



Welcome to the February 2025 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: myth-busting about DoLS and strong words about assessment of capacity of D/deaf people;
- (2) In the Property and Affairs Report: revoking Deputyship for a person no longer present in England & Wales;
- (3) In the Practice and Procedure Report: litigation capacity and a very clear statement of the ordering of the capacity test, delays in obstetric cases and guidance on neurodiversity before the courts;
- (4) In the Mental Health Matters Report: the Mental Health Bill progresses and two important Upper Tribunal cases;
- (5) In the (new) Children's Capacity Report: deprivation of liberty before the courts and Parliament, when capacitous consent is not enough, and best interests and the clinical circling of the wagons;
- (6) In the Wider Context Report: The Terminally Ill Adults (End of Life) Bill and capacity, CCTV and care homes, and using the arts to be more creative in capacity assessment.
- (7) In the Scotland Report: Scottish Government's law reform proposals – the consultation responses, and the OPG digitalises.

There is one plug this month, for a [free digital trial](#) of the newly relaunched Court of Protection Law Reports (now published by Butterworths). For a walkthrough of one of the reports, see [here](#).

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#), where you can also sign up to the [Mental Capacity Report](#).

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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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Mental Health Bill progresses

The Mental Health Bill continues to make steady progress at Committee stage in the House of Lords. This stage allows peers to scrutinise the detail of a Bill, but traditionally no votes are taken. We refer interested readers to the excellent summaries by Tim Spencer-Lane of the contents of the relevant debates on each day: [day one](#) (14 January); [day two](#) (20 January); [day three](#) (22 January); and [day four](#) (27 January) (at least one further day is required, but has not yet been confirmed). Of particular interest to readers wearing capacity hats were the debates on days 1 and 3.

On day 1, the Government made clear that it understands, and accepts, that the removal of learning disability and autism from s.3 MHA 1983 does not rule out the use of DOLS. The potential concerns around this area (and the interface more broadly between the two Acts) also featured heavily in the [oral evidence session](#) held by the Joint Committee on Human Rights as part of its scrutiny of the Mental Health Bill on 29 January.

On day 3, the Government made what might seem to be the slightly surprising assertion that the functional test (i.e. the test of the ability to understand, retain, use and weigh relevant information and to communicate a decision) had been ruled out by the courts in relation to those

under 16. This would come as considerable news to Cobb J (as he then was): see *Re S (child as parent: adoption: consent)* [2017] EWHC 2729 (Fam). In doing so, he regarded it as “appropriate, and indeed helpful to read across to, and borrow from, the relevant concepts and language of the Mental Capacity Act 2005”.¹

Upper Tribunal cases

Two recent Upper Tribunal cases have made important points about procedure before the Mental Health Tribunal.²

IN v St Andrews [2024] UKUT 411 (AAC) concerned a tribunal’s decision making around whether to adjourn or to proceed with a hearing from which both the patient and the patient’s appointed representative are absent, as well as what the tribunal must say in its reasons to clear the required hurdle of ‘adequacy’. UTJ Church gave guidance as to what to do when a patient with a representative appointed under Rule 11(7)(a) of the FTT rules makes a capacious decision not to engage with their representative to provide instructions. He made clear that the patient should not be left unrepresented and the representative should conduct the hearing on the basis that their implicit instructions are to test the legal test for the patient’s continued detention. He made clear that, where a patient’s liberty is at stake, and where the patient will be neither present nor represented at the hearing,

¹ *Re S (child as parent: adoption: consent)* at paragraph 16. A similar approach was taken by MacDonald J in *An NHS Trust v ST (Refusal of Deprivation of Liberty Order)* [2022] EWHC 719 (Fam).

² Both involved Arianna, so she has not been involved in the notes.

there is a significant risk that the disposal of the proceedings will involve an unlawful interference with the patient's Article 5(4) rights. In such circumstances, if a tribunal is to proceed to dispose of the appeal, UTJ Church made clear that it must explain specifically how and why it concluded that doing so was in the interests of justice. It is not enough to simply state that it decided that it was so.

In *JB v Elysium Healthcare* [2025] UKUT 009 (AAC), UTJ Church considered whether medical treatment which is considered to be appropriate for a patient can properly be said to be "available" to him if the hospital in which he is detained has the resources to provide it but is not willing to do so. He reiterated that *"as established both in Rooman v Belgium [2019] ECHR 105 and SF v Avon and Wiltshire [2023] UKUT 205 (AAC), [2024] 1 WLR 1540, appropriate medical treatment cannot be said to be "available" to a patient if the detaining authority is unwilling to provide it."* The Tribunal had been under a misapprehension as to whether or not it was, in fact, available, and the decision had to be remitted to them so that a decision on whether detention should be upheld could be made on the proper factual basis.

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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 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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