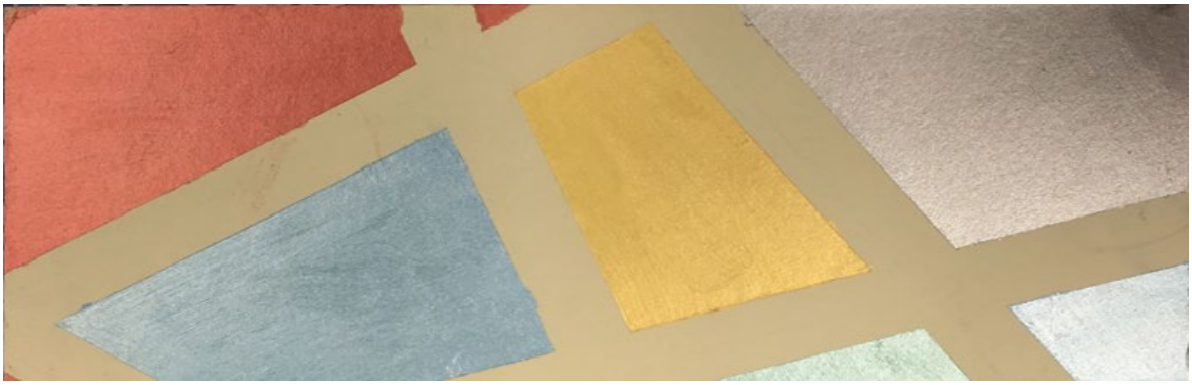
CHILDREN'S CAPACITY
February 2026 | Issue 157



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

(1) In the Health, Welfare and Deprivation of Liberty Report: two tributes following recent deaths of MCA champions, and best interests in the balance;

(2) In the Property and Affairs Report: *ACC* guidance from the OPG and guidance for regulated business on capacity issues;

(3) In the Practice and Procedure Report: personal welfare deputies revisited and facilitating access to pro bono representation;

(4) In the Mental Health Matters Report: the Mental Health Act 2025 and the Supreme Court considers illegality and insanity;

(5) In the Children's Capacity Report: looked after children and serious medical treatment and a consent confusion around DNACPR;

(6) The Wider Context: cannabis, criminality and capacity – a Jersey perspective.

(7) In the Scotland Report: a guest post from the Minister responsible for AWI reform and the Scottish perspective on treatment refusal by children.

We have also updated our unofficial update to the MCA / DoLS Codes of Practice, available here.

Chambers have launched a new and zippy version of our website. But don't worry, all the content that you might need – our Reports, our case-law summaries, and our guidance notes – can still be found via here. We know (flatteringly) that many of our materials are embedded on websites; the old links should automatically redirect to the new page, but do please let us know if you encounter difficulties. This is also perhaps a useful opportunity to flag that it is always best to link to the webpage which houses a guidance note, rather than a PDF of the guidance note, as we update them regularly, and linking to the PDF may inadvertently trap you in a time warp.

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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Looked after children and serious medical treatment

VW (Looked After Child: SMT: Need for Application) [2025] EWHC 3928 (Fam) (High Court Family Division (Poole J))

Other proceedings – family (public law)

Summary

This case was brought by Liverpool City Council for a declaration that it would be lawful for a three year old child (VW, a looked after child in long term foster care) to undergo cranio-facial surgery. The case was listed for a preliminary issue, namely whether it was necessary for the application to have been brought and whether the application should be permitted to proceed in circumstances where the treatment was unanimously recommended by the treating team and was agreed by VW's parents and the local authority as being in VW's best interests.

The local authority's justification for bringing the application was that they were sufficiently concerned about the risks of the treatment that it was anxious to have the Court's declaration that the treatment was in VW's best interests. In making this submission, the local authority relied on the well-known Court of Appeal decisions *Re C (Children)* [2016] EWCA Civ 374 ("*Re C*"), *Re H (A Child) (Parental Responsibility: Vaccination)* [2020] EWCA Civ 664 ("*Re H*"), which establish the proposition that some decisions are of such magnitude that it would be wrong for a local authority to use its power under s.33(3)(b) of the Children Act 1989 to override the wishes or views of a parent.

In his consideration of the issue to be determined, Mr Justice Poole examined *J v Bath and North East Somerset Council* [2025] EWCA Civ 478 in which Lady Justice King made the important point that *Re C* and *Re H* were *cases "about the profound impact upon the Article 8 rights of a parent who continues to share parental responsibility with a local authority which has no Article 8 rights."* As Mr Justice Poole noted on the case before him

> *the parents' views are known and the Local Authority is not seeking to limit or restrict the exercise of the parents' parental responsibility. There is no need to do so in order to safeguard or promote the child's welfare. The parents have been engaged in the decision-making process. They have capacity to exercise their parental responsibility in respect to serious medical treatment for their son. They fully understand the risks and benefits involved and they support the proposed surgery. The Local Authority also supports the proposed surgery. There is no debate amongst the treating clinicians – they agree that it is in VW's best interests to undergo the surgery. The treatment, whilst serious, is not experimental or unusually risky.*

In such circumstances Mr Justice Poole held that the application was not required, and that the clinicians could *"proceed on the basis that*

they have the necessary consent to perform the surgery, and the Local Authority can have confidence that it can exercise its parental responsibility to consent to the surgery, that being in accordance with the views of the child's parents and all treating clinicians."

Comment

This is an important case for those concerned with the medical treatment of children who have been subject to public law proceedings, because it makes the undoubtedly correct point that 'unnecessary applications' cause delay for the child who are likely to required the proposed medical treatment as soon as possible. Such application also of course take up resources which could be usefully deployed elsewhere.

It is interesting to note that Mr Justice Poole at paragraph 19 stated that he did "*not wish to imply that the position would be different were the treatment decision about withholding or withdrawing life sustaining treatment*." While he is clear that the treatment decision that he was concerned with was of a different kind, he must be correct that the logic of his judgment would apply equally in case concerned with the withdrawal or withholding of life sustaining treatments.

Consenting confusion and DNACPR recommendations

Bradford Children and Families Trust v Doncaster and Bassetlaw Hospitals NHS Foundation Trust & Ors [2025] EWHC 3311(Fam) (High Court Family Division (McKendrick J))

Other proceedings – family (public law)

Summary[1]

The local authority in this case applied under the inherent jurisdiction for relief for a declaration of lawfulness in respect of a DNACPR form which had been placed in the medical records of a young boy in foster care who had a life-limiting medical condition. The boy's parents and doctors had agreed that the DNACPR was appropriate, but the local authority did not consider it was able to consent to it, even though they did in fact agree that it was in the child's best interests, as part of a wider palliative care plan for the child.

At the hearing, the Trust confirmed that it was not offering chest compressions, defibrillation or admission to intensive care to the child, and so there was no best interests issue for the court to determine. The only possible treatment where there was a choice to made was the use of non invasive ventilation and intraosseous access, which the Trust did not consider in the child's best interests but which the doctors were not refusing to offer. The Trust also pointed out that the DNACPR (in this case, the RESPECT form) is not legally binding and there was nothing stopping the Trust forming a different view in the future should the child's circumstances change.

The local authority submitted that a court order was required since even though the local authority had the power to give or refuse consent to medical interventions through the care order, cases where the exercise of that power had very serious consequences for the child or its parents should be brought before the court.

The court decided to make a declaration that "*It is not lawful, being unethical, for [the child] to be provided with*" the treatments the Trust had said it was not offering. McKendrick J noted that the medical records showed discussion of whether the RESPECT form was in the child's best

[1] Note, Katie having been involved in the case, she has not contributed to this note.

interests, which implied that there had not been a decision not to offer resuscitation, and the ReSPECT form itself did not make clear which treatments were being withheld because the medical professionals were not willing to offer them, and which were judged not to be in the child's best interests. The judge also took the view that a local authority could not consent to a DNACPR decision as it was a matter of life and death and since the medical records had not made clear that certain treatments were not on offer, the local authority had been right to issue the application. If the Trust's position had been clear, the local authority would have understood that their only option was to issue proceedings for judicial review if they disputed the medical decision.

The judge therefore suggested that NICE may wish to consider whether its NG61 guidance, the CYCAP and ReSPECT should be revised.

Comment

The ReSPECT form includes what is described by the Resuscitation Council as "*a recommendation on whether or not CPR should be attempted if the person's heart and breathing stop*." It is a clinical judgment, based on consultation with the patient or their family – the requirement of consultation or involvement of the patient and family having been confirmed in *R (Tracey) v Cambridge University Hospital NHS Foundation Trust* [2014] EWCA Civ 822 [2015] QB 543 and *Winspear v City Hospitals Sunderland NHS Foundation Trust* [2015] EWHC 3250 (QB)). It is not a best interests decision, because a person can never, themselves, make the decision as to what the doctors should recommend.

The ReSPECT form itself does not characterise the decision to put in place a DNACPR recommendation as a best interests decision (and, in relation to adults, makes clear that the 'capacity' question is not capacity to make decisions about CPR, but capacity to participate in the making of recommendations). It also – deliberately – does not include a place for the person themselves or for someone on their behalf to sign the form, because logically it is not a question of 'consenting' to the making of recommendations by medical professionals.[2]

However, this case makes clear that there is further work to be done to get this message across. What does not help in this regard is the confusion caused by the analysis in the *Winspear* case, in which the court:

(1) endorsed established caselaw which confirms that the first stage in the decision-making process is for the doctor to decide what options to offer in the exercise of their clinical judgment; but

(2) framed the requirement to consult with the relatives of a person without capacity as deriving from s.4 MCA rather than Article 8 ECHR. This leads to confusion as it implies that the process the doctor is involved in is one of making a best interests decision, not deciding how to exercise their clinical judgment.

[2] And also, in relation to adults, because a signature would turn the form into a Frankenstein advance decision to refuse treatment, both purporting to refuse CPR, but at the same time not complying with the requirements for validity under the MCA 2005. In relation to an adult, clinicians must be careful – if the person really wishes not to have CPR – to guide them towards creating an advance decision to refuse it, which will stand as their own decision.

This confusion relates to adults with impaired decision-making capacity; it applies equally to children.

This sentence from R (Burke) v General Medical Council [2006] QB 273 correctly summarises the position*: "If, after discussion with the patient, the doctor decides that the form of treatment requested is not clinically indicated he is not required to provide it although he should offer to arrange a second opinion.""* The doctor decides whether to offer CPR, following consultation with the patient or their family. If they decide not to offer it, they cannot be compelled to change their minds, and so there could not be any best interests challenge in the court, as it is procedurally improper to use the court to pressure a doctor to change their clinical opinion (*AVS v A NHS Foundation Trust* [2011] EWCA Civ 7).

This clarity in *Burke* is not reflected elsewhere – in addition to the confusion in Winspear, the joint statement by the Resuscitation Council, the BMA and the RCN throughout refers to the need to take decisions in the patient's best interests. And it is common for doctors to use the phrase "best interests" even when what doctors are referring to are their clinical decisions, not a best interests choice, as appears to have occurred in this case.

Finally, it is of interest in this case that the declaration made was not a best interests declaration, but a declaration of lawfulness, the Trust have clarified the situation by the time of the hearing. If clarity about the nature of the clinical decision is given at an earlier stage, further such applications should be avoided.

Human rights of children in care settings

The Joint Committee on Human Rights, as part of its inquiry into the human rights of children in care settings, held an evidence session which (coincidentally) was on the 77th anniversary of the Universal Declaration of Human Rights. Alex hopes that it is not too cheesy to note that this gave him the opportunity in giving evidence to read into the record Eleanor Roosevelt's timeless observation that human rights start in the small places close to home.

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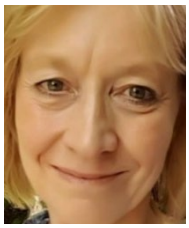

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Conferences

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

Alex is speaking at a conference organised by St Christopher's Hospice on Mental Capacity in Palliative Care on 9 March. The conference is in person (in London) and online; for details and to book, see here.

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 March. 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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