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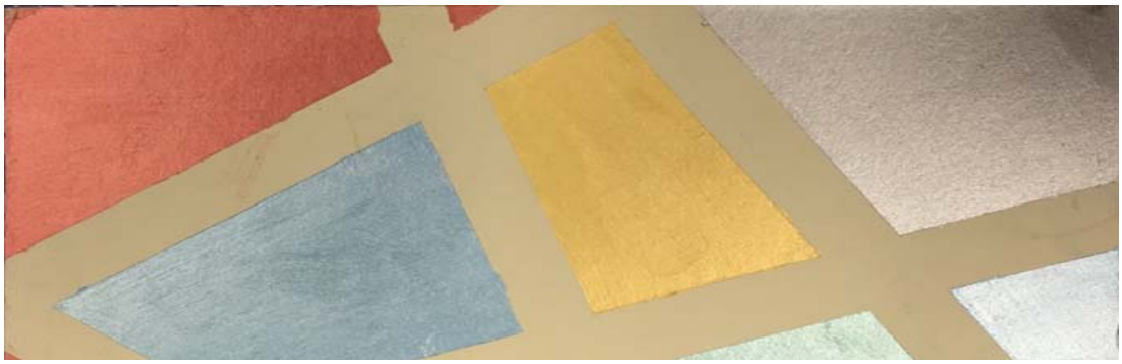

Welcome to the October 2017 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: serious medical treatment cases and the involvement of the CoP, family members and Rule 3A and DoLS before the European Court of Human Rights;

(2) In the Property and Affairs Report: financial abuse at home and tools to combat financial scamming;

(2) In the Practice and Procedure Report: a transparency update, a guest article on welfare cases in practice before the CoP and a problematic case on capacity thresholds and the inherent jurisdiction;

(3) In the Wider Context Report: the LGO and the MCA 2005, an update on the assisted dying challenge, the Mental Health Act review and guidance for enabling serious ill people to travel;

(4) In the Scotland Report: the Scottish Public Guardian on powers of attorney problems and a sideways judicial look at the meaning of support.

You can find all our past issues, our case summaries, and more on our dedicated sub-site here, and our one-pagers of key cases on the SCIE website.

We also take this opportunity to welcome Katie Scott to the editorial team!

Editors
Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
Simon Edwards (P&A)

Scottish Contributors
Adrian Ward
Jill Stavert

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

Contents

A commotion next door – sequel from the Public Guardian

[*Last month we commented, from a Scottish perspective, on the controversy triggered by Denzil Lush (retired senior judge in the Court of Protection, England & Wales) when he expressed concern about the lack of safeguards in the power of attorney system in England & Wales on the BBC Radio Four Today programme on 15th August 2017.*]

We mentioned that in response to the concerns raised in Scotland, comments were posted both by the Public Guardian and by the Law Society of Scotland on their respective websites. We indicated that we hoped to be able to include further comments by the Public Guardian in this issue. Those comments by Sandra McDonald, Public Guardian, took the form of an article published in the Journal of the Law Society of Scotland. We are grateful to Sandra, and to Peter Nicholson (editor of the Journal), for permission to reproduce Sandra's article below.

Quite shocking accounts of the scope for abuse under some United States guardianship arrangements have appeared – see here and here. These help to explain the blanket antipathy towards the very concept of guardianship some quarters. Powers of Attorney do have the fundamental advantage that they are a measure that never can be initiated without the full knowledge and participation of the adult who may become subject to such measure.

Adrian D Ward]

There has been focus in recent weeks on the potential for [financial] "abuse" of powers of attorney (PoAs). In response, several articles, including one released by myself, concentrated on the safeguards within the Scottish PoA system, but I would not wish people to think that PoAs could not be, or are not, abused in Scotland.

The capacity requirement for the granting of a PoA is, I believe, one of the fundamental safeguards and that this capacity assessment has to be undertaken by a lawyer or doctor is added protection, but is there suitable training for this? One does see cases where one wonders 'how on earth?'. Should the assessment of capacity be restricted to those who have themselves been assessed as capable of assessing this?

Most grantors of PoAs in Scotland choose to consult a solicitor; which offers a significant safeguard. The Law Society of Scotland has detailed guidance both on taking instructions from vulnerable clients and on PoAs. Solicitors are advised to refer proposed attorneys to the Code of Practice and to the Public Guardian's website, but most attorneys do not have a

sufficiently clear understanding of the responsibilities of the role – which substantially increases the risk of misuse of the PoA. Could we do more at the point of solicitor contact to mitigate this?

The inclusion of specific, express, powers is a helpful safeguard; but many deeds have much the same powers, such that they look very similar, despite the fact that the PoA deed does not have to be in a prescribed format; does this defeat the specificity of the powers?

As the deed is free format, the grantor could add in any particular safeguards they may wish, but I have never seen additional commentary of this ilk. Would a prescribed format, which directed one to insert safeguards assist?

Many PoAs appoint joint attorneys but grant them 'joint and several' authority without specification, which allows opportunity for an attorney of ill intention to go unchallenged until too late. The appointment of joint attorneys is added protection but I emphasise the importance of specifying fully in the document the extent of and any restrictions on the authority granted and would advocate against "joint and several" appointments, without such detail.

Are there other ways of increasing protection – should we offer notification to interested parties; should attorneys have to have cautionary insurance; should there be routine supervision: could we make better use of existing safeguards?

The Public Guardian has a statutory remit to investigate concerns about the operation of a PoA, where these are reported. More could be done, by us all, to ensure the public are aware of, and use, this service. Linked to which, is increasing the general public awareness of what financial harm is and how to recognise this, as well as easing the discomfort felt about discussing other peoples' finances.

There is a view that guardianship, perhaps because it is supervised, carries greater protection; my own view is that a PoA executed properly and used well offers no less a protection, or conversely, a guardianship used badly offers no greater protection.

We are obliged to consider the least restrictive form of intervention consistent with achieving, in this case, the purpose of safeguarding; this surely is a properly executed, and managed, PoA, in contrast to either an onerous and costly guardianship, or leaving matters to the chance of some loose informal arrangement.

In conclusion, there is much to be reassured about with our current system but we are deluding ourselves if we do not recognise that there is abuse of PoAs. We have a potential opportunity over the forthcoming years to influence change, as the relevant legislation is likely to be reviewed and we will be able to 'benchmark' our system against other countries with information soon to be released by the Council of Europe; but any changes have to offer proportionality, we cannot make a burdensome, and thus less attractive, option for the majority in attempting to increase protections for the minority?

Sandra McDonald

Two points

Secretary of State for Work and Pensions v M [2017] CSIH 57; 2017 S.L.T. 1045 is a decision by

an Extra Division of the Inner House of the Court of Session in which the central issue was the difference between "prompting" and "social support" for the purposes of the Social Security (Personal Independence Payment) Regulations 2013.

The points-based system for assessing eligibility for a personal independence payment ("PIP") is reasonably well-known. Separate calculations are made for daily living activities and for mobility activities. In each case, identified activities form the basis of assessment. Descriptors against each activity carry a specified number of points. A total of at least eight points for daily living activities, or for mobility activities, is required in order to qualify for a PIP.

In a process depressingly familiar to many readers, and which lasted in all for 30 months, *M* was awarded a total of four points for daily living activities by a decision-maker; then seven points by the First Tier Tribunal ("FTT"). He contested before the Upper Tribunal ("UT") that he was entitled to nine points. The UT judge allowed the appeal, set aside the decision of the FTT, and remitted the case back to the FTT for re-hearing before a differently constituted tribunal, in accordance with directions set out in the decision of the UT judge. The Secretary of State appealed to the Court of Session against the decision of the UT judge. The Court of Session refused the appeal.

The case before the UT and before the Court of Session concerned the choice between two descriptors in Part 2 of Schedule 1 to the 2013 Regulations for Activity 9 "engaging with other people face to face". By then it was accepted that *M* had scored a total of five points for other activities. For Activity 9, was he entitled to two points under descriptor b "needs prompting to be able to engage with other people"; or four points under descriptor c "needs social support to be able to engage with other people". Descriptor b would take his total to seven, inadequate for a PIP. Descriptor c would take his total to nine, entitling him to a PIP.

The opinion of the Court of Session, delivered by Lord Glennie, helpfully presented the human picture of *M* and his circumstances. Salient points in that narrative included that he was a 47 year-old man, living with his partner and two young children. He had suffered from anxiety and depression for about six years, and had been on medication for that condition for about four years. Prior to that he had suffered intermittent bouts of depression, and had first seen his GP about that in 2000. He worked (as it happens, for Department of Work and Pensions) until November 2011, when his employment was terminated following a number of attempts by him to return to work. He was on medication, which had been helpful, and had had counselling and cognitive behavioural therapy in the past. He had no physical health problems.

M had separated from his ex-wife some years previously. The divorce had been very lengthy and acrimonious. He found it difficult to meet people from that period in his life. He had a fear of meeting his ex-wife. He no longer saw his children from that marriage. He tended to avoid social contact, meeting strangers being fine in some respects if completely impersonal, but very difficult for him if he was asked whether he had children. He had some social anxiety, with a very complex background of social stressors.

He had had suicidal thoughts, but not since before Christmas 2014.

M had forgotten to take his medication on a number of occasions, leading to a sharp deterioration in his mood. His current partner ensures that he does take it. He is able to drive, mostly for local errands. His partner is with him most of the time, both when driving and otherwise. She does not work and is at home with him. His partner attends to household finances and has access to his current account. He tends to put things aside with the result that they do not get done.

The questions of law which fell to be determined by the court were:

1. Must the social support needed be contemporaneous with the engagement being supported?

2. Does anything that constitutes prompting also constitute social support, subject only to it being provided by "a person trained or experienced in assisting people to engage in social situations"?

Particularly relevant to the present case was the meaning of "experienced". The UT judge in his decision had quoted from p.38 of the government response to the consultation on the meaning of "social support": "*Some respondents were concerned that our definition of social support excludes friends and family. This is not the case, we recognise the importance of friends and family and that is why our definition of social support is: 'support from persons trained or experienced in assisting people to engage in social situations'. By referring to 'experienced' we mean both people such as friends and family who know the individual well and can offer support, or those who do not know them better and are more generally used to providing social support for individuals with health conditions or impairments.*"

On question 1 above, the court noted that there were conflicting decisions. In the hearing, Counsel for the Secretary of State "was constrained to recognise" that either social support or prompting might appropriately be given immediately before the occasion to which it related. As the court put it, "one can envisage the situation of a helper encouraging an individual to go into a meeting, or into a social function, standing at the door but not going in with him". The court pointed out that the definition of "supervision" in the 2013 Regulations used the words "continuous presence" (in relation to the person providing supervision), but that there was no such wording in the relevant descriptors for Activity 9. Once it is accepted that there is no need for absolute contemporaneity, the question becomes one of fact and degree in each case. There must be a "temporal or causal link" of some sort between the help given and the activity for which it is provided. It is for the decision-maker and, if necessary, the Tribunal to determine in each case whether that temporal or causal link is there. In the case of social support, the wording of the descriptor is "needs" social support, in the present tense. The court answered question 1 in the negative.

The court's answer to question 2 was: "*No, but a thing which constitutes prompting may also constitute social support if, to render it effective or to increase its effectiveness, it requires to be delivered by someone trained or experienced in assisting people to engage in social situations.*"

This report does not summarise the full reasoning of the court, nor does it do justice to the helpful guidance given by the court on the proper interpretation of many elements in Part 2 of Schedule 1 to the 2013 Regulations, including "acceptable standard", "engage", "support", the possibility of overlap between "prompting" and "support", the use of "continuous" in the definition of "supervision", and that "it would be wrong to assume that there is necessarily an absolute consistency between the descriptors relative to the different activities listed in Part 2" where those descriptors use similar wording. For the court's guidance, and full reasoning, readers are referred to the decision itself.

Adrian D Ward

Health and Education Chamber, First Tier Tribunal for Scotland

Between January 2018 and 2020 the Additional Support Needs Tribunal for Scotland ("ASNTS"), two Scottish NHS Tribunals, and all 32 Local Authority Education Appeal Committees in Scotland will all transfer into the Health and Education Chamber of the First Tier Tribunal. While there does not appear to have been an official public announcement, it is now within the public domain that Scottish Ministers have confirmed their intention that May Dunsmuir, currently President of ASNTS, will be President of the new Chamber. May was appointed President of ASNTS in May 2014. At that point she retained her position as an in-house convener with the Mental Health Tribunal for Scotland, but it is understood that with her new appointment she now intends to step down as an in-house convener, but will still sit as a convener, of that Tribunal.

May was a member of the Law Society of Scotland's Mental Health and Disability Sub-Committee ("MHDC") for 17 years, becoming vice-convener in 2012 and thereafter joint convener with me. Her 2014 appointment meant that she had to stand down from that committee, but remains an observer to it. Colin McKay, the first lawyer to become Chief Executive of the Mental Welfare Commission for Scotland, likewise has observer status, similarly having had to step down from the committee when he took up his current appointment. Among other points in common, May and Colin were both members of the steering group of the major campaign which resulted in the Adults with Incapacity (Scotland) Act 2000 being enacted as the first major legislation by the then new Scottish Parliament. The steering group first convened towards the end of 1997. Other members included Jan Killeen, formerly of Alzheimer Scotland and Alzheimer International, author of a recent report on supported decision-making in Australia, a project funded by a Churchill Fellowship; Hilary Patrick, a massive contributor to the development of relevant law and sometime vice-convener of MHDC; and David McClements, who gave considerable service to the Council of the Law Society of Scotland, including as treasurer to the Society, and who is currently a vice-convener of MHDC. On a personal note, having acted as principal spokesperson for that campaign, it is a particular pleasure to see the cumulative contributions made by members of that steering group ever since, and which they continue to make.

Further information on May Dunsmuir's career up to 2014 may be found in the Scottish section of the November 2014 Mental Capacity Law Newsletter.

Adrian D Ward

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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 Research Fellow 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. 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 has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. She sits on the London Committee of the Court of Protection Practitioners Association. To view full CV click here.

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Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). 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, and is chair of the London Group of the Court of Protection Practitioners Association. To view full CV click here.

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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

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Adrian is a Scottish solicitor and 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

Adults with Incapacity: the Future is Now

Adrian is speaking at this half-day LSA conference on 18 October in Glasgow. For more details, and to book, see here.

'Taking Stock'

Neil is chairing and speaking at the 2017 Annual 'Taking Stock' Conference in Manchester on 19 October. For more details, and to book, see here.

International Congress on Vulnerabilities, Law and Rights

Adrian is speaking on 7 November 2017 at the International Congress on Vulnerabilities, Law and Rights, in Coimbra, Portugal, organised by Coimbra University. For more details, see here.

Deprivation of Liberty in the Community

Alex is delivering a day's training in London on 1 December for Edge Training on judicial authorisation of deprivation of liberty. For more details, and to book see here.

Deprivation of Liberty Safeguards: The Implications of the 2017 Law Commission Report

Alex is chairing and speaking at this conference in London on 8 December which looks both at the present and potential future state of the law in this area. For more details, 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 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 Report will be out in November. 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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