection Officer and refer to Chapter 3: 'Data protection' for guidance on what is required under data protection and where to go when uncertain about compliance.*

When assessing detriment, practitioners are encouraged to consider whether it is possible to mitigate adverse consequences that might arise from sharing, so that valuable information can be shared, whilst minimising the chance of causing greater harm. This includes limiting the information shared or providing more general observations, avoiding stigmatising language, identity labels, historical narrative and untested allegations about the child, unless strictly relevant to safeguarding and promoting their welfare as set out earlier.

Where practitioners are unsure when assessing detriment, they should consider requesting information from other organisations and practitioners in order to better assess need. It is also suggested that practitioners with concerns for a child's safety and welfare should check with a manager, safeguarding lead or Caldicott Guardian if they believe detriment outweighs the benefit of sharing this concern.

We would recommend the guidance in full to any individuals who have duties under it, and it sets out clear and useful examples about how to comply with the duty.

Short note: the line between parental concern and impairment

P (A Child) (Interference with Medical Equipment) [2026] EWHC 2100 (Fam) concerned a very young child with a serious life-limiting condition who had spent most of his life in Great Ormond Street Hospital. His mother – who had autism and ADHD - was alleged to have deliberately harmed the child or put him at risk of significant harm. A hearing of disputed factual allegations took place which included that the child's mother had given false or misleading information about his health condition, had been fixated on a particular treatment pathway which was not clinically indicated, and had cut or disconnected his lines on three occasions. The court heard expert evidence that the mother's behaviour had tipped over from being anxious to interfering with treatment. This was not a case of fabricated illness as the child did have a serious medical condition, but there were concerns about the mother's conduct. The court found that the mother had tampered with the child's line on two of the three occasions, although this stood *'in marked contrast to her otherwise devoted and loving care for P'*. The reasons for the mother's behaviour would be considered at a future hearing in respect of the child's welfare, but the court noted the effect of her diagnoses on her

and the impact of having to care for a very ill child who had been hospitalised for most of his life and whose future was uncertain.

Strasbourg and children – new procedural rules

Following a consultation earlier this year, the European Court of Human Rights has adopted amendments to Rules 36 and 44 of the Rules of Court, to take effect from 25 March 2027. They provide for the possibility of appointing, in certain special circumstances, an independent representative for an applicant who is a child and, exceptionally, for a third party who is a child. The amendments do not affect the basic rules and case-law on the representation of children, but make it possible to request the appointment of an independent representative.

More details can be found here. Of note is that the initial consultation also provided for the same approach to be applied to those whose legal capacity had been 'restricted.' Many (including Alex) were troubled at the breadth of this drafting, and the extent to which it could be mapped onto (for instance) the category of those who would be considered to lack litigation capacity before the English courts. That element was not carried through into the adopted amendments, but many (including Alex) regret that the court did not take the opportunity to clarify the basis upon which it is possible for those lacking such capacity to start proceedings, as it remains worryingly ad hoc.

Editors and Contributors



Alex Ruck Keene KC (Hon): alex.ruckkeene@39essex.com
Alex has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court and European Court of Human Rights. He also writes extensively, has numerous academic affiliations, including as Professor of Practice at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.



Victoria Butler-Cole KC: vb@39essex.com
Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She is a former Chair of the Court of Protection Bar Association and a member of the Nuffield Council on Bioethics. To view full CV click here.



Neil Allen: neil.allen@39essex.com
Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. He trains health, social care and legal professionals through his training company, LPS Law Ltd. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click here.



Arianna Kelly: Arianna.kelly@39essex.com
Arianna practices in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in inherent jurisdiction matters. Arianna works extensively in the field of community care. She is a contributor to the Court of Protection Practice (LexisNexis). To view full CV, click here.



Nicola Kohn: nicola.kohn@39essex.com

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



Katie Scott: katie.scott@39essex.com

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



Annabel Lee: annabel.lee@39essex.com

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



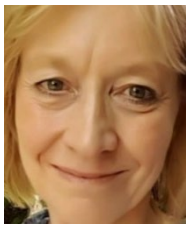
Alex Cisneros: alex.cisneros@39essex.com

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



Adrian Ward: adrian@adward.co.uk

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



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

Jill is the inaugural Executive Director (Law and Policy) at the Mental Welfare Commission, having previously been Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, as well as a long-standing member of the Law Society of Scotland's Mental Health and Disability Committee. To view full CV click here.

Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Alex also does a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in December. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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

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

Chambers UK Bar
Court of Protection: Health & Welfare
Leading Set

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Top Tier Set

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

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

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

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

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

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