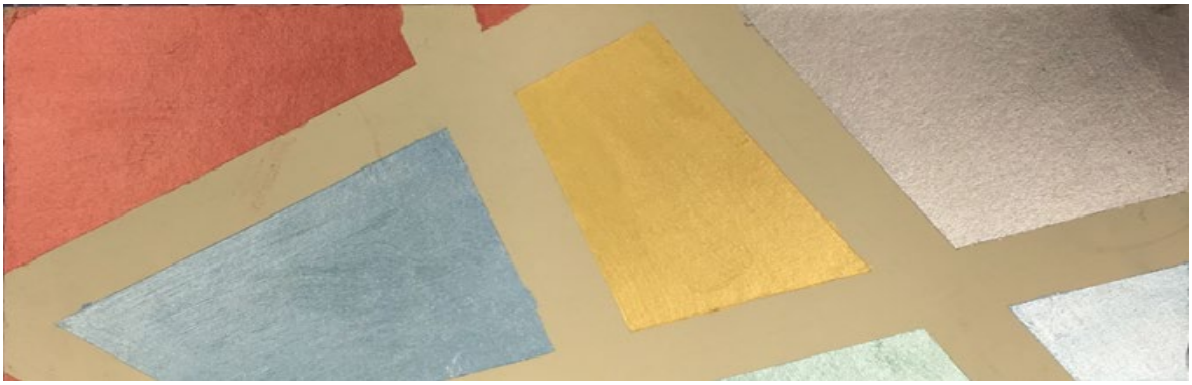

Welcome to the September 2026 Mental Capacity Report. Highlights this month include:

(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 a 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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The courts and litigation capacity

Two cases concerning this issue, one before the family courts, and one before the civil courts, merit noting.

In *RT v DW* [2026] EWFC 183 (B), HHJ Muzaffer gave a characteristically thoughtful – and rightly 'bothered' – judgment about the problems he faced in a financial remedies hearing in the Family Court with two litigants in person, one of lacked the capacity to conduct the proceedings. The Official Solicitor at one stage had been involved, but then for reasons which clearly frustrated HHJ Muzzafer, but which he could not properly criticise her in relation to, ceased to do so. As he noted:

> *25. The systemic difficulty is that vulnerable individuals such as the husband do not have automatic recourse to legal aid in cases of this kind. The husband has been left to navigate matters alone and without representation, while the wife has had to endure the continuing financial and emotional burden arising from the protracted litigation. The reality is that both parties have, in a very real sense, been impeded in their access to justice and have suffered hardship as a result. This is a matter that ought to give rise to real concern.*
>
> *26. I note that other possibilities were considered by the court, including pro bono assistance or the involvement of the Court of Protection. In terms of the former, advocates and charitable organisations understandably will not agree to act when there is a risk of being liable for costs. In respect of the latter, any application to the Court of Protection for the appointment of a professional deputy, who might then assist as a litigation friend, would be a lengthy and costly process. There is also no clear avenue as to who or how such application would be made in the circumstances of this case. Finally, there are no family or friends willing to take on the role.*

HHJ Muzzafer was therefore left to navigate through as best he could to do justice to the parties, and, for reasons he set out in his judgment, held that he could properly proceed notwithstanding the lack of a litigation friend to represent the husband. He did manage to involve an intermediary, and, at their recommendation, prepared a simplified

explanation of the judgment appended to the end.

The issues identified by HHJ Muzzafer, although they arose in the Family Court, are equally problematic in the civil courts. They were the subject of a detailed report and recommendations by the Civil Justice Council in 2024, recommendations which have yet, sadly, to bear fruit.

In *TLA v Chelsea and Westminster Hospital NHS Foundation Trust* [2026] EWHC 1751 (KB), HHJ Carmel Wall, sitting as a Judge of the High Court, had to consider whether the litigant in person claimant had capacity to conduct relatively complex personal injury proceedings arising out of asserted breaches of confidence and other matters. The issue had been put in play by the defendant's expert, who had been instructed to report on causation, condition and prognosis. Whilst HHJ Carmel Wall found that the defendant had been entirely right to raise the issue before the court in light of the expert's suggestion that the claimant lacked the capacity to conduct the proceedings, she found that, in fact, he had it. Of particular interest is the extent to which HHJ Carmel Wall was concerned about the expert's pre-JB approach of analysing the so-called diagnostic limb first, noting that:

> *66.* […] *Dr Bradbury's assessment of capacity is substantially undermined by the error she made in the way in which she approached the questions that had to be considered in making the assessment. She frankly accepted that she believed that the diagnostic criterion had to be addressed as the first stage of analysis and was not aware of more recent authority that mandated consideration of the functional criteria as the first stage. Her error had the result that she viewed the Claimant's functional decision-making through the lens of the diagnosis she had arrived at rather than making an openminded assessment of his ability to weigh or use information to make a decision.*
>
> *67. When asked in her oral evidence to approach the assessment from the correct starting point, she accepted that she found it very difficult to untangle her functional assessment from her diagnosis. She was not able to explain convincingly the areas in which she believed the Claimant was unable to use or weigh information without straying into a value judgment about how he did so. Her opinion on this issue seemed to me to be unduly influenced by her own view of the wisdom and reasonableness of the position he had taken in relation to the Defendant.*

The expert also found herself drawn to protect the claimant:

> *68. It also appeared from her evidence that another factor influencing her view on capacity was her clinical opinion that the litigation was causing damage and distress to the Claimant such that pursuing it was to the detriment of his mental health. She did not see any positive outcome for the Claimant was at all likely. She saw his determined pursuit of the claim in those circumstances as unreasonable and unwise. She recognised that as a clinician, her instinct was "to protect people from themselves".*
>
> *69. Time will tell whether she is correct in her assessment of the merits of the claim and/or its ultimate impact on the Claimant. But in my judgment, she has conflated her view of the wisdom of pursuing the claim with issues of capacity. It is undoubtedly the case that the Claimant has strong views about this litigation, and his priorities are influenced by those views. When making*

> *decisions about the conduct of the claim, he has and no doubt will continue to put those strong views at the forefront of his decision-making process. But he is not shown to lack capacity simply because he weighs factors differently from others. Nor is he shown to lack capacity because he makes decisions that may be seen as unwise by others, or which are not considered by others to be in his own best interests.*

Another – not uncommon – feature was the strong feelings held by the claimant:

> *70. I have considered Dr Bradbury's particular concern with the Claimant's antipathetical approach towards the Defendant and towards evidence with which he does not agree. In the context of functional decision-making, she may well be right that he lacks objectivity. Many capacitous litigants lack objectivity when conducting a claim in which they passionately believe. They may lack an objective view of the defence to their claim, the motives of a defendant, the evidence that is against them or the motivation of a witness giving that evidence. A lack of objectivity may be expressed strongly. But it does not equate with incapacity. I am not persuaded by Dr Bradbury's evidence that the Claimant is unable to make the relevant decisions necessary in this case.*

The decision stands, with respect, as an extremely good 'worked example' of how to analyse and resolve doubt about capacity whilst steering an appropriate path between the Scylla of over reliance on the presumption, and the Charybdis of paternalism.

The challenge of respecting end of life wishes

A new report from the charity Compassion in Dying, Bridging the Gap, examines why it appears to be so difficult for those at the end of life to have their plans respected. As the report notes, there have been many conversations and initiatives around end of life care, which have "*in common is their potential to deliver care at the end of people's lives that is driven by their priorities and underpinned by their own informed decisions. Existing policy has long emphasised the importance of this too – of people being seen as individuals, with the opportunity to have honest and timely conversations about what matters most*." However, the report asks, "*if this is what people want, and where policy aims to go, why are so many people still experiencing care that is not aligned with their decisions and preferences?*"

> *To understand this, we spoke with health and care professionals across levels and specialisms about their experiences of decision making at the end of people's lives. This report brings together both perspectives – health and care professionals and dying people and those who love them. It shines a light on how sometimes, delivering care aligned with people's preferences is the hardest thing for a clinician to do. This should be a wake-up call to everyone working to improve the experiences of people at the end of their lives.*

Protection of vulnerable adults

In a relatively rare criminal case before the Supreme Court, important clarification has been given as to the scope of the offence of under s.5 of Domestic Violence, Crime and Victims Act 2004 "allowing a child or vulnerable adult to die or suffer serious physical harm." In *R v Sheikh* [2026] UKSC 28, the Supreme Court made clear that the relevant question was not whether the defendant foresaw, or ought to have foreseen, the precise unlawful act that caused serious physical harm to the victim, but whether the act occurred in circumstances of the kind that the defendant foresaw or ought to have

foreseen. The provision required a broad and purposive interpretation. Where an act causing serious physical harm to a vulnerable adult was "utterly different" from the antecedent violence inflicted on the victim, that was not necessarily fatal to the requirement of foresight in s.5(1)(d)(iii).

Consent to anaesthesia, and medical treatment frameworks around the British Isles

The Association of Anesthetists have published an updated version of their guidelines available here [1] The supporting material also includes a table setting out the main differences in the legal framework for decision-making and consent, including in relation to those lacking capacity, in the nations of the UK and Ireland.

Caring for patients who elect to voluntarily stop eating and drinking to hasten death

The BMA Medical Ethics Committee [2] has published guidance about the law and ethics of voluntarily stop eating and drinking (VSED), seeking to set out a legal and ethical framework to enable doctors to engage in patient-centred care and provide the best possible support and care to patients electing to VSED, whilst acting in accordance with the law. This guidance does not provide clinical information about VSED or symptom management.

Patients with severe eating disorders and critical care

A framework document has been developed by members of the College of Intensive Care Medicine's Legal and Ethical Policy Unit, [3] *Referring patients with severe eating disorders to critical care to facilitate assisted nutrition under restraint: a framework to support decision making in life-threatening situations,* working with critical care consultants, psychiatrists, legal professionals, and patient and lay representatives. It is endorsed by the Intensive Care Society and the Northern Irish, Scottish and Welsh Intensive Care Societies.

The document sets out a framework to care for people who are under the care of eating disorders/liaison psychiatry teams and who have been referred to critical care, following a multidisciplinary team decision, so that they can receive nutrition to sustain life.

Assisted dying

Lauren Edwards MP has now published the Bill that she intends to bring forward to the Westminster Parliament in September (with second reading due on 11 September) to 'finish the task' of Kim Leadbeater MP. It is essentially identical to that earlier Bill. Alex and colleagues from the KCL-based Complex Life and Death Decisions Group have prepared a briefing above the Bil.

If Parliamentarians in Westminster do want to seek to move forward in a considered fashion, they may well wish to look to Jersey, where the (Government-drafted) legislation received Royal Assent on 7 July 2026.

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[1] Full disclosure, Alex was on the working group along with, amongst others, Nadine Montgomery.
[2] Alex is on the BMA Medical Ethics Committee.
[3] On which (with apologies for sounding like a stuck record) Alex sits.

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Annabel has a well-established practice in the Court of Protection covering all areas of health and welfare, property and affairs and cross-border matters. She is ranked as a leading junior for Court of Protection work in the main legal directories, and was shortlisted for Court of Protection and Community Care Junior of the Year in 2023. She is a contributor to the leading practitioners' text, the Court of Protection Practice (LexisNexis). To view full CV click here.

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Alex regularly appears in health and welfare and property and affairs cases in the Court of Protection. He has appeared in leading cases to do with deputyship and published a textbook about LPAs. His recent doctoral thesis explores the impact of changes to mental capacity law in England and Wales. To view a full CV, click here.

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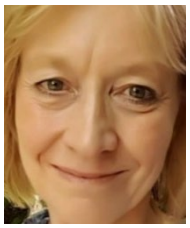
Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership 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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