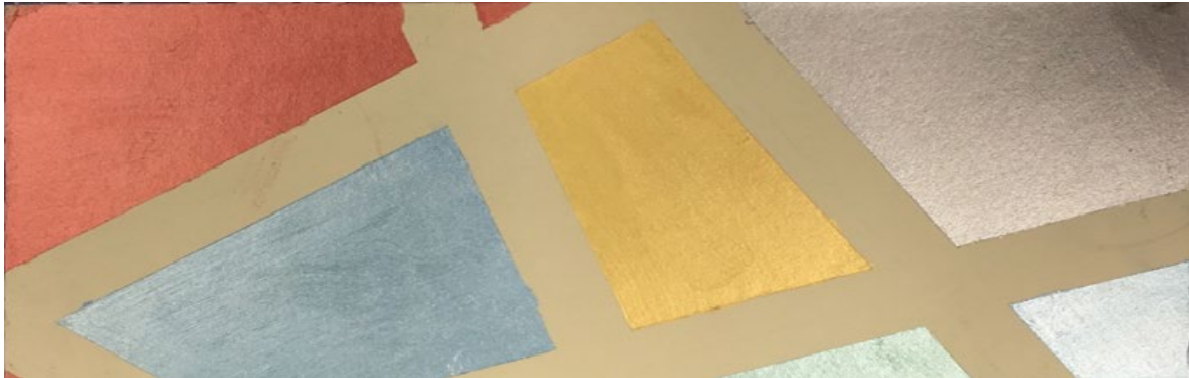




Welcome to the September 2026 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: an update on post-AGNI developments, two capacity conundrums in one case and 'over-litigation' in a PDOC case;
- (2) In the Property and Affairs Report: an update from the Property and Affairs Court User Group meeting and the OPG is recruiting lawyers;
- (3) In the Practice and Procedure Report: the Court of Appeal resets the approach to personal welfare deputies, and cross-border cases involving Scotland;
- (4) In the Mental Health Matters Report: recent cases concerning the relationship between the MHA and the MCA and an excoriating judgment on "detainability;"
- (5) In the Children's Capacity Report: AGNI and children and the Joint Committee on Human Rights reports on the human rights of children in care;
- (6) In the Wider Context Report: litigation capacity complexities, and recent medical guidance documents concerning consent, voluntarily stopping eating and drinking, and eating disorders and critical care.
- (7) In the Scotland Report: a Practice Note that has caused some consternation.

A reminder that that whilst Chambers have launched a new and zippy version of our [website](#) which may look unfamiliar, 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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AGNI and children

The decision in *Re Mustafa (A Child)* [2026] 2159 (Fam) represents the first reported consideration of AGNI in relation to children. The child in question was 15 and subject (at that point) to an order authorising deprivation of liberty. The local authority sought to withdraw an application for an extension of the order; an application opposed by the Guardian on the basis that he should still be seen to be deprived of his liberty even after AGNI.

Mr Recorder Adrian Jack (sitting as a High Court Judge) considered that it was possible for consent can only be given by a Gillick competent child: "[a] child who is not Gillick competent may nonetheless have sufficient understanding for their views to be relevant as to whether they consent to aspects of deprivation of their liberty" (paragraph 39). However,

40. This, however, still leaves the issue as to whether Mustafa's apparent consent is, as the Guardian submits, "compliance by Mustafa rather than valid consent" and whether his apparent consent "is likely to be insecure, not of an enduring nature and likely to be revised and retracted." The Guardian is in my judgment right to point out that Mustafa may seek to withdraw any consent he has given, if he does not like particular restraints placed on him. Moreover in principle he can do this at

any time, even (or indeed especially) whilst physical restraint is being used on him. This observation, however, overlooks the fact that in some cases schools are entitled to use physical restraint on children regardless of the child's wishes.

Directing himself by reference to the analysis of the powers of schools to restrain children (both at common law and in statute) analysed in *Re FXS v Mulberry Bush Organisation Ltd* [2026] EWCA Civ 415, Mr Recorder Adrian Jack considered that:

14.¹ When I stand back at look at all the factors relevant to the assessment as to whether there is a deprivation of liberty, in my judgment there is no deprivation of liberty. Mustafa is, as the Guardian sets out at length, generally happy in his placement. Where the school uses physical restraint, it either has Mustafa's consent or it is entitled to use restraint under its common law powers. Either way, there is no deprivation of liberty such as to give rise to a violation of Article 5(1). An extension of the DOLs order is therefore neither necessary nor proportionate and I refuse to grant one.

The judgment indicates that the Guardian was contemplating an appeal. If no appeal is forthcoming, we lay down a marker that we consider that it is likely that both of the core

¹ Note, the paragraph numbering in the judgment has gone somewhat awry; this

paragraph comes later than those set out above.

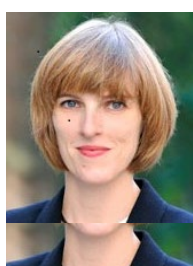
points set out above will be examined further in due course. There remains (to use a technical term) significant amount of 'fuzz' around whether *Gillick* has now in some way mutated to be the functional aspect of the MCA test. If it has, then the approach taken by the court in this case would appear to track the logic of *AGNI* impeccably. If it has not, but represents some rather more nebulous conception of the child's developmental abilities, it is perhaps not so obvious that the logic applies.

Whilst it is undoubtedly relevant that there are powers to restrain children at school that do not exist in relation to either those in other situations or to adults, it is perhaps not entirely obvious that the existence of a power to restrain gives the answer to the question before the court, which is whether the child is in a situation where (in legal terms) a power is required to serve as a defence to unlawfulness.

Shortly before the decision was handed down, the Nuffield Family Justice Observatory published a helpful blog by Camilla Parker KC (Hon) and Emma Smale on *Deprivation of Liberty and Children after AGNI*, available [here](#).

The Joint Committee on Human Rights and children in care

The JCHR has published a detailed and wide-ranging [report](#) on the human rights of children in care (which includes mention of *AGNI*). It includes detailed examination of and endorsement of the Law Commission's proposals for reform of disabled children's social care, to which we still await the Government's final response.



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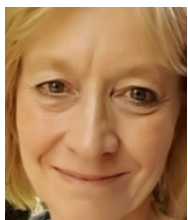
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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services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



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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 October. 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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