Essex CHAMBERS

MENTAL CAPACITY REPORT: SCOTLAND

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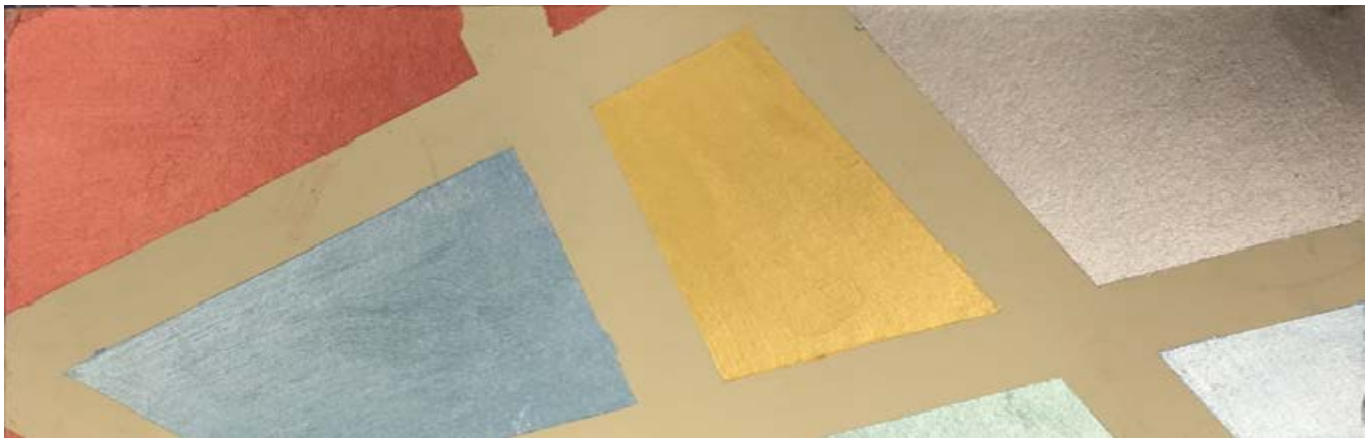

Welcome to the February 2017 Mental Capacity Report. You will note a new look, and also a new title, which reflects the fact that over the years we have evolved to carry material that goes considerably wider and deeper than in a conventional Newsletter. We have also retitled the individual sections of the Report (which you can continue to get in compendium and screen-friendly forms).

Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: positive obligations under Article 5, deprivation of liberty in the intensive care setting, and best interests in the context of childbirth and anorexia;

(2) In the Property and Affairs Report: common mistakes in making LPAs;

(3) In the Practice and Procedure Report: costs in medical treatment; an important case on time-limits in HRA cases, frustrating the Court of Protection and the end of era marked for the Court of Protection Practice;

(4) In the Wider Context Report: a new MCA/DOLS resource, capacity and the MHT, restraint in the mental health setting, mental health patients in general hospitals and truth and lying in dementia;

(5) In the Scotland Report: solicitors claiming an interest and the *nobile officium* comes to the rescue.

Editors
Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Anna Bicarregui
Simon Edwards (P&A)

Scottish Contributors
Adrian Ward
Jill Stavert

You can find all our past issues, our case summaries, and much more on our dedicated sub-site here. 'One-pagers' of cases of most relevance to social work professionals will also appear on the SCIE website.

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

Contents

Solicitor "claiming an interest"

We reported previously the troubling decision of Sheriff Braid at Edinburgh Sheriff Court dated 22nd March 2016 refusing to warrant an application by *J, Solicitor* for appointment of partners in *J*'s firm as guardians to a client of hers under Part 6 of the Adults with Incapacity (Scotland) Act 2000 (the "2000 Act"). The sheriff took the view that the applicant had not averred a sufficient interest to entitle her to make the application. The refusal to warrant was referred to the Sheriff Principal, who on 1st August 2016, at [2016] SC EDIN 66, declined to make an administrative direction that *J*'s application should be warranted. We deferred commenting on that decision pending the eventual outcome, which was that the local authority made a fresh application resulting in the appointment of one of the original nominees to be guardian to the adult in question.

In relation to *J*'s application, the most significant passage of the Sheriff Principal's decision was this:

> *The sheriff's decision with regard to warrant in this case does not preclude an application by a solicitor as a person "claiming an interest in the adult's property and financial affairs". The sheriff's decision is restricted to the circumstances of this application. Other applications fall to be determined on their own facts and circumstances.*

Of greater general application is the confirmation by the Sheriff Principal of the route that may be followed by a pursuer dissatisfied with a refusal by a sheriff to warrant an application or action. The Sheriff Principal referred to *Fitzpatrick v Advocate General for Scotland* 2004 SLT (Sh Ct) 93, in which it had been held that an appeal to a Sheriff Principal challenging a sheriff's refusal to grant a warrant to cite is incompetent. In the present case, the Sheriff Principal confirmed that *Fitzpatrick* remains good law, as it followed the decision of the Inner House in *Davidson v Davidson* (1891) 18R 84. The appropriate route to follow is not an appeal, but a direction in terms of section 27 of the Courts Reform (Scotland) Act 2014 by the Sheriff Principal to the sheriff clerk to sign a warrant to commence proceedings. That is a direction of an administrative character.

Returning to the facts of the application by *J*, the relevant statutory provision is section 57(1) of the 2000 Act which allows an application to be made "*by any person (including the adult himself) claiming an interest in the property, financial affairs or personal welfare of an adult …*". What may have muddied the waters in relation to the application by *J*? Firstly, at the outset of her judgment the Sheriff Principal noted that in the application the

pursuer was described as the adult's solicitor "*and has an interest in the adult's property and financial affairs*". Only in Part 5 of the 2000 Act does an applicant require to "have" an interest. For the purpose of all other provisions, an applicant need only be a person "claiming" an interest.

Secondly, an AWI report submitted with the application proceeded on the basis that the local authority, City of Edinburgh Council, were the applicants.

The Sheriff Principal referred to *Fitzpatrick* as setting the test which would justify the granting of an administrative direction such as was sought in the present case. In *Fitzpatrick*, the Sheriff Principal considered whether the refusal of warrant infringed the pursuer's right of access to justice in terms of Article 6 of the European Convention on Human Rights and concluded that:

> *"To deny the pursuer the opportunity to raise his action and deal in due course with such issues of competency as may arise would be, in my opinion, to deny him without sufficient justification his right of access to justice.*

In relation to *J*'s application, the Sheriff Principal noted that the object of the proceedings by Summary Application under the 2000 Act had the sole purpose of appointing a guardian to meet the needs of an adult with impaired capacity. Having regard to the section 1 principles, the Sheriff Principal commented that "it can be said that an adult lacking capacity has a right to a suitable and qualified guardian". The sheriff's refusal to warrant triggered the "fall-back" obligation of the local authority under section 57(2) of the 2000 Act to apply if "no application has been made or is likely to be made for an order under this section". Accordingly, there had been no denial of the adult's needs or right to a guardian, as the local authority was obliged to step in and make the relevant application.

Notably, in a carefully worded judgment, the Sheriff Principal did not assert that the sheriff was right to refuse to warrant the application. She merely held that this did not result in a denial of justice in terms of Article 6 of the European Convention which could only be remedied by a direction to warrant the application.

But for the "muddying" factors mentioned above, one may assert with some confidence that such an application by a solicitor in respect of the solicitor's own client, if in proper form and accompanied by the required reports, ought to be warranted. As noted above, only under Part 5 of the Act is an applicant required to have an interest. Part 6 does not require that an applicant should "have an interest", should demonstrate "a sufficient interest", or should "show an interest". The application may be made by any person "claiming an interest". Scottish Law Commission Report on Incapable Adults (Report No 151, September 1995) set out the rationale for what became the present Part 6 in terms which were not subsequently disputed or varied at any time in the proceedings up to and including enactment of the 2000 Act. It is clear from paragraph 2.38 of the Report that the Commission envisaged that solicitors would be among those who would apply, and that one of the purposes of "casting the net of title to apply wide" was to avoid undue burden upon local authorities.

In general terms, an application such as was made by *J*, namely an application by a solicitor whose client's capabilities had become impaired, is not only competent but the obligation of the solicitor, having regard to Rule B1.4 of the Law Society of Scotland Practice Rules 2011, which provides that solicitors "must act in the best interests of [their] clients", and Rule B1.12 which provides that solicitors "must not cease to act for clients without just cause". In a situation where a solicitor does withdraw from acting "so far as possible, the clients' interests should not be adversely affected". Under Rule B1.15, solicitors "must not discriminate on the grounds of age, disability … in [their] professional dealings with … clients". It is clear that a solicitor-client relationship existed between *J* and F. If, upon F's capacity and ability to give instructions and to safeguard her own interests becoming impaired, *J* had simply abandoned F to her own devices, *J* would have been in breach of all of the foregoing requirements.

Curiously, while the application was made in respect of an 87-year old adult, the original decision of the sheriff referred to it having been made "in respect of the child F". The complete inappropriateness of a child law approach in relation to adults with impaired capacity was stressed in paragraph 2.50 of the Scottish Law Commission Report.

A startling omission from the sheriff's original decision was any reference to the absolute obligation upon the court to act in accordance with the principles in section 1 of the 2000 Act. Section 1(1) required the sheriff to give effect to those principles "in relation to any intervention in the affairs of an adult under or in pursuance of this Act". In the words of Mr Angus MacKay, Deputy Minister for Justice, at SPOR Vol 5, No 11, col. 1047: "An intervention can encompass a positive and a negative act". The sheriff's negative act in refusing to warrant *J*'s application was an intervention. The sheriff failed to demonstrate that such intervention was justified by the section 1 principles. He did not even appear to have asked himself whether it was. On the information available, it plainly was not. There could have been no benefit to F in leaving her unprotected. There appears to have been nothing in the information available to the sheriff to suggest other than that F's wishes and feelings were that *J* and her firm should look after F professionally. The application demonstrated a *prima facie* requirement for guardians to be appointed. The question of who should be appointed guardian can only be addressed if an application proceeds. Section 59(1) permits the sheriff to appoint as guardian "any individual whom he considers to be suitable for appointment and who has consented to being appointed". The identity of the applicant who brings the adult's need for protection before the court is irrelevant to that decision. The very act of bringing such an application before the court will normally transfer responsibility for the matter from the applicant to the court. Any refusal by the court to accept and act upon that responsibility raises a potential question as to whether the court has failed to perform its fundamental duty to ensure that justice is done.

Perhaps even the Sheriff Principal's decision is open to query to the extent that it relies upon the obligation of the local authority under section 57(2) of the 2000 Act. It could be queried whether the requirement of that section that "no application has been made or is likely to be

made" can be said to have been triggered when an application has been made.

The difficulties, delays, inconsistencies and inefficiencies of the exercise of jurisdiction under the 2000 Act by sheriff courts have already led to the proposal by the Law Society of Scotland, in response to Scottish Government consultation, that a unified tribunal should have jurisdiction under the 2000 Act, the Mental Health (Care and Treatment) (Scotland) Act 2003 and the Adult Support and Protection (Scotland) Act 2007. The progress of the *J* application could perhaps be contrasted with the approach of the Court of Protection in England & Wales as exemplified in the recent case of *Cheshire & Wirral Partnership NHS Foundation Trust v Z* [2016] EWCOP 50 (covered in our Health, Welfare and Deprivation of liberty report), where Hayden J commended the speed with which that case had been brought to final hearing and commented that "The avoidance of delay should be regarded as a facet of Article 6 (i.e. a fair trial) in these cases. In this respect the Courts must play their part too and ensure that case management centres upon the needs of the patient [in Scottish terms, the adult] …".

Adrian D Ward

Cumbria County Council, Petitioner [2016] CSIH 92; 2017 S.L.T. 34

This decision by an Extra Division of the Inner House of the Court of Session related to a child, and would not normally have featured in this Newsletter. However, it provides a remedy to overcome a difficulty in a cross-border situation which might be of assistance in some situations concerning adults.

In this case, the High Court of England & Wales had made an order placing a child in secure accommodation in Scotland. The apparent reason for doing so was a shortage of such accommodation in England & Wales. Scottish legislation governing cross-border recognition of orders relating to the custody and care of children made no provision for such an order to be recognised and enforceable in Scotland. In terms of the legislation, and as analysed in a detailed judgment by Sir James Munby P ([2016] EWHC 2271 (Fam)), accordingly, the child was held in Scotland without legal authority.

The relevant English local authority, Cumbria County Council, petitioned the *nobile officium* of the Court of Session for interim orders finding and declaring that the order of the High Court ought to be recognised and enforceable in Scotland as if it had been made in the Court of Session.

The Court of Session held that it had an inherent power to exercise in its *nobile officium*, as *parens patriae*, jurisdiction over all children within the realm. In practice, the *parens patriae* jurisdiction has generally been subsumed into the *nobile officium*.

The legislation concerning cross-border recognition of court orders placing children in secure accommodation did not cover cases such as the present case. There was a gap in the legislation. The present case disclosed a clear *prima facie* case for application of the *nobile officium*. The balance of convenience clearly favoured making the interim order sought. The petition was granted.

The court noted that orders placing children in secure accommodation were not uncommon

and were of utmost importance for the children concerned. The court recommended that urgent consideration be given to remedying by legislation the gap identified in this case. Such legislation would require to address whether the regular judicial review and monitoring of any deprivation of liberty, in accordance with Article 5 of the European Convention on Human Rights, ought to be vested in the High Court in England & Wales or the Court of Session in Scotland, or jointly in both. It should however be possible to frame legislation to recognise the distinction between the overall responsibility for the child's welfare and the making of orders to secure the welfare, and on the other hand responsibility for enforcing them. It was suggested that a challenge to the existing arrangements ought accordingly to be competent in either jurisdiction. However, any remedy would be likely to be interim, leaving it to the English courts to decide the fundamental questions as to the child's welfare, and whether and on what terms any secure accommodation order ought to be continued.

The comparison between this case and the decision of the German Federal Constitutional Court which we reported in our December 2016 Newsletter, is interesting. Acting under a written constitution and basic law, the German court made an order filling a gap in German legislation regarding the circumstances in which treatment might be given without consent, and recommended that the legislature address the matter. The German court acted with reference to the constitutional duty of the German State to protect its own citizens. In the present case the Court of Session, by exercise of the *nobile officium*, also took steps to remedy a gap in legislation, and also recommended that the matter be addressed by the legislature. The obligations under the *parens patriae* jurisdiction could be said to be analogous to the German constitutional obligation to protect citizens.

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Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Wellcome Trust Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. He is on secondment to the Law Commission working on the replacement for DOLS. 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. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click here.

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Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. To view full CV click here.

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Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. To view full CV click here.

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Adrian is a Scottish solicitor, a consultant at T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: *"the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law,"* he is author of Adult Incapacity, Adults with Incapacity Legislation and several other books on the subject. To view full CV click here.

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Conferences

Conferences at which editors/contributors are speaking

Royal Faculty of Procurators in Glasgow

Adrian will be speaking on adults with incapacity at the RFPG Spring Private Law Conference on 1 March 2017. For more details, and to book, see here.

Seminar on Childbirth and the Court of Protection

39 Essex Chambers is hosting a seminar in conjunction with the charity Birthrights about caesarean-section cases in the Court of Protection. The seminar aims to take a critical look at these cases, with a distinguished multi-disciplinary panel. The seminar is at 5pm-7pm on 8 March 2017, and places can be reserved by emailing beth.williams@39essex.com.

Hugh James Brain Injury conference

Alex will be speaking at this conference aimed at healthcare professionals working with individuals with brain injuries and their families on 14 March. For more details, and to book, see here.

Scottish Paralegal Association Conference

Adrian will be speaking on adults with incapacity this conference in Glasgow on 20 April 2017. For more details, and to book, see here.

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 Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next Newsletter will be out in early 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 Newsletter in the future please contact: marketing@39essex.com

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