



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

- (1) In the Health, Welfare and Deprivation of Liberty Report: Permission to appeal granted in *Townsend*; post-AGNI guidance; and a new Guidance Note on Capacity for Care Providers
- (2) In the Property and Affairs Report: Statutory wills; charging for being an appointee; and guidance on assessing financial capacity
- (3) In the Practice and Procedure Report: Court of Protection and child deprivation of liberty statistics; court fees rising; reasons challenges in the Court of Protection; medical treatment cases – whether to issue, and the consequences of waiting too long
- (4) In the Mental Health Matters Report: EU Recommendation of the Committee of Ministers to member States on respect for autonomy in mental healthcare
- (5) In the Children's Capacity Report: A CAMHS psychiatrist's view on child deprivation of liberty cases – and what interventions can help to break the 'vicious cycle' of restrictions and institutionalisation
- (6) In the Wider Context Report: Adult social care reform; the Muckamore Abbey Inquiry Report is published; and what becomes of solicitors whose clients lacked capacity
- (7) In the Scotland Report: Circumvention and undue influence

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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Permission to appeal granted in *Townsend*

The Supreme Court has granted permission to the applications made by both the NHSTrust and Mr Barnor's family in the Townsend Court of Appeal judgment. It is understood that the hearing may be listed in December 2026 or January 2027, and we will continue to report on any updates in this matter.

Post-AGNI Guidance published

The DHSC has now produced initial guidance (15 June 2026) both as to the meaning of deprivation of liberty, and also steps to take by local authorities and other bodies. On 18 June 2026, ADASS issued a 'note' building on an initial statement on 5 June, supporting the DHSC guidance and setting out a number of points it considered should be followed by all councils.

The Department of Health in Northern Ireland issued interim guidance and an accompanying information leaflet on 24 June 2026 available here.

West Midlands ADASS has published updated DoLS forms to reflect the judgment – there are no statutory forms for the DoLS process, but these forms are used by many local authorities, and the updated forms represent an operationalisation of the judgment (note, the

relevant updated forms say April 2026, but they were prepared in June 2026).

Initial guidance provided on the day by Senior Judge Hilder to judges of the Court of Protection considering so-called 'community deprivation of liberty' orders is available here.

CQC has issued an initial statement (8 June 2026) here.

Guidance Note on Capacity for Care Providers

A Guidance Note on Capacity for Care Providers dated 23 June 2026 (authored by Alex Cisneros, Tor, Alex and Neil) has been published on the 39 Essex Mental Capacity Resource page. This guidance note is for provider settings such as care homes and supported living placements in England about:

- (a) when is it necessary to carry out and record a formal assessment of a person's mental capacity, and in relation to which decisions;
- (b) the difference between informally considering capacity as part of good care practice, and formally recording a capacity determination;
- (c) when a formal written record is and is not required;

(d) how providers should approach capacity across the domains of a care plan; and

(e) what providers should do if they receive advice from a CQC inspector or local authority quality monitoring officer that appears to go beyond what the law requires.

Recognition of a Scottish order under Schedule 3 MCA

Midlothian Council v DM [2025] EWCOP 61 (T3) (Theis J, VP) (18 December 2025)¹

International jurisdiction of Court of Protection – Recognition and Enforcement

Summary

After *Aberdeenshire Council v SF* (No 2) [2024] EWCOP 10 and *Argyll and Bute Council v RF* [2025] EWCOP 12 (T3), in which Scottish guardianship orders authorising a deprivation of liberty in England foundered on the Article 5 rocks, a Schedule 3 application has now succeeded. Theis J provided the judgment as a template, hoping that reporting what Midlothian Council did “will help and assist any other public authority that may be looking at other practical ways to meet the concerns set out in the *RF* case” (paragraph 23).

DM, aged 28, had autism and a learning disability, and since January 2021 had been placed in a care setting in Workington under a welfare guardianship order made under the Adults with Incapacity (Scotland) Act 2000. Midlothian Council sought recognition and enforcement of the renewed order made by Edinburgh Sheriff Court on 13 March 2025. Recognition was granted in light of the following measures to ensure Article 5 compliance:

1. DM had a real opportunity to be heard: a safeguarder was appointed by the Sheriff Court to collect and convey his views, he

was served with the renewal application, and he attended the hearing with his care team, so paragraph 19(3) of MCA 2005 Schedule 3 was not engaged.

2. The order itself contained an express power to review the continuing necessity of the deprivation of liberty annually or at DM’s request.
3. The council put in place and funded an advocacy support plan under which an independent advocate meets DM every four to six weeks to ask whether he is content with the deprivation of liberty measures, whether he wishes to challenge the guardianship powers or how they are being used, to check whether he is unhappy with any aspect of his care or residence, to ensure he knows of his right to a review, and to ensure that any review he requests is actually undertaken.
4. As to access to court, the council confirmed that if DM wished to seek recall or termination under section 71 of the 2000 Act, either the Chief Social Work Officer or the independent advocate would instruct a solicitor – funded by the council, and irrespective of the council’s own view as to whether the order should continue – with independent representation available in the Sheriff Court through a curator ad litem.

Theis J was satisfied that this “impressive and creative” framework was “real and not illusory”, met the concerns expressed in *RF*, and that recognition was neither manifestly contrary to public policy nor inconsistent with a mandatory provision of the law of England and Wales.

Comment

The decision confirms that the Article 5 deficits identified in *SF* and *RF* = can be cured by practical, funded arrangements constructed

¹ Note: Arianna did not contribute to this summary, having been involved in this matter.

around the order. One point merits watching. The sixth *RF* requirement is that reviews should not depend on the goodwill of the detaining authority, yet the machinery here is devised, funded and partly operated by the guardian authority itself. What carried it was the express commitment to fund advice and any section 71 application irrespective of the council's own position, coupled with the independence of the advocate and of any curator ad litem. Authorities seeking to replicate the model should ensure those commitments are equally concrete – and recorded in evidence – rather than gestured at. For cross-border placements, expect the 'Midlothian package' (a review provision on the face of the guardianship order, a funded advocacy plan with regular visits, and a guaranteed, funded route to the Sheriff Court) to become the de facto price for Schedule 3 recognition.

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



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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She is a former Chair of the Court of Protection Bar Association and a member of the Nuffield Council on Bioethics. To view full CV click [here](#).



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Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. He trains health, social care and legal professionals through his training company, LPS Law Ltd. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click [here](#).



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Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click [here](#).



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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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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](#).

Neil's training dates are available 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 September. 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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