



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

- (1) In the Health, Welfare and Deprivation of Liberty Report: Senior Judge Hilder lays down her baton; attorneys and failures to consult, and a research corner on anorexia and last resort options;
- (2) In the Property and Affairs Report: new OPG guidance, 'third sector' deputyship and a reverse indemnity tangle;
- (3) In the Practice and Procedure Report: notes from a fireside chat with DDJ Flanagan, and litigation capacity in the absence of subject-matter capacity;
- (4) In the Mental Health Matters Report: conditional discharge and deprivation of liberty – the new regime, and conditional discharge into hospital;
- (5) In the Children's Capacity Report: parental responsibility and confinement – the need for an appellate judgment;
- (6) The Wider Context: assisted dying / assisted suicide update, Strasbourg's latest word on withdrawing life-sustaining treatment and mental capacity reform in New Zealand.

Circumstances beyond our control mean that we do not have a Scottish report this time.

A reminder that we have updated our unofficial update to the MCA / DoLS Codes of Practice, available [here](#), and that, whilst Chambers have launched a new and zippy version of our [website](#), all the content that you might need – our Reports, our case-law summaries, and our guidance notes – can still be found via [here](#).

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

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Article 5 ECHR – children and young persons

Summary

The decisions of Henke J in *East Riding of Yorkshire Council v The Mother & Ors* [2026] EWHC 181 (Fam) and *Medway Council v The Father & Anor* [2026] EWHC 236 (Fam) are two more in a line of first instance decisions which just reinforce how badly the question of the scope of parental responsibility relating to confinement for those under 16 requires consideration by the appellate courts.

The cases were a little different to some of those which we have commented on previously, in that there was active argument as to the scope of the ability of the parents in question to consent to the confinement of their child (but we understand that there will be no appeal in either case).

The East Riding case

In the *East Riding* case, the child in question, L, was 12, and was accommodated pursuant to s.20 Children Act 1989. Her parents specifically, and additionally, contented to her confinement (L herself was not Gillick competent to consent).

We reproduce the material passages of Henke J's judgment discussion and analysis.

50. L is a very much loved 12-year-old whose parents wish to do their best for her. L's unique characteristics are such that she requires a package of care and support. That is provided by the local authority under s.17 CA 1989. L's parents' consent to that package of care. L's parents have accepted reluctantly that they cannot care for her themselves (because L's behaviours were impacting adversely on her siblings at home) and have agreed to her accommodation pursuant to s.20 CA 1989. L's parents retain parental responsibility for her throughout the period of accommodation. They can withdraw their consent to her accommodation at any time they wish.

51. L is currently placed at Rainbow Cottage with a care package to meet her unique needs. Rainbow Cottage is a registered care home. At Rainbow Cottage L is alone. There she is under continuous supervision on a 2:1 basis always in the home and the community day and night. She is never left alone without staff nearby, even when she requests space. Staff may prop her door open and maintain visual checks to ensure safety. Within the home L's movement is restricted. The outside gate is always locked. The external doors are locked unless L is outside with staff. The door from the dining room to the kitchen while staff

are cooking and preparing food is locked for the reasons already given. In addition Team Teach behaviour support (physical intervention) is used when necessary and in line with approved techniques by appropriately trained staff to prevent L causing harm to herself and others; to prevent L leaving the placement of her own accord; for the purposes of transport to and from the placement and educational provisions/appointments and to return L to the placement if she absconds. Those restrictions on her liberty are necessary and, in her welfare, best interests, but that does not mean that limb a of Storck is not met. Indeed, on the facts, it is indisputable that the implementation of the restrictions means that L is kept under complete supervision and control. She is not free to leave the place where she lives. L is now aged 12. It was held by Sir James Munby P in *Re A-F [2018] 3 WLR 138 (Fam)* that once a child who was under constant supervision had reached the age of 12 the court would more readily come to the conclusion that he was being confined. In my judgment it is thus rightly accepted by all before me that L, on the facts of the case, is confined within the meaning of limb (a) of Storck. That confinement is undoubtedly attributable to the State which is the provider of her placement, the staff therein and the services L receives. Limb (c) of Storck is met. The contentious issue before me is whether L's parents can provide valid consent to L's confinement within the meaning of limb (b) of Storck.

52. As already stated, L's parents have consented to her confinement and the specific restrictions which amount to that confinement as well as the care package. L's mother has previously

described herself as overwhelmed by the decisions she needs to make for her daughter, but she and L's father have persevered. They have considered the options for their daughter and made difficult, informed decisions. They have done that because they want to make the decisions for L to ensure she is safe and her needs are met. The decisions that they have taken include their decision to consent to L being subject to restrictions which amount to confinement within Storck limb (a) They consider, as do all parties before me, that the measures which fulfil limb (a) of Storck are in L's welfare best interests and are necessary and proportionate. The fact that L's parents accept that they cannot care for her themselves is but one factor which was taken into account when they considered where L was best placed, the care that is to be provided to her under her care package and her containment within limb (a) of Storck. They have also considered her safety, her need for care and support and her need for protection.

53. L's parents have actively engaged with the local authority which is providing care and support for their daughter under s.17 CA 1989. They have engaged with the planning process and communicate regularly with L's social worker. They also engage with the staff at Rainbow Cottage about the day-to-day care L receives. They advocate for their daughter and where appropriate, they provide challenge. Each of L's parents visits her once a week at Rainbow Cottage. Their visits are social, family time but they are also a vehicle for effective scrutiny of what is happening on the ground and an opportunity to judge whether their daughter's needs

are being appropriately met. The visits enable L's parents to monitor their daughter's welfare and intervene where necessary.

54. Rainbow Cottage is a registered children's home. The relevant statutory scheme in England is provided by the Care Standards Act 2000 and associated regulations, requiring all children's homes to register with Ofsted before operating, making unregistered operation a criminal offense. This scheme mandates inspections, compliance with standards and ensures appropriate care, management, and provision for children in residential settings, with Ofsted enforcing rules and assessing quality. The Children's Homes (England) Regulations 2015 (2015 regulations) apply and National Minimum Standards are required.

55. It is accepted before me that L's parents can consent to L being deprived of her liberty provided that the decision falls within the zone of parental responsibility: *Munby P in Re A-F* (above) at paragraphs 11; *Mr Justice Keehan in Re D [2015]* (above); *Mrs Justice Knowles in Re Z* (above); and *Mrs Justice Lieven in TGA* (above) applied. However, the zone of parental responsibility although extensive is not limitless. The ambit of parental responsibility, the extent of the zone of parental responsibility, in any particular case is to be ascertained by reference to general community standards in contemporary Britain: *Munby P in Re D [2017] EWCA Civ 1695* at paragraph 37 and repeated at paragraph 11 in *Re A-F*. *Mrs Justice Knowles' decision in Re Z* is an example of where on the facts of the

case before her she considered the limit of parental responsibility lay.

56. The real question in this case is whether the decisions that L's parents have made in relation to her confinement fall within the zone of parental responsibility. For the reasons I set out below, I consider on the acts before me that they do.

57. L is 12 years old. Most parents would expect to make most, if not all, significant decisions for a 12-year-old. L's parents are no different. L's maturity and level of understanding is relevant to her parents' need to make decisions for her. L is autistic. Her autism impacts her maturity and level of understanding. She does not have the capacity to make decisions for herself. It is accepted before me that L is not Gillick competent. I have described in earlier paragraphs of this judgment, L's presentations and behaviours. They are relevant to the risks that she poses to herself and others. Any parent of a 12-year-old would expect to take decisions to enable their child to be protected and would regard such decisions as coming within their zone of parental responsibility. Any parent when considering how to ensure their child's safety would take into account that child's behaviours and presentation and the risks that flow from them. That is exactly what L's parents have done here. In this case, L's parents have given their consent to the elements of her plan which amount to confinement within Storck limb (a). They have done so to ensure her care needs are met and that whilst she is accommodated away from them, she is safe. The decisions they have taken in that regard are acknowledged to be in L's best interests.

58. That brings me to the restrictions that amount to L's continuous supervision and control. In my judgment the 2:1 supervision, the locking of doors and windows etc are all matters that fall squarely within the zone of parental responsibility in relation to a 12-year-old who presents as L does. The issue of physical restraint however is less clear and requires careful consideration. I do not accept the local authority's submission that the Team Teach interventions are part of L's care and treatment. I have set out in an earlier paragraph how that intervention has been used to "unstick" her. Whilst it may be used for that purpose, the local authority also candidly state in the social worker's statement that Team Teach will be used to prevent L causing harm to herself and others; to prevent L leaving the placement of her own accord to keep her safe; for the purposes of transport to and from the placement and educational provisions/appointments; and to return L to the placement if she absconds. In those circumstances, the restraint used is, in my judgment, objectively a component of her confinement and falls within limb (a) of Storck.

59. Further I do not accept the local authority's submission that the purposes for which restraint is used in this case fall squarely within regulation 20 of the [Children's Homes (England) Regulations 2015]. Only regulation 20 (1)(a) and (b) would be applicable to L. The scope of those paragraphs is limited. The purpose of restraint and the circumstances in which restraint may be used, if necessary, in L's case quite clearly go beyond the ambit of regulation 20(1)(a) and (b).

60. On behalf of the Guardian, it is submitted that consent to such restraint is outside the zone of parental responsibility in this case. I do not agree. In my judgment the consent to restraint as provided here is part and parcel of L's parents' exercise of parental responsibility to ensure her safety and welfare when she is outside their care. It would be neglectful for them to not consent. Without the use of restraint for the purposes already described, L would not be safe.

61. There is one further element to which L's parents' consent, and which concerns the Guardian. That is advance consent to L being administered medication including antipsychotics if deemed necessary by medical professionals. At first blush that may appear extreme but on further consideration, I remind myself that L is under 16 and not Gillick competent and thus her parents can consent to her medical treatment if they consider that it is in their child's best interests to do so.

62. It is submitted on behalf of the Guardian that parental consent does not provide L with adequate safeguards. It is argued that without prior court authorisation, there is no objective judge of proportionality and necessity. There would be no court consideration of the restraints to be used and how they would be used or indeed any of the other restrictions her parents have agreed. That is true. However, there is no need for a court process here because in L's case her parents are acting in her best interests. They are consenting to that which all agree is necessary and proportionate. L's parents know her and her unique presentations better than anyone.

They have watched her grow up and until early last year cared for her daily. They thus are in many ways better placed to make the decision about what is necessary and proportionate for their daughter than others.

63. In terms of the court monitoring the components of L's confinement to ensure they remain necessary and proportionate, the reality is that any final court order authorising L's deprivation of liberty would be limited in duration. That duration is likely to be 6 or 12 months from the date of the final order. Within the duration of a final order there would be no court review. However, when the order reaches its expiry date the local authority would need to re-apply for a fresh order. That new application would involve the appointment of a Guardian who would make all necessary investigation and represent L's welfare interests. The new application would involve court scrutiny of the restrictions proposed and ultimately the court would make a best interests decision on all the evidence. Thus, I accept that the court process provides an element of investigating, monitoring and safeguarding. However, I balance against that the absence of court scrutiny during the currency of any final order. I also have to factor in that the court process itself is intrusive. As part of the process L's parents would be automatic Respondents. L would need to meet with or speak to her Guardian, if able. The Guardian would be another professional in L's life albeit for the duration of any court process until the final order is made. The Guardian would not have a role once a final order was made.

64. During the period of any final order there may be Child in Care meetings. However, they will only be once every 6 months in L's case. Those meetings could be supplemented by regular, say monthly, reviews of the necessity and proportionality of the restrictions on L's liberty if the local authority were willing to facilitate such meetings but there is no requirement for such a scheme given L's age. L's parents would participate in such meetings as would the professionals, social workers, clinicians etc working with L. The Guardian would not be a participant once a final order is made. Ultimately, I consider that any such meeting is only an effective safeguard if there is someone in the meeting who can object to the continuation of the restrictions proposed if they consider them neither necessary nor proportionate or contrary to L's best interests. Guardians, IROs and social workers can express opinions, but they do not hold parental responsibility and cannot object. The only people that can make an effective objection are L's parents. If they do object and withdraw their consent to L's confinement, then the local authority will have to apply to the court under s.100 CA 1989 for an order authorising the deprivation of L's liberty. They cannot lawfully confine her otherwise. Implicit in the forgoing is my rejection of the submission on behalf of the Guardian that all L's parents can do is withdraw their consent to their daughter's accommodation. That is one option open to them. The other is to withdraw their consent to such restrictions on L's liberty as they do not consider either necessary or proportionate or in L's best interests.

65. In my judgment the appropriate exercise of parental responsibility by

L's parents together with the statutory scheme set out at paragraph 54 above, provide effective safeguards for L on the facts of this case.

66. In the circumstances and on the facts of this case, I consider that the consents L's parents have given fall within the zone of parental responsibility. They are valid consents within the meaning of limb (b) of Storck. They are decisions taken in her best interests. Accordingly, L is not being deprived of her liberty for the purposes of Article 5, and these court proceedings are not necessary.

It is perhaps also worth noting an earlier passage in which Henke J considered the judgment in TGA relied upon at paragraph 55.

38. In NHS Trust v M and F and others [2024] EWHC 2207 Mr Justice Francis agreed with Mrs Justice Lieven's analysis in TGA with one caveat which he set out in paragraph 25:

25. I agree with that Judgment of Lieven J, but would add this, perhaps by way of qualification: in [51] above, Lieven J said, "If the parent was exercising parental rights, including consenting to the deprivation of liberty, in a way which was said to be contrary to the child's best interests then such a decision would no longer fall within the zone of parental responsibility". It seems to me that even a decision which was made contrary to the child's best interests could still be a decision made in the exercise of parental responsibility. Every day parents will exercise parental responsibility and will sometimes make decisions that are contrary to their child's best interests. This is still exercising parental responsibility. It is the duty of the State to intervene where a

decision is contrary to the best interests of the child, and might cause the child to suffer significant harm [...]

39. I need not determine the issue between Mrs Justice Lieven and Mr Justice Francis as there is no doubt that in this case L's parents are exercising their parental responsibility in her best interests. However, if they were to act contrary to her welfare interests, then if the local authority considered the relevant thresholds met, the local authority could apply for public law orders under Part IV and V of CA 1989. I remind myself that the State is under an obligation to take appropriate steps to safeguard the lives of those within its jurisdiction – LCB v UK 1998 paragraph 36 and that States are required to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman degrading treatment or punishment, including such ill treatment as administered by private individuals – AV UK 1998.

The Medway case

The Medway case concerned a profoundly disabled 15 year old girl, O, cared for by her father. Her circumstances were described thus at paragraph 3:

O's father is rightly described as devoted to O. He does all he can for her. O's father provides day-to-day care for his daughter. In addition, O has a package of care provided under an ECHP and a Child in Need welfare plan (s.17 Children Act 1989). As such, O is provided with services and support by the local authority. O is visited by a social worker every 15 days and has a Child in Need review every six-eight weeks. Support workers, an agency commissioned by the local authority, attend within the

home for 40 hours per week in term time, 44 hours per week in the school holidays. The Agency workers attend the home twice a day: two hours in the morning to prepare O for school and 4 hours in the evening after school. O attends a special needs school. School staff support O with her personal care as required. All the doors at the school are managed by the keypad and fob locking system; the combination is not shared with O or any of the children who attend that school. If by any chance O was able to leave the premises, she would be followed and returned to school. In addition, O is provided with two nights per month respite care at a short breaks home run by the Local Authority. There, O receives 1:1 supervision and is not permitted to move freely about the facility or when out in the community for her own safety. O has full 1:1 support always when attending the short breaks home and cannot be left unsupervised. At the short breaks home, a keypad and fob locking system is in place to keep all children safe and ensure they do not venture into harmful areas or leave the premises where they can come to some harm. To ensure that O does not enter other children's rooms during the night, a staff member/s sit near O's door to redirect O quickly back to bed, if she wakes so that O does not disturb others. O requires staff to open doors for her as she has no danger awareness and could not access the community without supervision. The short stay home requires the use of O's wheelchair when in the community as O will drop to the floor and decline to move even if in a dangerous location such as roads or carparks. O does not use a harness when accessing the home's transport, be it in a bus or smaller vehicle, but O does have full 1:1 supervision and needs to sit in a double seat with a staff member next to them. O does not sit on a single seat as this does not keep her safe whilst travelling.

The local authority issued application for an order under the inherent jurisdiction in relation to O. If permitted to exercise the inherent jurisdiction, they sought an order to deprive O of their liberty for a period of 12 months. Both the Guardian and O's father took the position that the application was unnecessary.

Henke J traversed much of the same ground as she had done in the *East Riding* case in her analysis, confirming her view that the proper construction of the effect of the relevant authorities was:

24. [...] a regime in relation to those under 16 which permits parental consent provided that said parental consent does not leave that child without safeguards. Parental responsibility must be exercised in the best interests of the child. What falls within the zone of parental responsibility is not limitless- see paragraph 55 *Re L* (above). As a matter of logic, any zone must have boundaries. Where the decisions taken by a holder of parental responsibility are not in the child's best interests, there are safeguards. The measures include applying to the court to authorise the child's deprivation of liberty where the parent does not exercise their parental responsibility and refuses to consent to deprivation of their child's liberty which are necessary and proportionate to safeguard their child. Further if the decision were taken contrary to the child's welfare, then if the local authority considered the relevant thresholds met, the local authority could apply for public law orders under Part IV and V of CA 1989.

25. I remind myself that the State is under an obligation to take appropriate steps to safeguard the lives of those within its jurisdiction – *LCB v UK* 1998 paragraph 36 and that States are required to take measures designed

to ensure that individuals within their jurisdiction are not subjected to torture or inhuman degrading treatment or punishment, including such ill treatment as administered by private individuals – A v UK 1998. If a parent were confining their child in a manner which amounted to inhuman degrading treatment or punishment, then the State in the guise of the local authority would need to act.

Ultimately, therefore, Henke J considered that the question was whether the consent that O's father gave to her confinement fell within the zone of his parental responsibility for her. That was a fact-specific question, and she considered that, on the facts of the case, they did, such that the application was unnecessary.

Comment

Although, as noted above, we understand that this case will not go further, we would respectfully suggest that it is unfortunate that neither way:

1. Both are paradigm cases of visibly well-intentioned parents seeking to consent to 'high end' restrictions of their children, of a nature which clearly go beyond those which would be expected in relation to children of that age without disabilities. We have no determinative appellate confirmation that it is acceptable to take account of such disabilities when identifying whether parents are acting within the scope of their parental responsibility (the observations of Sir James Munby in *Re D* were obiter insofar as they concerned those under 16, the case not concerning those under 16 by the time it came to the Court of Appeal, and the other observations relied upon all being first instance).

2. It would allow confirmation as to whether a confinement carried out at the hands of a parent is not imputable to the state, as Henke J appears to have considered in the *Medway* case (see paragraph 32). This proposition does not sit easily with the judgment of the Court of Appeal in *SRK* about private confinements or, indeed, with the approach of Lady Hale in *Re D* at paragraph 47:

There are two contexts in which a parent might attempt to use parental responsibility in this way. One is where the parent is the detainer or uses some other private person to detain the child. However, in both Nielsen and Storck it was recognised that the state has a positive obligation to protect individuals from being deprived of their liberty by private persons, which would be engaged in such circumstances.

In other words, the critical question is not whether the confinement is at the hands of a private person, but whether the state is aware or ought to be aware of the position. Otherwise, it might be said that the right to liberty becomes entirely empty if the state washes its hands of responsibility on the basis that state agents are not, themselves, confining the individual but standing by in awareness of the confinement.

3. It would give the opportunity for the Court of Appeal to consider the position by reference to the expanded regime for authorising deprivation of liberty proposed in the Children's Wellbeing and Schools Bill. To the extent that Henke J's thinking was influenced by working backwards from the scope of safeguards available (a flavour of which comes through in paragraph 64), it would perhaps be important to test that thinking by reference to the potential for the situation to come within the scope of the expanded s.25

Children Act 1989 and the safeguards available thereunder.

A final note. In the throes of writing a book chapter about competence and capacity for those under 18, Alex was particularly struck by Henke J's statement at paragraph 20 of the *East Riding* case that:

In Gillick v West Norfolk and Wisbeach Area Health Authority [1985] UKHL 7, it was held in the context of consent to medical treatment that when determining whether the child themselves can consent, consideration should be given to their ability to:

- (a) *Understand the nature and implications of the decision and the process of implementing that decision*
- (b) *Understand the implications of not pursuing the decision;*
- (c) *Retain the information long enough for the decision-making process to take place;*
- (d) *Be of sufficient intelligence and maturity to weigh up the information or arrive at a decision;*
- (e) *Be able to communicate that decision.*

Alex's immediate thoughts were:

1. "If only." Sadly, the House of Lords did not give anywhere near such granular detail, even if clinicians, DH (as it then was) in the promulgation of the Mental Health Act Code of Practice, and several of Henke J's fellow High Court judges, have sought to read in that level of detail when seeking to analyse whether a child should be understood to be competent to give consent to medical treatment. See further in this regard Chapter

12 of the Law Commission's Disabled Children's Social Care report for more on what might be thought to be the very unsatisfactory state of the law here.

2. In light of the observations of Sir Andrew Macfarlane in *Re S*: should we even be talking about *Gillick* in the context of consent to confinement?

SEND White Paper

The long-awaited SEND White Paper was published on 23 February 2026, with a consultation set to run until 18 May 2026. One meta-observation is that, as with the Law Commission's work on disabled children's social care, the proposals throw a very stark spotlight on:

1. What the Convention on the Rights of Persons with Disabilities really requires: inclusion or the provision of specialist (potentially separate) services and facilities based – ultimately – on some form of impairment;
2. How to ensure that provision based on impairment is not either too 'wide', based solely on an impairment which has no actual impact on the child's life, or too 'narrow,' based on either a very limited category of 'acceptable' impairments (and, linked, what evidence is acceptable) or a very severe set of impacts;
3. Whether appropriate provision can be secured by way of systems-level obligations, or whether only individual legal entitlements to specific services can suffice;
4. What appropriate remedies look like in a situation where, for essentially historical reasons, the SEND Tribunal has powers to direct service provision in a way that no other Tribunal (or indeed court) can.

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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 April. 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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