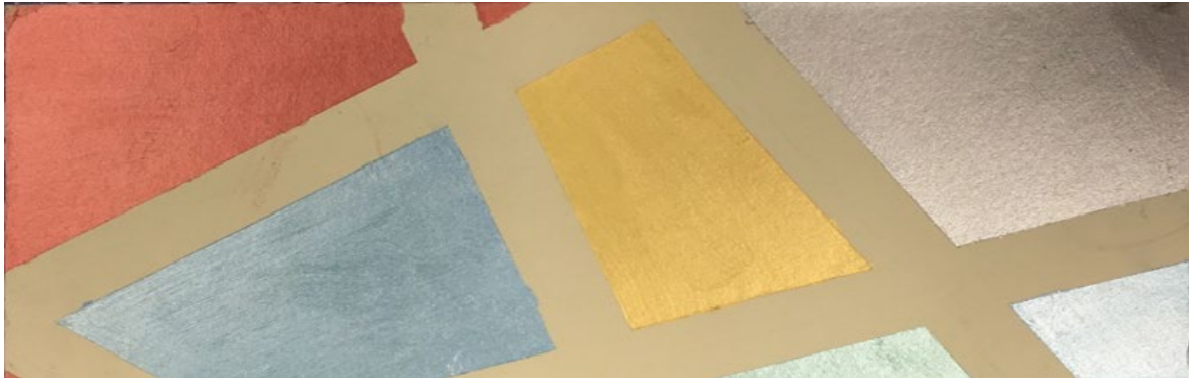




Welcome to the November 2025 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: *Cheshire West 2*, the return of LPS and where the buck stops with termination;
- (2) In the Property and Affairs Report: accessing Child Trust Funds and LPA fee increase;
- (3) In the Practice and Procedure Report: where (not if) brain stem death testing should take place;
- (4) In the Mental Health Matters Report: progress of the Mental Health Bill and the duties owed by AMHPs;
- (5) In the Children's Capacity Report: resources for children transitioning to adult in the palliative context.
- (6) The Wider Context: the Terminally Ill Adults (End of Life) Bill before the House of Lords, and CQC despairs at the state of care.
- (7) In the Scotland Report: an update on AWI reform.

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#), where you can also sign up to the [Mental Capacity Report](#).

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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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Brain stem death testing and best interests

London NHS Trust v DT & Anor [2025] EWCOP 36 (T3) (Theis J)

Practice and procedure – other

Summary¹

DT was a 42 year old woman who having collapsed following a flight, has never recovered consciousness. She was transferred to the UK by her family to a hospital in London in September 2025. Following tests and observations the clinical team looking after DT in London came to the view that she was brain stem dead. They therefore wanted to establish diagnosis and confirmation of death by brain stem testing performed according to the *Academy of Medical Royal Colleges 2025 Code of Practice for the Diagnosis and Confirmation of Death* ("the 2025 Code").

The family did not agree to the brain stem tests being undertaken in London. Instead, they wanted to fly DT to a hospital in the country in which she was born, raised and lived (her home country), so that the tests and likely subsequent withdrawal of treatment could take place there. This would allow the rituals following death to be carried out in accordance with DT's religious and cultural beliefs. That position was supported by

DT's litigation friend the Official Solicitor as being in her best interests.

The evidence before the court from the clinicians set out their collective view that DT was dead (they expressed this as a certainty). No diagnosis of death could be made however in the absence of brain stem death testing.

It is not entirely clear from the judgment whether there was a dispute about whether DT was (as a matter of law), alive or dead. The Trust is recorded as having submitted that the legal position was nuanced, because there was a "reality gap between the clinicians' clinical assessment of death and the diagnosis of death in accordance with the 2025 Code." The family and the Official Solicitor were clear that as a matter of law, DT was not dead until such time as death could be diagnosed following brain stem death testing.

Theis J had no difficulty in reaching the view that "[p]rior to the diagnosis of death through the 2025 Code the individual concerned is not dead as a matter of law. The legal consequence is that in the absence of agreement for the tests to be conducted under the 2025 Code, including the arrangements for them, there needs to be an application to the Court of Protection for the issue to be determined in accordance with the person's

¹ Tor having been involved in the case, she has not contributed to this note.

best interests." She therefore answered the question that had to be answered by the court (i.e. whether DT should be repatriated in circumstances where the purpose of her transfer would be for brain stem death testing to be carried out and treatment withdrawn or for the tests to be undertaken in the UK), by reference to the best interests test in the MCA 2005.

In determining where DT's best interests lay, Theis J weighed the benefits of DT being flown back to her home country for the tests to be carried out and for treatment withdrawn, against the risks. She described the evidence showing DT's connection to her home country as '*compelling*', and was satisfied that DT's wishes and feelings would have been for her to return to her home country for the brain stem testing to be undertaken there. Set against this was the fact that continuing to receive treatment was considered by the Trust to be futile. The Trust also relied upon the inherent risks in a complex transfer such that she may die in transit.

Theis J had no difficulty in finding that the benefits of DT returning to her home country to have the tests outweighed the risk.

Comment

The Trust was undoubtedly right to issue proceedings in the Court of Protection to determine the dispute between them and the family as to whether brain stem death testing should take place in the UK or not.² However it is difficult to understand why the Trust were in dispute with the family about this issue in the first place, given the '*compromise*' they offered to the court and the family - namely that if brain stem death testing were to take place in the UK and a diagnosis of death made, they would continue to provide the medical treatment to DT

in order to allow her to be repatriated to her home country. This was a position that Theis J understandably described as '*perplexing*'.

CoP statistics – October 2025

The Court of Protection has published statistics on the applications made to the court, charting their trajectory over several years:

- Total applications under the MCA have had an upwards trajectory, and are currently around 9,500 applications per quarter.
- Applications for property and affairs deputyship have fluctuated more significantly, with a slightly decreasing trend, and currently stand at approximately 3,200 per quarter. The number of appointments has increased in the last year due to backlogs being addressed. As of October 2025, the turnaround for deputyship applications was 25 weeks.
- Applications for personal welfare deputyship are much lower, typically between 200-300 applications per quarter. Relatively few of these are made, with the most recently recorded quarter reflecting under 60 welfare deputyship orders made per quarter.
- Applications relating to deprivations of liberty have increased significantly since 2020, and continue to have an upward trend. They are now near 2,200 applications per quarter. However, changes in recording practices in 2024 make it difficult to determine long-term trends in orders relating to deprivations of liberty. Since March 2025, backlogs on COPDOL11 applications have fallen substantially.

² It may be that different issues arise in relation to the question of whether brain stem death testing should take place at all. The 2025 Guidance is (deliberately)

silent as to whether this is a matter requiring the agreement of the family.

- The total number of orders made has slightly increased since 2020, from approximately 12,000 to approximately 14,000 per quarter.

Reporting concerns to the OPG

The OPG has launched a new [website](#) to report a concern about an attorney, deputy or guardian. The new form is designed to make it quicker and easier for people to raise concerns, and to redirect people who are raising complaints which the OPG has no legal power to investigate. The form screens concerns with the following conditions:

Complete this form to notify us of your concerns if all of the following are true:

- *you have conducted your own initial safeguarding queries (this only applies if you are a public authority);*
- *you believe the donor or P lacks mental capacity to deal with the concerns themselves*
- *there is enough evidence to warrant further investigation.*

Position statements

As we went to press, we learned that the Court of Appeal has granted permission to appeal the decision of Poole J in *Re AB (Disclosure of Position Statements)* [2025] EWCOP 25 (T3) on the basis that it is important for the court to provide guidance as to the proper approach to disclosure of position statements to observers in Court of Protection cases.

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



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Conferences

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

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

Advertising conferences and training events

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

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

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