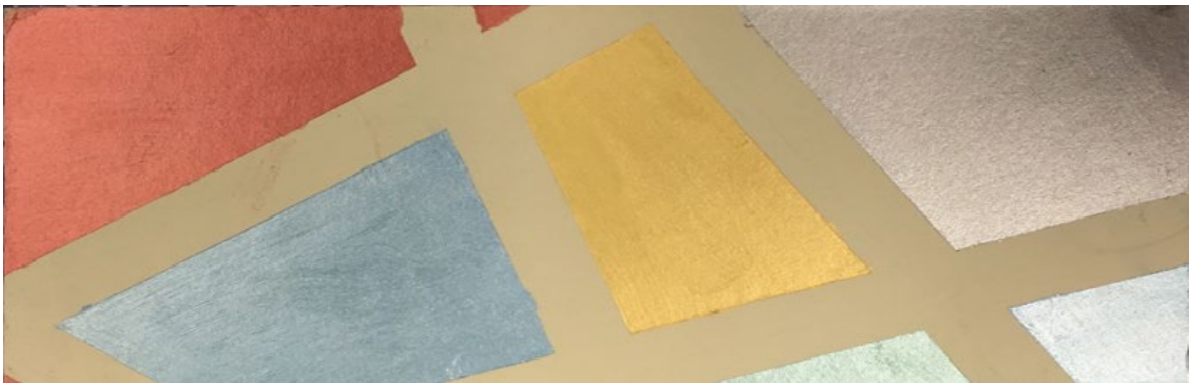


Welcome to the November 2026 Mental Capacity Report. Highlights this month include:

(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.

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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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HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

Senior Judge Hilder

Senior Judge Hilder's term as Senior Judge of the Court of Protection ended on 30 October 2026, having served for nearly 10 years – almost

half the life of the new court. All those who use the court owe her an exceptional debt of gratitude for her work in keeping the Cinderella court going on a shoestring and in the most adverse of circumstances – none more so than during COVID-19.

In her judgments, and in her work behind the scenes, Senior Judge Hilder has been vigorous in seeking to ensure that shortcuts are not taken in the interests of others at the expense of P. Her judgments – especially her recent judgments – have shed a sometimes uncomfortable light on how systems have evolved in the interstices of the law and at a tangent to the Court of Protection.

Alongside this, one task Senior Judge Hilder has expended considerable time and energy on is the creation of a Mental Capacity Justice Council, to serve as the equivalent of the Family and Civil Justice Councils; it is characteristic of her to wish to take such steps to establish a body which might well make the life of the court more difficult if it discharges its function of being a critical friend. We will keep working on this whilst Senior Judge Hilder is enjoying a very well-deserved Visiting Fellowship at All Souls College, Oxford, for two terms from January 2027, and we hope that (in whatever guise) it will be a project she can be involved in thereafter.

In the meantime, thank you, Senior Judge Hilder.

DEPRIVATION OF LIBERTY

The floodgates have now firmly opened as regards post-*AGNI* caselaw. Importantly, we are aware of two cases (*AR* and *SM*) which have been leapfrogged to the Court of Appeal. As the former is a judgment of HHJ Simon Burrows, who has delivered the majority of the judgments so far, it will be particularly interesting to see whether the Court of Appeal endorses the general approach that he has been taking.

We are aware that not everyone has time or inclination to read all of the cases being delivered at first instance, especially given that, with one exception, and as a number of judges have made clear, they represent worked examples as opposed to binding decisions in relation to principle. The exception is the decision in *Re B (A Child: Complex Needs: Deprivation of Liberty)* [2026] EWHC 2789 (Fam), which both determines a point of law (namely that the pre-*AGNI* case of *Re J* remains good law, such that local authorities cannot consent to the confinement of children in their care) and sets out a clear approach that must be followed in relation to approaching the court for authority where a child may be deprived of their liberty.

With huge thanks to Neil Allen, we have therefore set up a running table of 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.

Drawing together the key messages from the cases in the annex, they might be these:

- That assessments carried out in a pre-*Cheshire West* world are not irrelevant: if a person is not confined applying the old 'acid test,' it is inherently very unlikely that they will be confined under the multi-factorial test. However, satisfying the 'acid test' may be necessary, but is no longer likely to be sufficient;
- The need for a particular focus on the individual's lived experience of restrictions and, in particular, whether they experience those restrictions as coercive;
- That judgments around normality and participation in 'ordinary life' as part of the

multi-factorial test need to take into account what is normal for that person;

- That it will be an unusual situation in which a person is confined but is seen to be able to (and does) give valid consent to that confinement. Either they will not be confined at all, or they will be confined but are not consenting;
- That there is a need to consider alternative safeguards under Article 8 where Article 5 is not engaged – but that care needs to be taken to identify a proper basis upon which it can be said that the appointment of "rights protection" advocates under the Care Act 2014 (or Social Services and Well-Being (Wales) Act 2014) is something that a local authority can actually lawfully do (if it is falling to the local authority to secure the individual's Article 8 rights.

We also draw attention to the decision of the ECtHR in *Kaganovskyy v Ukraine (No. 2)*, discussed in the Wider Context section of this report.

In other developments, the Joint Committee has written again to the Secretary of State for Health and Social Care to identify that they remain concerned about what concrete steps the Government is taking after *AGNI* to secure rights protection.

HEALTH AND WELFARE

Giving the court the benefit of clinical judgement in the most difficult of circumstances

St George's University Hospitals NHS Foundation Trust v UJ & Ors [2026] EWCOP 39 (T3) (Theis J)

Best interests – medical treatment

Summary

This very sad case, decided in the summer, has only recently come to our attention. A 45 year old man attempted to take his own life by shooting himself in the head with a crossbow arrow. As a result, he was taken to A&E at the Trust, and underwent emergency surgery to remove the arrow and the insertion of an external ventricular drain. His body was then unable to drain the fluid his brain was producing. This had been managed by a combination of procedures including lumbar punctures, a lumbar drain, and an external ventricular drain, but this was no longer sustainable, and he therefore required surgery to insert a shunt as a permanent solution to draining the fluid; not carrying out the surgery would (as Theis J put it) "negatively impact his long term recovery," and was likely to lead to his death. The Trust made an urgent application to authorise the surgery. Theis J recorded the family's position thus:

> *18. The evidence from the family has been given in statements and oral evidence. There are detailed and moving written statement from his aunts and cousin. They speak as one voice, about how much UJ valued his independence, especially walks with his dog and his adventurous spirit. They explain that to be trapped in a body which cannot move or function independently is a fate that he would consider a living torment. The shunt cannot remove the original damage caused. That act of self-harm was a tragic expression of the deep pain he was experiencing. To undergo further surgical procedures is something he would not want, as interventions to maintain a minimal, highly compromised existence is described in the statements as a "violation of his dignity and who he was as a person". His maternal cousin describes how close they area, that he loves art in all its forms. His biggest passion is solo travel, and she describes him in her statement*

as adventurous. She brings to life his wanderlust, his phrase of choice.

19. The family have nothing but praise for the medical team, however, they consider that the medical best interests for this course of action and UJ's best interests are being conflated.

20. His cousin, EM, said that to take away his autonomy and add to his disabilities would be truly devastating to him. She considers UJ would not align with this treatment and would fight against it. In her statement she says: "To take away his autonomy, his independence and any to add of the disabilities that have been touched upon would be truly devastating to him. I say with conviction, UJ would not align with this treatment and would fight against it. I'm sure that in most cases, for most patients, this this treatment could be the best course of action. However, UJ's outlook on his own life along with his views on the world, do not necessarily align with the masses. I would like it to be considered how UJ will live out the remainder of his years beyond the proposed treatment and rehabilitation. Whilst the prognosis spectrum is exceptionally broad, I can say with confidence, that's even with the best case scenario that the medical team can predict UJ would be deeply unhappy. Subjected to lifelong disabilities, stripping him of his dignity, reliant on others for his day to day care. We cannot yet predict whether he will see, walk, talk or even have the capacity for basic human functions of feeding and toileting independently. But beyond this, my main concern is the mental load that will take its toll on UJ when, if ever, his condition allows him to become conscious enough to be aware of his state, and the immense pain and suffering that will cause him for the rest of his days. Let it be known, I understand that without the procedure, UJ will not pass away imminently, I am clear that without the procedure, UJ will live, for an unknown amount of time. A burden that we, his immediate family, will happily take on as his carer; but he will live without the awareness of his condition. At peace that before the incident, he fulfilled his goal in life. He lived it fully, independently, without apology. He lived a life less ordinary, a life that most can only dream of."

21. In her powerful oral evidence, UJ's mother recognised that her position has changed. As she set out, she initially supported the treatment proposed, but as she thought about it more, she knew in her heart that this would not be what UJ wanted. Her initial view was as a mother, not expressing UJ's wishes. She was clear in her oral evidence that UJ wouldn't want to live with a disability. Being dependent on others was not the way he lived his life, and she was sure he would want to die.

The final position of the parties at the conclusion of the evidence was set out at paragraph 5:

The position of the parties at the conclusion of the evidence was that the Trust still maintained its application, but they maintained it in a neutral way. They wanted to bring this matter before the court, and it was still their clinical judgement that this procedure should be undertaken. The family have listened to the evidence with great care, and maintained their position that they do not support the application. Simply put, they do not think it accords with UJ's best interests, including his wishes and feelings and beliefs and values if he was able to be here today. The Official Solicitor reserved her position until the

evidence had been heard. Ms Hearnden has specifically taken instructions from the Official Solicitor herself, and on a fine balance, she supports the position of the family in opposing the application being granted.

Theis J's conclusion was as follows:

32. Standing back as I have to do, this is a finely balanced decision. I have to factor in a number of matters. The importance of the sanctity of life is a powerful and compelling force. Dr A's evidence is that this procedure is the best opportunity for rehabilitation, whatever it may be, though that is largely unknown within the range indicated. Dr A's evidence highlighted the disability paradox, in that sometimes those who one would not expect to be able to gain enjoyment out of life in such circumstances in fact do. The court needs to be very cautious about any unquestioning acceptance in relation to what may be said to be UJ's views. All of those views need to be weighed in the balance. There is no dispute in reality about the evidence from the family about wishes and feelings and beliefs and values. Their written evidence is thoughtful, considered and reasoned. They have known UJ over many years, in many different and difficult circumstances. They should be given considerable weight. They speak with one voice that he wouldn't want the procedure. I have to recognise that this is not from UJ himself, and what he would think now, following three months in hospital is still unknown. They are reporting a position prior to the incident in April, and one has to be cautious as to what Ms Hearnden describes as the 'detective position' in trying to second guess what his view was on 24 April 2026, and whether he really did intend to end his life. It is right to record that the attempt was of a different nature to his previous attempts, with UJ having taken the additional steps to write 'DNR' on his chest and arms to make it clear on what he thought.

33. Each case is fact-specific, by definition, and the court has to weigh very carefully in the balance the importance of the sanctity of life and wishes and feelings, with no direct evidence from UJ. The court also needs to look at the quality of the evidence it does have about what his wishes would be.

34. I have reached the very sad conclusion that the application for the Trust should be refused. I recognise the sanctity of life and consider that even though it does give him some prospect of recovery, it is a recovery with a wide spectrum, which I have to view in the context of the evidence from the family, which I accept, about what his wishes and feelings and beliefs and values are likely to be.

35. My conclusion is that this is not a procedure he would support or want to take place. For those reasons, with very great sadness, I refuse the application.

Conclusion

It is hardly surprising that, as Theis J made a point of recording, Counsel for the Official Solicitor sought specific instructions from the Official Solicitor herself before advancing the proposition that it was not in UJ's best interests to undergo the surgery proposed by the Trust, given the sensitivities around a situation which could by some – but wrongly – be characterised as "suicide by doctor."

It is also hardly surprising that Theis J also expressed the need for caution before simply

accepting unquestioningly what might be said about UJ's views.

However, it is difficult when reading the (admittedly short) judgment not to feel that the approach in this case entirely captured the point of the best interests exercise. And one reason that this might have been is that this is a case in which the doctors did exactly what we would hope: i.e. to deploy their clinical judgement to set out what the right course of action clinically would be, enabling (in this instance) Theis J to stand in the shoes of UJ to make an informed decision as to whether or not to accept that advice, taking account not just the clinical input but also the wider picture. It therefore stands in interesting contrast to the decision in the *MSP* case where (as Alex has discussed here) a strong case could be made that the doctors abdicated their responsibility to set out the full clinical picture, disabling the court from making a truly informed decision as to whether life-sustaining treatment should continue. The decision in the *Epsom* case has not helped the cause of trying to ensure that doctors do not simply short-circuit the exercise of their clinical judgment in pursuit solely of trying to identify the patient's presumed wishes. We would find that unacceptable (and indeed potentially negligent) in respect of a capacitous patient; it is not obvious why the incapacitous patient should not equally be required to benefit from the exercise of that clinical judgement.

Short note: responding appropriately to the physical health needs of those with mental health conditions – a case study

Barts Health NHS Trust v CG [2026] EWCOP 55 (T3) is a relatively 'routine' serious medical treatment case, which Theis J identified was rightly brought because of the level of proposed restraint required both pre-operatively and post-operatively to secure the safe carrying out of keyhole surgery (an endoscopic transsphenoidal resection) on a 59 year old man, CG, suffering from a large pituitary macroadenoma. CG, who had a diagnosis of paranoid schizophrenia, consistently refused the procedure "aris[ing] from his fixed belief that he does not have a tumour and that his difficulties can be cured by obtaining a new pair of glasses." That fixed belief meant that he lacked the capacity to make the decision whether or not to undergo surgery.

One passage in the judgment stood out for us. At paragraph 28, Theis J held that:

> *Having considered the evidence I am clear that CG's best interests are served by making the necessary declarations to permit the procedure to take place. This procedure is the standard treatment option, **and CG should be placed in no worse position due to his lack of capacity than anybody else requiring this procedure**.* (emphasis added).

The plan advanced by the Trust would – potentially – mean that CG's experience in undergoing that 'standard treatment option' might be very different to anyone else. However, in the face of so many cases in which 'freezing' has taken place in the context of those with mental health conditions, leading to them suffering serious harm, if not death, in consequence of their comorbidities because of failures to take forward the standard assessment / treatment protocols for such comorbidities, it is refreshing to see the discrimination inherent in such situations identified and, in this case (we hope) avoided.

For help in avoiding these situations more broadly, we strongly recommend this guidance from SCIE: Get me to hospital.

PROPERTY AND AFFAIRS

Self-dealing through the rearview mirror

Irwin Mitchell Trust Corporation v PW & Anor [2026] EWCOP 53 (T2) (Senior Judge Hilder)

Deputies – property and financial affairs

Summary

This judgment followed on Irwin Mitchell Trust Corporation v PW & Anor [2024] EWCOP 16 ("the First Judgment") which concluded that the appointment by Irwin Mitchell Trust Corporation ("IMTC") of IM Asset Management Ltd ("IMAM") as investment manager for an individual, PW, was a breach of the self-dealing rule. This earlier decision affected 260 individuals whose deputyships were held by IMTC, and whose funds were managed by IMAM. Further hearings were held to consider the applications made by IMTC for retrospective and prospective ratification of these appointments; these applications were opposed by both the Official Solicitor and the Public Guardian.

Since the First Judgment, the Irwin Mitchell Group had sold IMAM, such that HHJ Hilder considered that, from 30th May 2027, the conflict of interest which gave rise to the First Judgment will no longer exist. in respect of prospective ratification:

> *a. the parties have agreed, and the Court has authorised by order made on 4th May 2026, a scheme which 'manages' the conflict in so far as it continues until 30th May 2027 in respect of 260 other persons for whom either IMTC or an individual employee of the Irwin Mitchell Group acts as property and affairs deputy;*
>
> *b. in respect of PW herself, the positions of the parties are not crystallised, pending determination of the retrospective ratification issue.*

This further judgment was divided into issues relating to the prospective ratification agreement and retrospective ratification.

Prospective: The issues around prospective ratification did not consider PW's circumstances, but the other 260 individuals "*for whom either the Applicant Trust Corporation or an individual employee of the Irwin Mitchell Group is currently appointed as property and affairs deputy and as such has appointed IMAM as investment manager. Notwithstanding the sale of IMAM, the prospective ratification question still arises for these 260 individuals because of the terms of the sale agreement*" (paragraph 17). The details of the sale were not set out due to commercial sensitivity, but the court and parties "considered that the terms of sale of IMAM mean that there is potential for a continuation of the breach of the self-dealing rule until 30th May 2027" (paragraph 18). The parties had agreed a scheme (and submitted it to the court for its approval) to manage this conflict of interests, "*essentially that an Independent Financial Adviser with appropriate Court of Protection and personal injury expertise will conduct a high-level independent review of the general suitability of investment arrangements*" (paragraph 20). For each of the 260 individuals, they and one person with an interest in their welfare were to be notified of this arrangement, along with the court's order and an explanatory letter. The purpose of the scheme was temporary:

> *22. In substance, this arrangement 'holds the ring' – managing the continuing conflict of interest for a defined period so as to avoid necessity for hurried reorganisation of many deputyships at once – until there can be full individual reviews in light of this judgment.*

The retrospective ratification took place in respect of PW alone, but it would appear likely to be the basis of consideration of this issue in the other matters. Senior Judge Hilder noted the basis on which the court approached the matter:

> *25. Retrospective ratification means the waiver by the Court of claims that PW has or may have against IMTC or IMAM in respect of the breach of the self-dealing rule. By agreement of all parties, I approach the decision whether or not to ratify on the basis of the following assumptions ("The Assumptions"), which have been set out in recital E to the order made on 7th June 2024:*
>
> *a. that the performance of PW's investments during their period of management by IMAM have been such as would have been achieved by a reasonable and experienced investment manager; and*
>
> *b. that the fees and charges charged by IMAM in respect of PW during this period were such as would have been charged by a reasonable and experienced investment manager.*

HHJ Hilder identified how, "*because the Court is standing in the shoes of PW, it is possible for the Court to impose terms or conditions on any ratification. However, the person whose act may be ratified is not obliged to accept the terms or conditions. If the terms are not accepted, there is simply no ratification*" (paragraph 28). PW did not have an understanding of the matters so as to be able to express wishes and feelings. PW's husband was very positive about the work of the deputy, but raised a concern that he did not want to incur extra costs as a result of instructing IMAM as a fund manager (relative to other fund managers).

On behalf of PW, the Official Solicitor opposed a 'blanket' ratification, and wanted to consider whether PW was entitled to compensation. The Official Solicitor's argument was set out at paragraph 34 of the judgment:

> *a. 'this is not, therefore, a case of an inadvertent breach of the strict self-dealing rules, rather it is a case where IM has quite deliberately – and in the face of the decision in Re MWS – grown a business model based upon the appointment of its own asset management business for incapacitated individuals." [**ps para 5**]*
>
> *b. IMTC has not 'only just discovered it has committed a technical breach….it has been (or ought to have been) aware since 2015 that the appointment of IMAM was a breach of the rule.' The OS sees no justification for saying that such conduct is not deserving of sanction. [**ps para 13**]*

The Official Solicitor considered that PW had claims with a real prospect of success against IMTC and IMAM, and did not consider that a waiver of the claims was of benefit to PW. The Official Solicitor considered that the likely quantum of such a claim was "*all of the fees and charges levied by IMAM throughout its period as investment manager. From the evidence filed, for the period from IMAM's appointment until the end of 2023 and not including the amount paid to third parties, this amounts to £37 647 [**229**] – "not a small sum of money" [**ps para 9**]*" (paragraph 36). The Official Solicitor was open to the possibility of a commercial settlement to this claim (proposing a settlement for 70% of the claim in correspondence), but it was agreed by all parties that if ratification did not take place, IMTC would need to be removed as deputy as it would be infeasible to pursue these claims with IMTC as deputy. The Public Guardian fully aligned herself with the Official Solicitor.

IMTC accepted the conclusion of the 2024 judgment, and was clear that both IMTC and IMAM wished to preserve the relationship between PW and IMTC (and avoid litigation over these issues). They noted that neither PW nor her husband had strong views about this matter, and wished for the court to determine what should happen. IMTC raised concerns that the family had not been advised of the full range of outcomes of PW bringing proceedings, but had instead had the high-water mark of potential recovery figures in litigation put to them. IMTC considered the likely quantum of recovery was much lower than the total charges raised by IMAM, as allowances would be made for the expenditure incurred in realising profits for PW and the fiduciary's own work and skill. PW's recovery would not be "*to punish the fiduciary but to prevent them from obtaining an advantage from their breach*" (paragraph 47(b)(iii)). IMTC noted that the likely profit was more in the range of £9,000-£9,500 over a six-year period, and that this would be the 'ceiling' of the claim. It was also emphasised (paragraph 47(f)) that:

> *this is not a case where there has been any dishonesty, bad faith or surreptitious dealing. IMAM worked diligently for PW's benefit, providing full consideration for the fees that were charged. Had IMAM not been appointed, PW would still have incurred similar charges with an alternative investment manager. 'This is a paradigm case for a generous allowance to be made for IMAM's work and skill….such an allowance would either eliminate the claim entirely or (at best from PW's perspective) reduce it to a very modest amount.' [**ps para 15(5)**]*

HHJ Hilder summarised IMTC's position at paragraph 50:

> *Overall, IMTC's primary position is that it is in the best interests of PW to provide retrospective ratification of its appointment of IMAM, without any terms/conditions, on the following grounds [**ps para 16**].*
>
> *a. it allows the deputyship relationship to continue;*
>
> *b. it is not in PW's best interests to pursue uncertain litigation;*
>
> *c. drawing a line under the past breach of the self-dealing rule enables both parties to move on from the current situation;*
>
> *d. the conduct of IMTC and IMAM has been honest and reasonable, the connection between the two never hidden but disclosed in in annual deputyship reports; and the 'reasonableness' should therefore be considered in light of the fact that the OPG as statutory body responsible for supervision of deputies took no action about it because it accorded with policies the OPG was applying at the time;*
>
> *e. IMAM provided full consideration to PW for the fees and charges it rendered. Had a different investment manager been appointed, PW would have been paying similar fees. PW has not been disadvantaged in any way by the breach of the self-dealing rule;*
>
> *f. the resource implications of refusing ratification would have a direct, negative consequence for PW – "it cannot be in PW's best interests to be placed in the position of requiring a new deputy if there are a large number of other Ps in a similar position at the same time, and insufficient deputies available to take up this work".*

In the event that the court was minded to grant ratification, IMTC proposed that this be in the

amount of 75% of IMAM's assessed profits, or approximately £6,750.

At paragraph 53, Senior Judge Hilder considered that the main issue around retrospective ratification was "*dominated by* [the parties'] *different approaches to likely quantification of any claim which PW has against IMTC to account for profits gained as a result of the conflict of interest:*

> *a. IMTC says that such claim will be based on net profits ie payments received from PW minus VAT, third party disbursements, a share of IMAM overheads/expenses and an allowance for skill and care undertaken – "**the profits approach**";*
>
> *b. the Official Solicitor (with the Public Guardian in alignment) says that such claim is based on net receipts ie payments received from PW minus VAT and third party disbursements but without any deduction for overheads/expenses and with very limited likelihood of any discretionary allowance for skill and care undertaken – "**the receipts approach**."' [53]*

In PW's case, the difference was approximately £18,500. HHJ Hilder did not reach a view on quantum, as this was not a matter for the Court of Protection, and noted that it was open to either party to make those arguments in the civil court. She did consider that PW "*has a real claim, with real value (albeit presently unquantified) – and that is a factor which I must weigh in the balance when making a 'best interests' determination as to whether IMTC's breach of the self-dealing rule should be ratified*" (paragraph 56). Given that PW had significant assets, while the higher sum proposed by the Official Solicitor was significant, it was not "*likely to be a life-altering one for PW*" (paragraph 57). However HHJ Hilder was also mindful that "[i]*f IMTC's approach were to find favour, the figure is so much lower that, bearing in mind the disruption to deputyship arrangements which would be required (see below), the compensation 'victory' might even be considered pyrrhic*."

Senior Judge Hilder considered that:

> *58.* […] *the amount of compensation which PW may receive from her prospective claim weighs less heavily in the scales than the existence of the claim. That is, it is more important that PW's claim is recognised than that it is pursued to its fullest possible extent. I count it as a factor against ratification that ratification would – at least unless some condition of compensation is attached – extinguish PW's claim. And I give considerable weight to the position of PW's own representatives in these proceedings, that her claim should not be given up.*
>
> *59. In the absence of ratification, I consider that PW is likely to be adversely affected to some extent, because a settled and positive relationship with her deputy will have to end. Dispute will continue and litigation be required. All parties accept that in those circumstances, IMTC could not continue to act as PW's deputy. Even if, as her representatives in these proceedings contend, the further litigation itself need not impact on her day to day experience, getting to know a new deputy will. There is adversity in that, but how much?*
>
> *60. There would inevitably be some financial cost involved in changing deputy, whilst the new deputy 'gets up to speed' with the requirements of getting to know PW and managing her estate. Other detriments are likely too, in terms of confidence, morale, stress etc. The best indication of these comes from Mr. W's observations to the Official Solicitor's representative, as outlined above. He does not want his wife to lose out, but neither is it for them simply a*

> *monetary consideration – their past relationship with Irwin Mitchell is valued…. I conclude that changing deputyship would incur some financial cost for PW and some disruption, but not so much as to amount to a 'magnetic factor' in the Court's determination.'*

Senior Judge Hilder ultimately included a balance sheet table to weigh up the different factors:

A. In favour of ratification	B. Against ratification	C. Not to be weighed
1. Continuation of existing deputyship relationship	1. Gives up claim of real (unquantified) monetary value - recognition more important than (unquantified) amount	1. Punitive sanction
2. End of dispute and associated uncertainty - level of disruption not so great as to amount to the magnetic factor	2. PW's her legal representatives oppose ratification - PW and her husband consider that court should decide	2. Resource implications
3. The Assumptions - no loss caused to PW's estate		

Senior Judge Hilder stated that she was *"not persuaded that any of the factors in column A, either individually or collectively, justify complete abandonment of PW's potential claim, contrary to the considered position of her legal representatives. Therefore, IMTC's primary position does not succeed*" (paragraph 67). However, these factors "*do carry sufficient weight to conclude that the Court should do what it can to bring about a situation where both PW's claim is recognised and the positive deputyship relationship is maintained, which is her representatives' preferred outcome. The mechanism for that is conditional ratification. In my view, it would be in PW's best interests that IMTC's past breach is ratified on condition that IMTC pays back into PW's funds an appropriate amount to recognise her claim*" (paragraph 68).

Senior Judge Hilder considered that the 'receipts' approach was the method to be adopted, "b*ecause that is the methodology preferred by PW's own representatives. They have very considerable experience, and their position is that they serve PW's interests best by pursuing her claim on this methodology, even at the potential cost of disrupted deputyship*" (paragraph 70). However, "*the discount should be more than 30%, because that has already been insufficient to produce agreement, which suggests some risk that IMTC may choose not to accept the condition. The discount should be not so far less than the Official Solicitor's open position that the reasoning of PW's representatives is lost, but it should be sufficiently less that IMTC now sees merit in accepting the condition. In my view, both considerations should be met by a reduction of 40%"* (paragraph 70), leaving the ratification open to IMTC at 60% of the higher valuation of calculating the claim. If IMTC did not accept this, Senior Judge Hilder found that "*its appointment as property and affairs deputy for PW must be discharged so that PW's claims in respect of the unratified breach of the self-dealing rule can be pursued elsewhere*" (paragraph 71). Questions of prospective ratification would only arise if the

retrospective ratification were accepted, and Senior Judge Hilder set a timetable for IMTC to give this notification, along with inviting the parties to suggest a timetable for seeking relevant directions in respect of the 260 or so other cases raising the same issues.

Comment

It was inevitable given the First Judgment that IMTC was going to be in for (to use a technical term) a rocky time of it. The decision by Irwin Mitchell group to sell the 'offending' IMAM was also perhaps an inevitable consequence of the judgment. What we do not know at the time of writing is whether IMTC had, in fact, agreed to the conditions imposed by Senior Judge Hilder. If they have not, and if matters are then potentially taken to another jurisdiction on PW's behalf, it will be interesting to see whether the veil of privacy around what would ordinarily be highly confidential matters will continue to be pierced (it would, for instance, be highly unlikely that any compromise agreement endorsed pursuant to CPR Part 21 by the civil courts in litigation in the former Chancery Division would be made public).

Deputyship, delegation and judicial dismay

The London Borough of Bromley v the Public Guardian [2026] EWCOP 58 (T2) (Senior Judge Hilder)

Deputyship – property and financial affairs

Summary

Senior Judge Hilder delivered this judgment on her last day in post. It concerned whether the functions of the deputy for property and affairs (the authorised officer of the London Borough of Bromley – 'Bromley') for various 'Ps' had been improperly delegated pursuant to a contractual arrangement Bromley had with Liberata to undertake certain practical tasks of deputyship.

The judgment sets out the legal background against which this case was being determined. Senior Judge Hilder emphasised that deputyship is unequivocally a form of agency, where the deputy is the agent and, where the Court of Protection exercising its jurisdiction on behalf of P, is the principal. Senior Judge Hilder rehearsed a cardinal principle of the law of agency, namely that an agent may not delegate his authority in whole or in part except with the express or implied authority of the principal, and made clear (at paragraph 30) that:

> *An agent may be expressly authorised to delegate or may have implied authority to do so in certain circumstances, or – after the event - the agent's act may be ratified. In each scenario, the authorisation is by the principal. Therefore, in the context of deputyship, ratification is a matter for the Court of Protection. An agent cannot 'ratify' its own acts.*

Senior Judge Hilder then went on to examine the law in relation to ratifying the deputy's act as agent after the event, concluding that "*ratification by the Court of Protection of actions taken by a deputy outside their authority is a 'best interests' decision, to be taken in accordance with the principles of section 1 of the Act and the requirements of section 4 of the Act*" (paragraph 32).

The analysis of the contractual relationship between Liberata and Bromley comes next. In short, the contract transferred to Liberata 22 members of the Council's Financial Assessment Teams and Appointeeship & Deputyship Team and specified that a wide range of tasks concerned with the deputyship were to be exercised by Liberata. As Senior Judge Hilder noted:

- There was nothing in the contractual documentation "which gives any consideration to the meaning and effect of deputyship authority conferred by the Court of Protection. There is no recognition of the personal and fiduciary nature of the appointment" (paragraph 41).
- The contractual documentation envisaged Liberata '*managing*' all the 'functions permitted/required as set out in the Court order. And specifically, it was envisaged that Liberata had at least some direct engagement with the person for whom a deputy is appointed ('P');
- The contractual documentation did not address any question of delegating deputyship authority, or the implications for the discharge of deputyship functions from the expectation that transferred employees would no longer be part of the appointed deputy's organisation.

Perhaps most critical however, was the fact that the contractual documentation does not address the question of <u>who</u> was making the best interests decisions about the finances of the Ps in question. As Senior Judge Hilder asked at paragraph 50:

> *Setting up direct debits or standing orders sound like ministerial tasks but who is deciding what such arrangements need to be made? Who is deciding whether or not it is in the best interests of P to make other, irregular payments? Who is making any decision, for example, about whether to accept any of the 'offers received' in a sale of property after they have been 'reviewed' by Liberata? Who is deciding whether to 'accept the referral' for a Community Funeral after Liberata has received it and carried out any necessary property search?*

Having considered the contractual arrangements and the witness evidence, Senior Judge Hilder had this to say at paragraph 53 (with some, understandable, frustration):

> *I found it difficult to form an understanding about how the contractual arrangements work in practice. My overall impression is that, after the implementation of the arrangements with Liberata, the people who were previously directly employed by Bromley to do deputyship work carried on going to the same workplace, doing the same tasks, with the same employment terms and conditions, and nobody directly involved in Bromley deputyships considered that anything significant had changed.*

There was even some confusion in the evidence as to who "*the authorised officer for property and affairs deputyship for the London Borough of Bromley*" was, i.e. the individual who was actually holding the deputyship appointment. After some reconstruction work, Senior Judge Hilder found as a matter of fact that it was Bromley's Director of Adult Social Care.

Senior Judge Hilder went on to state that clearly Bromley's Director of Adult Social Care "*is not expected to undertake every task of every deputyship personally, but I found it difficult to extract any clear explanation of how her deputyship functions are actually performed*" (paragraph 56).

It was Bromley's position that it had not delegated decisions to a service provider and that it had acted properly by doing no more than outsourcing functions (such as routine tasks and administrative work associated with managing the individual's finances and assets) over which it had supervision.

Senior Judge Hilder did not accept that the evidence submitted by Bromley reflected the

reality of what was happening on the ground. "*Rather, in my judgment, it reflects an understanding of deputyship which has only been reached during and through these proceedings. I have no basis for being satisfied that this understanding has yet become manifest 'at the coal face*" (paragraph 105).

Senior Judge Hilder then went on to analyse the evidence provided by the OPG, who had concluded that not only was Bromley one of the best performing local authority deputy teams (presumably in the country), but also that Bromley have been acting in accordance with the OPG's Deputy Standards; Practice Note SD12 and the MCA Code of Practice. Senior Judge Hilder considered that, in parts, the OPG evidence was incomprehensible, and strikingly, that there was a complete absence of any recognition that Liberata UK was a third party organisation. The OPG saw them as one and the same as Bromley, and had concluded that *"*[t]*he deputy has not delegated their discretionary decision-making responsibilities to Liberata*" (paragraph 68). The ultimate position taken by the OPG was that the threshold for a finding of improper delegation from Bromley to Liberata under the Act and Guidance was not met.

Senior Judge Hilder held as follows:

- The "outsourcing" of the services and tasks set out in the contractual documentation amounts to the London Borough of Bromley purporting to give at least some tasks which arose on appointment of its authorised officer as deputy to a third party.
- Authority for the outsourcing could not be implied from the making of the deputyship appointment. Nor was it an instance of permitted delegation within a large organisation as Liberata UK was a separate organisation to the London Borough of Bromley.
- While the contractual documentation gave rise to the possibility that Liberata's involvement was limited to ministerial acts, "*the evidence gives rise to real concern, in respect of anything other than the biggest of decisions with Bromley's deputyship cohort (eg sale of property), either that it is not in fact being understood that way or that proper best interests decisions are simply not being made*" (paragraph 104).
- The evidence did not establish that there was a best interests decision making pathway within the Deputy's organisation (i.e. Bromley), and in particular the evidence did not explain how, even if social workers at Bromley were making financial decisions such as setting personal budgets (which Senior Judge Hilder was somewhat doubtful about), this translated into a best interests decision made by the Deputy.
- Further, the evidence suggested that Liberata were in fact making financial best interests decisions on behalf of P: *"the tasks assigned to Liberata could be permitted delegation as 'ministerial acts' but I am not satisfied that arrangements on the ground are actually happening that way. There is scope for 'mission creep', and no evidence of robust decision making structures to avoid that, or of sufficiently detailed reporting and oversight to enable proper supervision of that*" (paragraph 106)
- Senior Judge Hilder expressed herself "*satisfied that the contractual arrangements between Bromley and Liberata UK are capable of operating as permitted delegation of ministerial acts. However, I am not satisfied that this has always been*

> *understood or manifested*" (paragraph 111).

The judgment ends by noting that the OPG's view that Bromley's clients were assessed as receiving an excellent service, therefore "*it is right for the Court to be cautious about 'ruining a good thing' by excessive proceduralism. Nonetheless, statutory requirements must be upheld. Deputyship is a fiduciary relationship, and fiduciary obligations apply*."

In the course of setting out a way in which Bromley could provide evidence to the OPG (on a cohort basis) to enable it to undertake appropriate supervision going forward (and to allow it to identify any situation in which Liberata had exceeded its ministerial authority), the judgment also set out (at paragraph 107) a checklist of evidence which would serve as a useful tool for any local authority utilising a similar contractual arrangement.

Comment

The judgment is an interesting read for a number of different reasons. The first is because of the way that it came before the court. It appears that the arrangement between Bromley and Liberata came to the attention of one of the resident Tier 1 Judges at First Avenue House in the course of welfare proceedings concerning a P called 'BJ' in January 2024. Thereafter it was the court very much driving an investigation into this practice, which probably explains the very difficult procedural journey there was between the court first making directions to allow it to investigate the arrangements in January 2024 and being (finally) ready for hearing in May 2025. As Senior Judge Hilder said at paragraphs 94 and 95 of the judgment:

> *94. My overriding impression is that both parties have considered throughout that the contractual arrangements under scrutiny "work", in the sense that the estates of all Ps are being managed without issues or complaints arising; and therefore, they have responded to the issue raised by the District Judge with a shared attitude that questions as to whether the arrangements meet legal requirements are intrusive and unhelpful.*
>
> *95. Regrettably, and unusually, I am concerned that the Court has not been given the well informed, focussed submissions of law that it would usually expect, despite assurances and active objection to appointment of an amicus. Arguments which are clearly wrong, such as that the deputy could ratify her own delegations, have persisted for far too long. Obtaining evidence of what actually happens in Bromley once a deputyship appointment has been made has taken repeated directions. The evidence from the Office of the Public Guardian was that the person with supervisory responsibility for the deputyships in question only appreciated a difference between the entities of Bromley and Liberata on the occasion of the third hearing. None of this is satisfactory. It has made the Court's task considerably more difficult.*

The case also exposes the OPG's practice of directing those that it supervises to seek 'advice' from Court staff – specifically relied upon by the OPG:

> *100. For the avoidance of doubt, neither "the Court" nor any of its staff has any standing to give "advice". That was the case in 2014 and in 2015, just as it is the case now. Nothing that any member of the Technical Specialist Team, or any*

> *"Court Appointed Officer",*[1] *may have said or written in an e-mail has any determinative authority on issues of delegation or how a public authority discharges the functions of deputyship. The OPG should have understood that in 2014 and 2015, and should be clear about it now. Like every other court, the Court of Protection speaks through judgments and orders, with a clear appeal structure.*

It is unsurprising given the procedural history in this case that the OPG came in for some criticism. These were expressed in typically measured style, but there should be no doubt that Senior Judge Hilder had serious misgivings about the failure of the OPG to have grasped the difficulties with Bromley's arrangements with a third party (particularly as this is a practice that has been deployed by other local authorities):

> *102. I do not suggest that any persons involved had anything less than positive intention to promote the interests of Ps but the admitted 'struggle' on the part of the body with statutory responsibility for oversight of deputies to see any significance in contractual arrangements between two different bodies is, frankly, cause for dismay.*

Blithe ignorance (1)

Zedra Trust Company (UK) Limited v Graham David Tustain [2026] EWHC 2578 (BP) (High Court (Business and Property Division) (Chief Master Shuman))

Other proceedings – Chancery

Summary

Section 20(3)(a) MCA 2005 provides that a deputy "*may not be given powers with respect to* […] t*he settlement of any of P's property, whether for P's benefit or for the benefit of others*." This decision of Chief Master Shuman shows what happens when that limit is ignored. Six discretionary settlements made by a property and affairs deputy in 2011, without an order of the Court of Protection, were declared void *ab initio*, together with associated loans of more than £2.7 million. Although the assets had been administered as trust property for many years, the beneficial interest in them had never left P.

The consequences for the professional trustee are dealt with in a separate judgment: *Zedra Trust Company (UK) Limited v Graham David Tustain (Section 61)* [2026] EWHC 2576 (BP), which we note below.

Mr Tustain had lacked capacity to manage his property and affairs since a brain injury in about 1984. Nigel Yeadon, a solicitor, became his receiver in 1993 and, when the MCA 2005 came into force, his deputy. An Extended General Order made in 2006 had expressly withheld authority to execute a settlement on Mr Tustain's behalf without a further order.

In 2010, Mr Tustain won about £4.4 million on the National Lottery. Mr Yeadon applied to the Court of Protection for further authority, putting forward proposals that included a discounted gift trust. The order made on 5 July 2011 appointed him deputy with general authority and referred to a discounted gift trust. A further order

[1] A footnote at this point reads as follows: "[i]t is assumed that this is intended to be a reference to 'Authorised Court Officers', a role which was introduced by the Court of Protection (Amendment) Rules 2011 (SI 2011/2753) with effect from 12th December 2011. This role is held by civil servants who have been authorised by the Senior Judge or the President so to act. The authorisation enables them to exercise the jurisdiction of the court, limited in accordance with a Practice Direction effectively to strictly defined, non-contentious property and affairs applications."

in October 2011 authorised gifts of £50,000 to each of Mr Tustain's seven siblings.

In November and December 2011, Mr Yeadon executed six discretionary settlements on Mr Tustain's behalf. Under five of them, more than £2.7 million of Mr Tustain's money was lent to the trustees, unsecured and interest-free. The beneficiaries were his siblings and their descendants; Mr Tustain himself was expressly excluded. The trustees included Barclays Bank Trust Company Limited, now Zedra, the claimant.

No order authorising the settlements was ever made. The trusts were administered for years, and £133,000 was distributed to the siblings, before the problem came to light in late 2020. On Zedra's Part 8 claim, which Mr Tustain's current deputies supported, Chief Master Shuman granted the declarations sought.

The July 2011 order's reference to a discounted gift trust did not help: "[a] *discounted gift trust and a gift-and-loan trust are materially different structures*" (paragraph 41). The settlements engaged s.18(1)(h) MCA 2005, a power that s.20(3)(a) MCA 2005 reserves to the court, and required a further application, which was never made. Chief Master Shuman held that they were void, not merely voidable, because the defect went to the existence of authority rather than the manner of its exercise:

> *54. The Court's involvement is therefore not merely supervisory. The Court's approval supplies the authority which permits the disposition to occur. The statutory scheme contemplates that the settlement derives its legal foundation from that approval.*

In reaching this conclusion, Chief Master Shuman drew support from *Re Beaney* [1978] 1 WLR 770, among other authorities. As the settlements were void, the trustees held the assets on a resulting trust for Mr Tustain, which arose by operation of law (see paragraph 74). The loans, which fell outside both Mr Yeadon's investment powers and the authority granted in relation to gifts, were also void ab initio (see paragraphs 78–79).

Comment

Section 20(3)(a) MCA 2005 means that a deputy can never be given power to settle P's property, however widely their general authority is drawn. Only the court can decide that a settlement should be made, and its order must cover the settlement actually executed.

Zedra shows how easily that can be missed. The restriction had been spelt out in the 2006 Extended General Order, and the July 2011 order referred to a discounted gift trust. But those involved treated the settlements as part of Mr Tustain's investment and estate planning, and no one went back to the court when the plan changed. Deputies and their advisers should read an order for what it actually authorises. If the plan changes, they should make a fresh application before anything is signed.

Because the defect went to the existence of authority, the settlements were void, and nothing done afterwards could cure them. Some fifteen years of administration must now be unwound and, as the s.61 judgment shows, much of the cost falls on Mr Tustain's own estate.

Blithe ignorance (2)

Zedra Trust Company (UK) Limited v Graham David Tustain (Section 61) [2026] EWHC 2576 (BP) (High Court (Business and Property Division) (Chief Master Shuman))

Other proceedings – Chancery

Summary

In *Zedra Trust Company (UK) Limited v Graham David Tustain* [2026] EWHC 2578 (BP) (discussed above), Chief Master Shuman held that six discretionary settlements made in 2011 by Mr Tustain's then property and affairs deputy were void *ab initio*, because the Court of Protection had never authorised them. The assets had remained Mr Tustain's throughout, held for him on bare resulting trust.

This second judgment deals with the consequences for the professional trustee (formerly Barclays Bank Trust Company Limited), which had administered the assets for about fifteen years on the wrong assumption that the trusts were valid. It sought relief from personal liability under s.61 Trustee Act 1925, authority to keep its past remuneration, payment for unwinding the arrangements, and its costs. It succeeded on all of those applications.

The deputy, Nigel Yeadon, was a solicitor who conducted the 2011 Court of Protection application himself. Barclays Wealth advised on the planning, recommended trust-based arrangements and offered trustee services. The order of 5 July 2011 referred to a discounted gift trust, but did not authorise the settlements eventually executed. Distributions of £133,000 were later made to Mr Tustain's siblings.

To ensure "*the benefit of full adversarial argument*," Chief Master Shuman directed Mr Tustain, acting by his deputies as litigation friends, to argue against relief (paragraph 5). The questions were whether the trustee had acted reasonably and ought fairly to be excused. The standard is reasonableness, not perfection, but it is likely to be higher for a paid trustee (*Santander UK plc v RA Legal Solicitors* [2014] EWCA Civ 183).

Barclays Wealth knew that the planning depended on what the Court of Protection regime allowed. The judge nevertheless held that responsibility for obtaining the necessary authority "*rested principally with Mr Yeadon*" (paragraph 31). The July 2011 order followed an application that had included trust-based planning, it referred to a discounted gift trust, and it said nothing about a further application. That was "*capable of supporting the understanding that the Court of Protection process had supplied the authority required for implementation*" (paragraph 34). The decisive statutory point "*was missed by Barclays Wealth, Mr Yeadon and the other professionals involved*" (paragraph 40). The trustee's conduct "*remained within the range reasonably open to a professional trustee*" (paragraph 41).

On "fairness," Chief Master Shuman distinguished between spending on managing and preserving the assets and the £133,000 distributions, which "*transferred value to persons who possessed no beneficial entitlement under the resulting trust*" (paragraph 47). Both, however, arose from the same mistake. Once the defect came to light, the trustee had investigated and brought the matter to court. Relief was granted for remuneration and expenses charged to the assets, liabilities discharged and the distributions, up to a date to be fixed in the order (paragraphs 50–51).

The trustee could also keep its remuneration even though the express trusts never existed. The trustee had administered property held on the resulting trust, so s.29(1) Trustee Act 2000 applied; the court's inherent jurisdiction led to the same result (paragraphs 55–63). Chief Master Shuman held that the trustee could also charge its ordinary rates for unwinding the arrangements. Both parties' costs are to be assessed on the indemnity basis and paid from the assets held for Mr Tustain (paragraph 72).

Comment

While Chief Master Shuman's reasoning in the decision is undoubtedly sound, the result is uncomfortable. A solicitor acting as Mr Tustain's court-appointed deputy put more than £2.7 million of his money into trusts from which he was excluded, without the authority the MCA 2005 requires. Fifteen years later, the trustee has been relieved of liability and keeps its remuneration, and both sides' costs are to come out of Mr Tustain's assets. The cost of a professional mistake fell on the person the statutory scheme exists to protect.

Professional trustees should not take too much comfort from the finding of reasonableness, which was closely tied to the facts. Now that the point has been spelt out, it will be harder to say it was reasonably missed in other cases. Anyone asked to act as trustee of a settlement made on P's behalf should check that the order authorises that specific settlement.

Finally, the direction that Mr Tustain's deputies argue against relief is a sensible model wherever P's estate will, in effect, bear the cost of relief granted to a professional.

Estate planning where a loved one has a learning disability

Mencap Trust has published research and guidance in relation to estate planning where a loved one has a learning disability. As they note:

> *In August 2026 we commissioned a survey of more than 500 Independent Financial Advisers (IFAs), financial planners and solicitors, revealing a worrying knowledge gap.*
>
> *Around a third of financial and legal professionals surveyed have 'no idea' about how to financially protect people with a learning disability and lack confidence in how to advise clients who want to leave inheritance to a loved one with a learning disability.*

The guidance can be found here.

Child Trust Funds – new legislation on the cards

It appears that the Government is going to put forward its own amendment to the Financial Services and Markets Bill to set in place a new framework to allow easier access to Child Trust Funds by parents and carers of young adults who lack the mental capacity to manage their finances.

A statement on 3 November 2026 from the Justice Minister, Jake Richards MP, and the Economic Secretary to the Treasury, Rt Hon Lucy Rigby KC MP set out how:

> *The Government will work with various stakeholders to explore how the new process is designed, including who can access funds, what evidence is required and what proportionate safeguards are necessary to protect young people who lack mental capacity without creating unnecessary and costly red tape.*
> *The scheme won't replace the important work of the Court of Protection, which will remain available as an alternative route to protect the financial interests of adults lacking the mental capacity to make financial decisions.*
>
> *The Government will bring forward an amendment to the Financial Services and Markets Bill to enable the new scheme, with the details to be set out in secondary legislation following Parliamentary approval.*

Anon-Governmental amendment to the Bill moved in and adopted by the House of Lords to (clause 24) to this end had considerable technical problems with it; we hope that the

Government's approach will be better fitted to (and do less violence to) the MCA 2005.

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PRACTICE AND PROCEDURE

Personal welfare deputyship after *HB*

With thanks to Senior Judge Hilder, we reproduce here a template welfare deputyship order following the decision of the Court of Appeal in *HB*. It is important to note that the 'suggestions' at (i) – (viii) of paragraph 2 of the deputyship template are just that –suggestions of wording from which selection is to be made according to the facts of the case. They should not be understood as invariably likely to be included (in contrast to the 'standard' provisions of a Property and Affairs deputyship order.) For example, we would expect that (i) is not often included, residence issues will generally be considered so serious that a decision of the court is to be preferred.

In many situations, a welfare deputyship order is not actually needed. Again with thanks to Senior Judge Hilder, we reproduce an order which may be made where the reason for seeking an order is that the applicant is not being listened to in best interests decision-making. Although the result is an order refusing the application, it nonetheless leads to a piece of official paper which can be put before the relevant public body: a somewhat expensive and cumbersome way of ensuring that decision-makers actually comply with their obligations under the MCA 2005.

Court of Protection User Group Meeting

Ahead of the October 2026 meeting, the minutes of the April meeting have been published. Key practice points include the following:

Email communications with the Court

Users were strongly reminded of the following:

- Use informative subject lines:
    - P's initials | Case number | Document name | URGENT + reason (if applicable)
- Do not send "chasing" emails (there would be no reply sent to e-mails asking for an update. This position would be reviewed in 3 months.
- Send emails to one Court email address only.
- Do not copy judges unless specifically authorised.
- State clearly in the first line who you represent, and do not copy the Court into inter-party correspondence.

Judicial Visits to P

Requests for judges to meet P in person must follow the formal application and risk assessment process. The Court remains committed to P's participation but off-site judicial visits should not be assumed to be routine.

Digital vs Paper Applications

Costs may be refused where an application was made on paper when it should have been submitted digitally.

Replacement deputy applications should now generally be made through the portal, even where the original deputyship was created via paper application.

Signatures and Statements of Truth

A typed name alone is not regarded as a valid "digital signature". An electronically stored signature is required.

MENTAL HEALTH MATTERS

Mental health conditions, ADHD and autism prevalence review

The long-trailed review report was published on 9 October. It is a long, detailed, and nuanced report. Of particular importance are its conclusions (taken here from the executive summary) in relation to diagnosis:

> *Public debate is often reduced to a single question: is there too much diagnosis or too little? Underdiagnosis, misdiagnosis and overdiagnosis are different problems, and all 3 can occur within the same system at the same time. They occur across many areas of medicine and are not unique to ADHD, autism or mental health conditions.*
>
> *Diagnosis is often complex, and in mental health and neurodevelopmental care there is no biological test that provides a simple 'yes or no' answer. What matters is:*
>
> - *whether people receive an accurate and comprehensive assessment that identifies the causes of their difficulties and the degree of functional impairment they are experiencing*
> - *appropriate diagnosis where needed and that this informs the right support that improves their functioning, participation and quality of life*
>
> […] *Overdiagnosis, misdiagnosis and underdiagnosis are all system failures.*
>
> *Both misdiagnosis and overdiagnosis are harmful. They may delay appropriate support, lead to unnecessary or inappropriate treatment, or focus attention on the wrong solutions. People understandably ask whether 'ordinary' stress, worry and low mood are increasingly being classified as disorders. That may happen because the threshold between normal variation or having certain traits and having a clinical condition or disorder can be difficult to define in practice and is a clinical judgement. But over-medicalisation specifically occurs when every difficulty is assumed to require a medical response. For example, a young person who is lonely but not clinically depressed may benefit more from rebuilding social connection and participation than from antidepressant medication.*
>
> *Misdiagnosis is an unwelcome but inescapable fact of modern medicine, including psychiatry and psychology. However, we are confident that the rapid increases in administrative prevalence and demand for diagnostic assessments, together with the system failures in responding to this, are creating the conditions for increasing risk of misdiagnoses. As was noted above, recorded diagnoses in some younger age groups are now exceeding older population prevalence estimates (chapters 7 and 8).*
>
> *On the basis of evidence available to us we cannot conclude that overdiagnosis is occurring at scale, particularly given the gaps in population prevalence data and data reporting. However, if present trends continue we are clearly entering a phase in which the balance of risks is changing, from previous merited concerns with under recognition and underdiagnosis, towards an increased risk of misdiagnosis and overdiagnosis, which are becoming increasingly important considerations for policy and service delivery.*
>
> *Under-recognition nevertheless continues for some groups. The increasing risk of overdiagnosis or*

> *misdiagnosis cannot mean neglecting those often overlooked. The requirement is for comprehensive, high-quality assessment and timely diagnosis where needed, while making practical and clinical support available according to need rather than diagnosis alone.*
>
> *None of this should be taken to suggest that people's distress or difficulties are not real. If anything, the evidence points the other way: the rising numbers coming forward for assessment have not been accompanied by any fall in severity or impairment - those now presenting are no less affected than those identified before. People are seeking answers and support for very real problems, and they are not the problem. The problem is a system that leans too heavily on diagnosis as the route to help and cannot keep pace* (emphasis added)

The system's reliance on diagnosis, rather than need, is a feature of the report more broadly,[2] the report earlier emphasising:

> *There should be a fundamental shift from a 'diagnosis-dependent' system to a 'needs-led plus diagnosis' system. The heated debate about whether there is too much diagnosis or too little risks reinforcing the centrality of diagnosis rather than need and timely access to support and treatment. The government must address 2 failures at the same time:*
>
> 1. *People wait far too long for support, diagnosis and treatment.*
> 2. *Diagnosis has become the primary gateway to support that could and should be available earlier.*
>
> *These failures sit alongside insufficient capacity for people with the most severe, enduring and complex needs.*

As the report makes clear:

> *Diagnosis matters but is not without risks. For many people it is clinically necessary, personally meaningful and essential to treatment. It can help explain and address difficulties that significantly impair a person's functioning, participation and quality of life. People with significant functional impairment should be able to access diagnostic assessment within a reasonable timeframe and specialist care should reach those who need it most. Support should be available according to a person's needs before, during and after assessment, and not be withheld while waiting for a diagnosis.*
>
> *Diagnosis can also do harm when it is inaccurate or used poorly. It can direct someone towards the wrong treatment and obscure co-occurring conditions or the social and environmental causes of their difficulties. A diagnosis can inform practical support people need to remain in education, participate in work, sustain relationships and live well. But those same outcomes can also be delayed or denied if a diagnostic label defines a person by their difficulties rather than by their strengths, circumstances and potential.*

[2] Similar issues were highlighted by the Law Commission in its report on Disabled Children's Social Care.

Royal College of Psychiatrists' position statement on coercion and human rights

Responding to guidance issued by the World Health Organisation, suggesting (in effect) that any form of non-consensual admission and treatment is always unlawful, the Royal College of Psychiatrists published in October 2026 a position statement entitled: *Coercion and other forms of restrictive practices: compliance with human rights*. [3] As the covering webpage identifies:

> *The statement sets out the College's position on coercion and other forms of restrictive practice in mental healthcare. It emphasises dignity, autonomy and the need to minimise these interventions, while arguing that their use may sometimes be necessary as a last resort to prevent serious harm. Responding to WHO–UN guidance, it explains the College's view that carefully justified interventions can be compatible with human rights, drawing particularly on the European Convention on Human Rights.*
>
> *The College states that care should be based on informed consent wherever possible. Any involuntary treatment or restrictive measure must be lawful, necessary, proportionate and subject to rigorous safeguards, including individual assessment, clear documentation, regular review, access to advocacy and independent oversight. The statement also supports advance care planning to preserve patients' wishes and preferences, and highlights additional safeguards for children and young people.*
>
> *Its recommendations extend beyond individual clinical decisions to the organisation of care. The College calls for stronger community services alongside appropriate inpatient provision, research into alternatives to coercion, and coordinated action on housing, education, employment and social inclusion. It also advocates continued work on capacity-based mental health law across the UK, robust accountability, and meaningful involvement of patients and families in care, research and policy.*

[3] Full disclosure, Alex was one of the authors, in his role as a member of the College's Special Committee on Human Rights.

CHILDREN'S CAPACITY

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.

THE WIDER CONTEXT

Deprivation of liberty before the ECtHR

Kaganovskyy v Ukraine (No. 2) [2026] ECHR 39 is a case which has only recently come to our attention, decided between the Supreme Court hearing in *AGNI* in October 2025 and the hand down of its judgment in June 2026.

Mr Kaganovskyy had paranoid schizophrenia and in 2012 was declared legally incapable by a court in Kyiv. On 6 August 2014, at his family guardian's request, he was admitted to a State-run social care home. Nobody asked him formally to consent, but he did not object. He needed permission to leave the grounds, though at first he regarded his stay as voluntary (paragraph 9). In February 2017 he applied to court to restore his legal capacity. From around 1 April 2017 staff stopped him leaving the premises, later on his guardian's written instructions, which also barred visits from his lawyers unless the guardian was present (paragraphs 12–15). Between 27 June and 6 July 2017 he was held in a closed unit, a period already found to be an unlawful deprivation of liberty in *Kaganovskyy v Ukraine* (no. 2809/18, 15 September 2022). Otherwise the ban on leaving lasted until about 27 June 2018. He died at the placement in December 2019.

Ukrainian law treated a guardian's placement of an incapacitated person in a social care home as voluntary, and the courts played no part (paragraphs 26–28). The ECtHR reiterated that "*the notion of deprivation of liberty within the meaning of Article 5 § 1 does not only comprise the objective element of a person's confinement in a particular restricted space for a length of time which is more than negligible. A person can only be considered to have been deprived of his or her liberty if, as an additional subjective element, he or she has not validly consented to the confinement in question*" (paragraph 57, emphasis added).

On the objective element, he could never discharge himself and needed authorisation even for short absences. Had he left without it, he would have been brought back. Staff also medicated him and moved him between the residential and enhanced supervision units. They therefore exercised "*complete and effective control over the applicant's care, residence and movements*," and "*his entire stay in the institution bore all the objective features of a deprivation of liberty*" (paragraph 59).

On the subjective element, the court had to "*assess whether the applicant validly consented to his confinement throughout the period under consideration*". His lack of legal capacity did not mean that he was de facto unable to understand his situation (paragraph 60). The court held:

> *In this connection, the Court would first observe that even if the applicant, as a person who lacked legal capacity, tacitly agreed to his admission to the institution, such initial agreement cannot be regarded as irrevocable or as depriving him of the protection of Article 5 § 1, particularly once he objected to his continued confinement. Also, the fact that for almost two years and seven months after his admission (August 2014-April 2017) the applicant did not contest his stay at the KPRI, even assuming that during that time he regarded it as voluntary, is not decisive in respect of any subsequent period.* (paragraph 62)

From April 2017 "*it was obvious that the applicant no longer wished to remain confined*." He tried to leave, told the courts he wanted to be discharged, and through his lawyers made a criminal complaint (paragraph 63, contrasting *Mihailovs v Latvia* and *Storck v Germany*). The Government produced no entry-exit logs, so his approximate dates were accepted (paragraph 64). He was held to be deprived of his liberty during the relevant periods.

The court held that the deprivation of liberty was contrary to Article 5. No formal decision was ever

made (paragraph 76). He was detained "solely on the basis of the consent and instructions given by his guardian" (paragraph 79), and no court scrutinised that consent (paragraphs 80–81). Nor was there evidence of medical necessity or of the annual psychiatric review that domestic law required, so the *Winterwerp* criteria were not shown to be met (paragraphs 82–84). Article 5(4) was breached because no procedure allowed a court to review the detention; the Court saw "no justification for denying comparable judicial safeguards" to care home residents when psychiatric patients had them (paragraph 90). Article 5(5) was breached because he had no enforceable right to compensation (paragraphs 97–98).

Comment

As the judgment was handed down after the hearing in *AGNI*, the Supreme Court only considered the earlier *Kaganovskyy* judgment (at [182]). The case focused on his complaint regarding the 2017-2018 period, so there is no detailed consideration of the 2014-2017 period. Whether he had mental (as opposed to legal) capacity to decide on residence and care throughout is unclear. In 2012 he was "unable to comprehend and control his actions" (paragraph 6) and prior to 2016 the care home described him as tense, ambivalent, anxious and "senseless" in his speech and actions, lacking any critical awareness of his health or his behaviour (paragraph 10).

Paragraph 62 on valid consent is interesting because it shows that "even if" he had tacitly agreed, and "even assuming" he regarded the earlier period as voluntary, this cannot be regarded "as irrevocable or as depriving him of the protection" of Article 5, "particularly once he objected to his continued confinement". The case illustrates how valid consent is a continuing issue, so there can be a de facto withdrawal of it, and how the issue is consent to "the confinement in question."

State of Care 2025-2026

The CQC's annual State of Care report has been published for 2025-2026. It makes slightly surreal reading in terms of DoLS because, as CQC note, they are "reporting on findings from our monitoring activities and assessments of local authorities for April 2025 to March 2026, as well as government statistics from April 2024 to end of March 2025, before the judgment [in *AGNI*] was delivered." However, CQC does not simply look in the rearview mirror, but also notes that:

> *As the legal and policy landscape around deprivation of liberty continues to evolve, it is important that the system remains focused on delivering rights-respecting and person-centred care now and in the future.*
>
> *The recent Supreme Court judgment represents a significant shift in case law, with potentially far-reaching consequences for the operation of DoLS. While the extent to which this judgment will affect individuals at the heart of the system remains to be seen, these changes do not lessen the responsibility of providers, professionals and local authorities to uphold and protect people's rights. As we noted in our initial statement following the Supreme Court judgment, providers should continue to ensure that they meet the requirements of the MCA, irrespective of whether people are deprived of their liberty. This includes consistently delivering rights-respecting and person-centred care that is informed by people's views, wishes and preferences.*
>
> *Through our reporting on DoLS, we have continued to identify concerns about inconsistent MCA practice, delays in*

authorisation processes, weaknesses in record-keeping, workforce capability issues and poor communication with people and their families. These challenges risk undermining how effectively people's rights are protected and can lead to poor experiences of care, regardless of whether people are cared for under arrangements that amount to a deprivation of liberty. At the same time, we are already seeing providers and local authorities adapting to the changes introduced by the recent Supreme Court judgment and responding to the evolving landscape.

Further reform remains on the horizon, as the Liberty Protection Safeguards (LPS) have been expected to replace the current DoLS system for several years. While the timetable for LPS implementation remains uncertain, strengthening MCA practice across health and social care should remain an immediate priority. We will continue to use our role to monitor the operation of DoLS during this period of transition and to work with stakeholders to understand any longer-term implications of both recent and proposed changes.

Ensuring that the MCA and its principles are fully understood and consistently applied is fundamental to protecting people's rights, promoting autonomy and delivering positive outcomes for people, including for those who may no longer fall within the scope of the safeguards. In this context, an updated MCA Code of Practice would be a significant step towards supporting providers and professionals to apply the MCA more consistently, confidently and effectively in practice.

One other area merits particular emphasis, namely inequality including these two chilling sets of statistics:

> *For adults living with SMI, the risk of dying prematurely is almost 5 times higher compared with others. There is huge variation in annual health checks for people on an SMI register by ICB area – ranging from only 53% of people to 81%.*
>
> *In March 2026, 80% of people aged 14 and over who were on their GP's learning disability register had received a health check in the previous 12 months. These figures also vary by ICB area, from 70% to 86%. But, as at March 2024, it was estimated that only around a quarter of the 1.3 million people with a learning disability in England were recorded on their GP's learning disability register.*[4]

Even if it is not possible to fix these inequalities overnight, three action points commend themselves:

- Read *Get Me To Hospital* to make sure that you are not inadvertently letting concerns about capacity get in the way of ensuring parity of access to physical healthcare for those with cognitive impairments.
- Any time you might be involved (in any capacity) in a Court of Protection case concerning a person with a SMI, ask when their last annual health check was;
- Any time you might be involved (in any capacity) in a Court of Protection case concerning a person with a learning disability, ask whether they are recorded

[4] Why it appears that there are no more up to date statistics than this is, itself, telling.

on their GP's learning disability register (and if they are not, why not).

The care sector and COVID-19

The UK Covid-19 Inquiry published the most recent of its reports on 20 October 2026, examining the impact of the pandemic on the adult social care sector in the four nations of the United Kingdom.

A woman with dementia, fit and active before lockdown, had not left her care home for over a year. "They won't let me out," she told her granddaughter, "it's like a prison" (para 4.71).

Strikingly, and more than a little depressingly, the Inquiry's report on the adult social care sector never mentions the Mental Capacity Act 2005,[5] deprivation of liberty, DoLS, the Court of Protection or Article 8 ECHR, and 'best interests' appears once, in a GP's letter that the Inquiry quotes as an example of how not to do it.

The report runs to eight chapters and makes eight recommendations. Most concern planning, isolation facilities, sick pay, inspection, workforce data and a register for care workers. Three areas matter to readers of this Report: visiting, DNACPR decisions and safeguarding.

Visiting

The Inquiry describes the impact of visiting restrictions as "catastrophic" for many (para 4.105). The restrictions were necessary at the outset to protect life (para 4.103). But by early April 2020 it was clear that they would last for an unprecedented period, and the harm from isolation was "obvious from the outset" (para 4.104). Some residents "did not leave their care homes or even their rooms for months on end" (para 4.70). Guidance on visits out did not arrive in England, Wales and Northern Ireland until December 2020 (para 4.67).

Recommendation 4 asks the four governments to publish guidance for a future pandemic, led by four core principles:

- measures should be "the least restrictive possible, both in terms of severity and the length of time for which they apply";
- residents should have "the right to in-person visitors, except in the most grave or exceptional of circumstances";
- restrictions should be decided "at the most local level possible, based on local risk assessments and considering individual circumstances"; and
- communications must explain the measures and their purpose.

Decision-makers should start from the presumption that the harm of anything other than short-term isolation "may well be as significant, grave and devastating as the risks posed by the infection", especially for people with dementia, cognitive and communication disabilities, and those at the end of life (para 4.107). Visits by essential carers should be distinct from general visiting and should continue "unless the circumstances make it impossible or the risk is simply too great" (para 4.109).

Providers should ascertain residents' "wishes and feelings" about the trade-off between risk and quality of life. "Issues of capacity are likely to arise and create further complexities". Those views "will inevitably not be determinative" but "must be taken into account" (para 4.111).

[5] Or equivalent in the other nations.

On the law since the pandemic, the Inquiry welcomes regulation 9A of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, in force in England from 6 April 2024 (paras 4.66 and 4.76). It also notes DHSC's own review of March 2026, which found that "more needs to be done to address gaps in awareness and understanding, variation in decision making, and weaknesses in monitoring and enforcement" (para 4.78). Scotland has gone further. Under the Care Reform (Scotland) Act 2025 ("Anne's Law"), every care home resident must have at least one essential care supporter, with a legal presumption that suspending their visits is likely to cause serious harm (para 4.54). The Inquiry asks the other three nations to "consider" equivalent duties (para 4.55).

DNACPR and advance care planning

The Inquiry found no national instruction to impose blanket DNACPR decisions but found many reports of their inappropriate use. Decisions based on age, disability or health condition, or made without a personalised assessment of the person's wishes and feelings, were "unacceptable and must not happen again" (para 7.52). Among 2,048 adult social care providers in England, the number of people with a DNACPR in place rose from 16,876 to 26,555 between 17 March and December 2020 (para 7.51).

The evidence includes the following:

- A GP wrote to care home residents that if no plan was returned "within a suitable time frame, a best interests decision may well be made by the clinicians involved" (para 7.40).
- One surgery wrote to care homes for people with learning disabilities about blanket DNACPR decisions, and later retracted the letters (para 7.50).
- Relatives described being "coerced to comply", feeling that a brother "was forced to sign documents", and being "advised this was in mum['s] best interest" (para 7.63).
- A GP twice asked a mother about the CPR preferences of her daughter, a woman in her twenties with learning difficulties (para 7.65).
- "Blanket ReSPECT forms" were completed with no comments and no residents' signatures (para 7.39).[6]
- Some DNACPR decisions were read as "do not treat" (para 7.74).

The CQC found that older people, people with dementia and people with a learning disability "were not supported to the extent they needed to be" in advance care planning conversations (para 7.34). The Inquiry declined to recommend an investigation into pandemic DNACPR decisions, which would require a manual review of each person's records (para 7.61).

Recommendation 7 calls for mandatory end-of-life care training for health and social care professionals. At a minimum, it should give them the communication skills "confidently to conduct and document conversations about advance care and, where appropriate to the professional's role, decisions on [DNACPR]".

Safeguarding

Routine inspections stopped. So did visits from families and from health and care workers, who would otherwise have played "an additional supervisory and oversight role". Safeguarding

[6] Note, though, that ReSPECT forms deliberately do not include a place for the signature by the person to avoid the inadvertent creation of a (very likely) invalid ADRT.

referrals fell sharply (para 5.72). The CQC described the pandemic as a "hotbed" in which closed cultures could develop. About 19% of a sample of its inspections up to 14 July 2020 raised closed cultures as an issue (para 5.78). Recommendation 5 asks the four regulators to keep on-site inspection going wherever possible in a future public health emergency, and to minimise the risk that remote or hybrid inspection misses safeguarding issues.

Eating and drinking with acknowledged risks of choking or aspirating

The BMA has published guidance addressing decision making in England and Wales after the case of *JJ v Spectrum Community Health CIC*.[7] It provides advice on how doctors and healthcare professionals can continue to ensure patient-centred care when making decisions about patients eating and drinking with acknowledged risks of choking or aspirating.

As the BMA notes:

> *This guidance has been developed following reports that healthcare staff are being encouraged to adopt an excessively cautious approach when making decisions about patients eating and drinking with acknowledged risks of choking or aspirating. This follows from a 2022 legal case (JJ v Spectrum Community Health CIC). This case involved a highly unusual set of circumstances, and the legal question considered was whether healthcare staff were obliged to comply with JJ's request for food that would expose him to significant risk, NOT whether the staff could comply with the request.*
>
> *This case has presented a difficult dilemma for healthcare professionals. They are under a statutory duty to act in the best interests of patients who lack capacity and are expected, where possible, to respect the autonomous, informed wishes of patients who have capacity. Now, following the case of JJ, some healthcare professionals are facing pressure to shift the balance of decision making to give more weight to protecting themselves and/or their employers, potentially to the detriment of their patients. This guidance seeks to find a way through this dilemma, enabling doctors to continue to meet their obligations to the patient and engage in patient-centred care, whilst minimising the risk of legal challenge.*

Jehovah's Witnesses and blood transfusions

Anyone working with Jehovah's Witnesses needs to be aware of a significant clarification in their approach to blood products which took place in September. Whilst the Governing Body of the Witnesses has confirmed that their long-standing refusal of whole-blood transfusions on religious grounds remains unchanged, the Governing Body has made clear that it considers that the decision to accept red cells, white cells, plasma or platelets from another person's blood is a matter of personal conscience. Likewise, each Witness must decide whether or not to donate blood for the clearly expressed purpose of providing components or fractions for use by another person.

Although most blood donations in the UK are whole blood donations, the separation of these into individual components means that the vast majority of transfusions now only use components such as red cells, plasma, and platelets.

[7] Full disclosure, Alex was involved as a member of the BMA Medical Ethics Committee.

Appropriately tailored and sensitive questioning will be needed in any case where a Witness is reluctant to accept blood, so as to unpick whether their refusal to do so is based upon the current position of the Governing Body.

Capacity and sexual consent – guidance and research

A reflective practice toolkit has been published for social care providers and frontline social work practitioners in England supporting older people in residential care homes. Written by James Codling, Dr Laura Pritchard-Jones and Prof Bev Clough, it provides grounded, legally coherent, and extremely thoughtful prompts to help practitioners seeking to navigate these exceptionally thorny issues.

Under the same heading, we also draw people's attention to a research project being conducted by Hannah John at Manchester Metropolitan University. She is exploring how capacity assessments to engage in sex are understood and carried out in practice. The longer-term aim is to interview both practitioners and people with learning disabilities to explore their experiences and perspectives. The first stage is to recruit practitioners in England and Wales who have led at least one capacity assessment around sexual decision-making involving a person with a learning disability. If you are such a person, please fill out Hannah's survey here.

APSOs in Wales

Jess Antrobus, Adult Safeguarding Senior Manager at Powys County Council and a PhD candidate at Keele University, is recruiting participants for a doctoral research study exploring the origins, development and use of Adult Protection and Support Orders ('APSOs') in Wales. Introduced through the Social Services and Well-being (Wales) Act 2014, APSOs provide a legal power of entry, authorised by a magistrates' court, enabling professionals to gain access to and speak privately with an adult at risk where there are concerns about abuse or neglect. Despite being a unique safeguarding power within Wales, APSOs remain a relatively under-researched area of adult safeguarding practice. This study aims to explore how the APSO was developed, how it is understood by professionals, and what influences decisions about its use in practice. There are two opportunities to contribute:

(1) Semi-structured interviews (for professionals involved in the development, strategic oversight, or practical use of APSOs);

(2) Focus groups (for local authority and police safeguarding professionals. Previous experience of using an APSO is not required)

Jess is keen to hear from professionals working within adult safeguarding across Wales who may be interested in contributing to this research. Your insights will help develop understanding of a little explored area of safeguarding law, policy, and practice. If you would like further information about the research, are interested in participating, or would like Jess to deliver a presentation on the study, please contact her at j.antrobus@keele.ac.uk.

Research corner: autonomy and the lawyer's role

Bethane Harland and Iko Onuh-Goddard, *Autonomy and the Lawyer's Role: Enabling Choice or Exercising Control? Insights from Adult Social Care Practice*, (2026) Amicus Curiae 459-476

Both lawyers working in and those working with local authorities will find much to chew on in the fascinating article just published by two adult social care solicitors at Brighton and

Hove Council reflecting on their role in supporting social workers navigating the tension between autonomy and protection in adult social care law and practice.

Short note: intermediaries in the Business and Property Division

In *Isbilen v Turk & Ors* [2026] EWHC 2722 (BP), the (unusual) situation arose where the court had to contemplate whether the Defendant required an intermediary. As Adam Johnson J noted, intermediaries are well known in family and criminal proceedings, but are a rarity in the (now) Business and Property Division. He confirmed that the guidance given by the Court of Appeal in appeal from the Family Division: *M (A Child): Intermediaries* [2025] EWCA Civ 440 was applicable by analogy, such that the basic test is whether the appointment of an intermediary for any aspect of the proceedings is necessary to achieve a fair hearing. The rest of the (short) judgment is an interesting working through of whether, on the particular facts of the case, Mr Turk did require one: the short answer being that he required intermediary assistance during the period of his oral evidence in court.

Isle of Man Assisted Dying

Following Royal Assent having been given to the equivalent (but much more developed) legislation in Jersey, Royal Assent has now been given to the Isle of Man Assisted Dying Act. Whereas Jersey has a set (and tight) timeline, no date has yet been agreed for the Manx law to be implemented: see this statement from the Manx Government:

> *The Act will not come into force until all practical, clinical and safeguarding arrangements have been agreed.*
>
> *This is a significant and sensitive moment for the Island, but it marks the start of a careful process, not the end of one. There is still a great deal of detailed work to do before the law can come into force, and this will take time to get right.*
>
> *The Department of Health and Social Care will now begin that work, setting up a formal policy and implementation programme with clear governance and accountability. This includes working out the practical details, from the training and support needed for healthcare professionals, to how medicines will be safely managed, to the safeguards and independent oversight that will keep people protected.*
>
> *It also includes understanding how these new arrangements will fit alongside existing health and care services, and what they mean for the Island financially and practically.*
>
> *Some of this work depends on other safeguarding laws being in place first. Assisted dying cannot begin until specific parts of the Capacity Act are in force, which is currently expected by April 2028.*
>
> *The service will not begin until government is confident it is genuinely ready. This will require listening carefully to those affected, drawing on clinical, legal and safeguarding expertise, and remaining open with Tynwald about the decisions still to be made.*

Protection of liberty in Ireland

On 29 September 2026, the Irish Government approved the preparation of a General Scheme of a Protection of Liberty Safeguards Bill. Materials relating to the proposals can be found here. It should be noted that these proposals

predated the decision of the UK Supreme Court in *AGNI*: decisions of that court self-evidently are not binding in Ireland, but we know that a close eye has been kept on the Anglo-Welsh saga for many years, and it will be interesting to see whether the latest twist finds a reflection across the Irish Sea.

An EU cross-border regulation on the protection of adults hoves into view

On 20 October 2026, the European Parliament plenary session, formally adopted at first reading a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults (COM(2023) 280).

In crude terms, the Regulation will 'domesticate' within the EU the 2000 Hague Convention on the International Protection of Adults, although with some modifications, to reflect, in particular the changed international landscape following the coming into force of the Convention on the Rights of Persons with Disabilities.

The new Regulation will introduce a streamlined set of rules that will apply within the EU, in particular to establish which court has jurisdiction, which law is applicable, under what conditions a foreign measure or foreign powers of representation should be given effect and how authorities can co-operate.

It is expected that the Council will also formally adopt the Regulation at first reading, after which it can be published in the Official Journal of the European Union and enter into force.

The Regulation would apply 18 months after its adoption. Member states would then have four years to make their communication channels electronic, and five years to create a register and interconnect it with registers of other member states.

For further details, see here.

SCOTLAND

Legal Director appointed for Mental Welfare Commission

In the September Report, Julie Paterson, Chief Executive of the Mental Welfare Commission, kindly provided an explanation of the new role created by the Commission of Executive Director (Legal & Policy). Julie explained that this would be a key new senior leadership position, created to strengthen legal expertise and policy capability across the work of the Commission. This can now be seen as a "stop press" item because the news that the Commission has now made an appointment to the new position has entered the public domain, though the formal announcement of that, no doubt with supporting information, is awaited. It is of massive, double significance that Professor Jill Stavert has been appointed to the new position, and in consequence is leaving Edinburgh Napier University. Jill Stavert's expertise, experience and standing across all areas of law that encompass the work of the Commission is massive, and indeed can reasonably be described as second to none. Her achievement and contribution in establishing Edinburgh Napier University's Centre for Mental Health and Capacity Law (a title recently altered, but still accurate) has been unique. It would not be entirely accurate to describe the Commission's gain as being balanced by Edinburgh Napier's loss. Her departure from Edinburgh Napier will leave a huge gap, including externally in the perceptions of many organisations and individuals engaged in the field, and the public generally. Nevertheless, the massive capability and reputation of the Centre should prove to be robust. Following Jill's departure, Professor Thanos Karatzias will be the Interim Centre Lead. Dr Amy Zarins continues as Centre Manager. In her intimation of these changes, Jill has confirmed that: "*The Centre will be in excellent and very capable hands.*"

Adrian D Ward

Second AWI certification course

We are grateful to Sandra McDonald, former Public Guardian, for providing the following update:

> *"In the Scotland section of the May 2026 Report, we provided a comprehensive overview of the then new Incapacity Law and Practice Certification: a six-week course, delivered online for three hours each week, designed to explore the full range of challenges an adult capacity practitioner may face. The course is provided by the Law Society of Scotland in conjunction with Sandra McDonald, the former Public Guardian for Scotland. At that time, the first course had just launched. Places were initially limited to 20, then increased to 25 in response to demand. Numbers were deliberately kept low to encourage interaction and networking. Despite the increased number, the first course was oversubscribed, selling out within two weeks. I am delighted to report that feedback from the first cohort showed extremely high levels of satisfaction—no doubt reflecting the outstanding calibre of the expert speakers. Delegates were also encouraged to offer constructive criticism and, with some persuasion, suggested several ways to make the experience even better. To their credit, the course providers embraced that feedback and have adjusted the second course accordingly. We are now two-thirds of the way through a fully subscribed second course which appears to be receiving an equally positive response, judging by the enthusiastic participation of its delegates. Sandra McDonald commented: 'The Law Society of Scotland, and particularly the course*

leader Rachel Steer, have shown a real commitment to wanting to improve adult capacity practice, developing this course in an area of law that had little in-depth training available. I'm hoping the course gives participants a feeling of increased confidence, even if that is from positive reinforcement, and that longer term it will be a recognised signal of competence which will increase public confidence.'

Sandra McDonald
30th October 2026

The Law Society of Scotland now has a long record in supporting and encouraging the emergence of adult incapacity law as a subject, and area of practice, in its own right. Of particular significance have been the establishment of the Society's Mental Health and Disability Committee in 1989; provision of Update and CPD training from the 1990s onwards; establishment of specialist accreditation in incapacity and mental disability law (at the same time as the parallel accredited specialism in mental health law); the provision and updating of powers of attorney guidance, and the related vulnerable clients guidance; and now – this year – the introduction of a specialist incapacity law and practice certification course. Sandra McDonald is to be commended for applying her huge experience of the subject, along with her organisational abilities, in structuring and delivering the first two courses, in quick succession. One must also commend Rachel Steer, CPD Projects Manager, Law Society of Scotland, for acting as course leader in close collaboration with Sandra, and her colleagues who have ensured the practical delivery of the courses. Also to be commended are all the busy practitioners who have nevertheless recognised the value of the courses and have taken up the challenge of devoting significant professional time and energy towards building their competence, and collectively increasing the standard of service by their profession, in the crucially vital area of adult incapacity law. Sandra's contribution above was reviewed by Rachel.

Adrian D Ward

Law reform: the Bill that never was

On 1st September 2026, Maree Todd MSP, Minister for Mental Wellbeing, Public Health, Sport, Alcohol and Drugs, circulated a letter providing "an update on the Learning Disabilities, Autism and Neurodivergence (LDAN) Bill", in which the key messages at the outset were as follows:

"As set out in the Programme for Government, Ministers remain strongly committed to improving outcomes for people with learning disabilities, autistic people and neurodivergent people through a programme of reform, service improvement and investment.

"While legislation can be an important tool for driving change, Ministers have concluded that progress is needed now through policy reform, service improvement and targeted investment, rather than a legislative process which would take several years to complete and implement. Our focus is therefore on delivering practical improvements now, while retaining the option of future legislation should evidence show that additional statutory measures are required."

There never has been an "LDAN" Bill, so far as one can ascertain – neither introduced to the Parliament, nor even issued in draft form. That is not surprising. The issues identified under the description "LDAN Bill" are real and require to be addressed, but unclear throughout to many

lawyers has been the question of what useful role could be played by new legislation. The concept that legislation was required has seemed to many to be travelling along the wrong track, perhaps an example of the public misconception that all such problems can be solved by throwing new laws at them. That would seem to be acknowledged by the steps now taken by the Minister and her advisers. It is a step that has caused widespread disappointment and concern, and indeed in some quarters dismay, but sooner or later the apparent misconception that this was a matter to be addressed by legislation had to be confronted. The Minister has "grasped the nettle" and done what had to be done. As a matter of policy and provision, rather than law reform, one will wish to follow the development of the work already underway "in a number of key areas". As described by the Minister, these include:

- improving neurodevelopmental support so people can access the right support at the right time;
- expanding Learning Disability Annual Health Checks;
- delivering the Coming Home Action Plan;
- increasing the availability of Changing Places Toilets; and
- continuing improvement work across health, education and wider public services.

One would tentatively suggest that appropriate AWI law reform will be a better vehicle for updating the law, and among other things it will be the better for addressing the needs of all people anywhere within its wide scope, rather than artificially limited to those intended to come within particular definitions such as "Learning Disabilities, Autism and Neurodivergence", which among other things would create a wholly unhelpful need to try to define who is in and who is out by reference to such descriptions, rather than by reference to circumstances and needs.

The one potential concern which is not addressed in the Minister's letter, but which one hopes will be promptly and adequately addressed, is a commitment that although the "LDAN Bill" has been abandoned, AWI reform still has the Minister's full support and will continue to be pressed ahead on no longer than the timetable necessary to do it properly. In this regard, the most that we seem to have so far is the following, lacking any firm acknowledgement or commitment in relation to the urgency of the need to pass appropriate legislation and bring it into force. The September 2026 Mental Health and Wellbeing Delivery Plan identifies that:

> *The Scottish Government will deliver a staged approach to mental health and capacity law reform following the Scottish Mental Health Law Review, with an initial focus on Adults with Incapacity policy development and preparation for updated legislation. The Scottish Government expect to complete policy development on Adults with Incapacity reform by summer 2027, with the timing of a future Bill subject to agreement of the wider legislative timetable.*

We can confirm that the work of the Expert Working Group, and of the officials with whom it works, continues; we also understand that the Ministerial Oversight Group will be reconvened in January 2027.

In the meantime, we now have confirmation that the Bill that never was has become the Bill that – in all probability – never will be.

Adrian D Ward

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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 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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