



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

(1) In the Health, Welfare and Deprivation of Liberty Report: alcohol and best interests, the price for failing to support, patient choice from the other side of capacity, and Bournemouth brought to life;

(2) In the Property and Affairs Report: Denzil Lush and LPAs, the Law Commission consultation on wills, professional deputies run amok and OPG updates;

(2) In the Practice and Procedure Report: s.21A, medical treatment and the role of the courts, the extension of the pilots, and guidance on CoP visitors;

(3) In the Wider Context Report: mental capacity in (in)action in SARs, litigation friends in tribunals, legal services and vulnerability, and the Committee on the Rights of Persons scrutinises the UK;

(4) In the Scotland Report: a Scottish perspective on powers of attorney problems and attorney registration updates.

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 say goodbye to our fellow editor Anna Bicarregui and thank for all her dedication in producing contributions against the odds – we will miss you.

Editors

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Neil Allen
Annabel Lee
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Simon Edwards (P&A)

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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.

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A commotion next door

On BBC Radio Four Today programme on 15th August 2017, Denzil Lush – retired senior judge in the Court of Protection (England & Wales) - expressed concern about the lack of safeguards in the power of attorney system in England & Wales. His comments were widely reported. Denzil Lush is well respected here in Scotland, and internationally. He has participated in training and other events in Scotland. In this interview he was speaking solely about the mental capacity regime in England & Wales, contrasting potential dangers under lasting powers of attorney with the greater safeguards in the deputyship system. Unfortunately, the London-based media were as usual mostly blind to the fact that within the universe, and even within their range of coverage, there are regimes other than that of England & Wales. Interestingly, so far as can be ascertained, the concerns generated in Scotland extended mainly to solicitors, urgently asking for guidance as to how they should respond, rather than to the public.

One is tempted to say that it does no harm for the general public to be aware that financial abuse can happen, and is substantially more likely with an unwise choice of attorney, just as other problems can arise, most often with a

poorly thought-out and drafted power of attorney document. The process of granting a power of attorney should not be undertaken lightly. The “begin the conversation” advertising campaign in the West of Scotland got it right: talk to family and others, discuss your situation and wishes with a solicitor with relevant expertise, and have the document individually drafted. As with most things, risks cannot be entirely eliminated, but they can be minimised. Sometimes, in Scotland, a guardianship will be the better option, accepting that the price of the higher protections is a more cumbersome, complex and expensive regime, and that – sometimes crucially – there is likely to be a gap between impairment of relevant capacity and guardianship powers becoming available for exercise. Even under guardianship, risks can be minimised but not eliminated.

Denzil Lush is reported as preferring deputyship (an approximate equivalent to guardianship) over an English lasting power of attorney. That would be his choice in his circumstances. Proportionality applies both at the individual level, and more generally. Judges see the protections of guardianship (or in this case deputyship) on a daily basis, and they will generally only encounter the power of attorney regime in the small proportion of cases where something has gone significantly wrong. They

do not, in the course of their duties, generally see the vast number of attorneyships working satisfactorily.

There are differences between regimes in England & Wales and Scotland. For example, at time of granting Scotland requires certification by a lawyer or doctor. England & Wales accepts certification by any certificate provider. Scotland, without any fixed prescribed forms, offers greater scope for tailor-made solutions, though in practice one does not always see that happening. Going forward, the Scottish requirements are more likely to be adaptable to modern developments such as incorporation of supported decision-making and co-decision-making arrangements in power of attorney documents, and other features already seen in some other regimes such as the supervising attorney.

Denzil Lush's comments were made in advance of publication, due later this month, of the 8th edition of "Cretney and Lush on Lasting and Enduring Powers of Attorney". We must await publication to see whether the authors go so far as to propose that England & Wales be set aside from the otherwise unanimous European consensus that: "States should promote self-determination for capable adults in the event of their future incapacity, by means of continuing powers of attorney and advance directives"; and that: "In accordance with the principles of self-determination and subsidiarity, states should consider giving those methods priority over other measures of protection" (Council of Europe Ministerial Recommendation (2009)11). That definition of "continuing" includes health, welfare and other personal matters, as well as economic and financial matters. Development of the use

of such powers of attorney across Europe is still proceeding, rapidly. For example, Sweden's regime came into force on 1st July 2017, and Denmark's on 1st September 2017. Use of advance directives is even more under-developed. In some states they can be used as a "hybrid" arrangement under which the choice of guardian, and sometimes other aspects of the terms of any guardianship order, can be specified by the granter in advance.

In response to the concerns raised in Scotland by the interview with Denzil Lush, comments were posted both by the Public Guardian and by the Law Society of Scotland. We hope to be able to include further comments by the Public Guardian in next month's issue.

Adrian D Ward

Powers of attorney – registration update

[Editorial Note: We are grateful to Sandra McDonald, Public Guardian, for providing the comments and information below, and allowing us to reproduce here in the Report. The difference between powers of attorney received for registration, and actually registered, is significant. The remarkable rising trend in numbers received, which can reasonably be interpreted as reflecting numbers granted, has continued year-on-year without any dip. The gap between receipts and registrations completed, with registrations flattening off in the most recent three years, is simply explained by the fact that the rising flow of receipts hit the absolute maximum of resources available to deal with them. It is accordingly very much to be welcomed that Sandra has been able to obtain additional resources. The "mypowerofattorney" campaign, and accompanying rigorous analysis of outcomes, including savings to NHS in reduced levels of

delayed discharge where powers of attorney are in force, demonstrate an overall benefit to public funds in having ever more people grant powers of attorney. It would be a false economy for OPG not to be provided with adequate resources to keep up with the inflow, on a permanent basis. One trusts that this will be done.]

There have a number of developments and initiatives with PoAs and this article offers a round-up of the current position.

Most significant is the continuing upward trend over the past 5 years the number of PoAs received. We record both number registered and number received categories, the number received figure is a more accurate reflection of PoA usage, given the difficulties we have currently with processing PoA demand.

The number received figures show that there has been a 21% increase in demand in recent years, and a 53% increase over the five years included in the table below. OPG is now processing more than 300 new PoAs each working day.

Increased volumes bring a rise in associated work such as requests for amendment, change of details or revocation. There are currently 80 such requests per day.

PoA Numbers

Year	No. Registered	No. Received
2012 / 2013	42528	47774
2013 / 2014	45576	52226

2014 / 2015	55527	60093
2015 / 2016	55007	67043
2016 / 2017	54919	72950

Processing developments

The OPG is presently recruiting an additional, sizeable, cohort of staff, on a fixed term basis, to address the issue of delays in processing PoAs which have been caused by this large increase in volumes. You will notice turnaround times progressively improving over the course of the latter half of this year – this will increase the volume of your return mail.

Rejection rates

One of the main causes of the processing delays is the substantially high level of rejected PoAs we have to deal with. Rejection rates are currently 22% for manual and 14% for electronically submitted deeds. This amounts to more than 12,000 deeds that require re-working – which in statistical terms is 75% of the backlog.

Please ensure you submit ‘clean’ deeds at first submission as this will help reduce the processing time enormously.

Public register

We receive a significant number of calls each day for public register information and these also impact on time we can give to processing new business. We are developing an online

version of the public register, which we hope to have available later in the year.

Digital signatures

The (EPOAR) electronic PoA certificate is presently being revised to allow for a SMART card authenticated digital signature to be inserted. This will be available very shortly.

EPOAR

This digital option is only available for the electronic PoA function (EPOAR). If you do not use EPOAR and would like information or assistance with getting started, please contact us via the OPG email inbox OPG@scotcourts.gov.uk.

Sandra McDonald, Public Guardian

When a surviving spouse is not capable of acting as executrix-dative

A Note by Sheriff John Neil McCormick at Glasgow on 8th August 2017, [\[2017\] SC GLA 45](#), has clarified the position when a surviving spouse is entitled to the entirety of an intestate estate, but is not capable of acting as executor or executrix.

Common practice where a sole executor-nominate, or the only person entitled to be appointed executor-dative, is not capable of acting, is for a guardian to seek appropriate powers, or if there be no guardian, for a guardianship order to be applied for with appropriate powers. Typically the powers will include general power to act in the commissary matter of petitioning the court for appointment of the guardian as executor in the guardian's capacity as guardian; to apply for and obtain a bond of caution; to lodge an application for

Confirmation; to obtain Confirmation; and to ingather and distribute the deceased's estate in accordance with the laws of intestacy. Where the adult is entitled to legal and/or prior rights, power is customarily sought to allow the adult to claim those rights. As a matter of prudence, the possibility of a Will being found is also covered, with power to distribute in accordance with the terms of such Will.

In the application before Sheriff McCormick, that route was not followed. Mr McNair died intestate. The prior rights of his widow would exhaust the estate. The couple's daughters, Alison Mary Russell and Beverly Jane McNair, sought in those circumstances to be decerned executrices-dative to the deceased. Sheriff McCormick held that the daughters had no title to be decerned executrices-dative. He therefore refused to warrant their application.

Sheriff McCormick helpfully reviewed the relevant authorities. He considered in particular the terms of section 9(4) of the Succession (Scotland) Act 1964: "Where by virtue of subsection (2) of this section a surviving spouse or civil partner has right to the whole of the intestate estate, he or she shall have the right to be appointed executor". He was referred to *Murray, Petitioner*, 2012 S.L.T. (Sh Ct) 57, where, in similar circumstances, a petition by the deceased's son for appointment as executor-dative *qua* son (not as guardian) of the deceased was granted. Sheriff McCormick noted that in *Murray* the sheriff had not expanded on his reasoning, it was unclear whether earlier decisions (reviewed by Sheriff McCormick) had been brought to the attention of the court, and the value of the estate was not disclosed. Sheriff McCormick concluded (at [17]) that: "the purpose

of section 9(4) is to make clear that the surviving spouse or civil partner is the only person to be appointed executor-dative where his or her rights exhaust the estate”.

He pointed out that where an intestate estate exceeds the prior rights of a surviving spouse or civil partner, other relatives may apply. There was an inconsistency in statute in that such petitions are based on relationship to the deceased, not on beneficial interest in the estate, but that nevertheless is the position. Sheriff McCormick decided the case before him on the basis that there would be no surplus estate in which others would have an interest.

Sheriff McCormick made the following comment which will be of particular interest to adult incapacity practitioners:

[24] Secondly, the right to appointment rests solely with the surviving spouse or civil partner where his or her claim exhausts the estate. In my opinion, that right may be expressly declined allowing a surviving spouse or civil partner (who may be reluctant, elderly or ill, but not infirm) to be relieved of the administrative burden of winding up the estate. Until then, the right vests solely in the surviving spouse or civil partner. The right to appointment would have to be expressly declined in favour of a named petitioner. It would not be sufficient in my opinion for a petitioner merely to intimate the writ upon the surviving spouse or civil partner. This clarification should resolve many of the practical issues which have crept into commissary practice, while giving effect to the meaning of section 9(4) and protecting the interests of the surviving spouse or civil partner.

[25] In particular it avoids the implication that the right to appointment vests in the surviving spouse or civil partner exclusively, in the sense that it could not be declined, which is not within the 1964 Act but is a throwback to earlier legislation.

This would appear to open up the following possibility. If for some reason Mr McNair's daughters were determined to seek appointment as executrices in their own right, rather than as guardians to his widow, it would appear to be possible for an intervention order to be sought to authorise execution on behalf of the surviving spouse of a declinature in favour of (in that case) the daughters. Whether in fact that would confer any advantages beyond the usual procedure may be open to question. However, that option would appear to be open.

(I am grateful to Alison Hempsey, partner, TC Young LLP, for confirming current practice where guardianship powers are sought to seek appointment as executor-dative as guardian to the person entitled to such appointment.)

Adrian D Ward

International Society of Family Law speech

Adrian recently delivered a keynote speech “Do family laws reflect the realities of families with elderly and/or disabled family members” at the 16th World Conference of the International Society of Family Law in Amsterdam. The speech is available [here](#).

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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 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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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

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](#).

The Legal Profession: Back to Basics

Adrian is speaking at the Annual Conference of the Law Society of Scotland at Edinburgh International Conference Centre on 19th September 2017. For more details, and to book, see [here](#).

JUSTICE Human Rights Law Conference

Tor is speaking at JUSTICE's Annual Human Rights Law Conference in London on 13 October. For more details, and to book, see [here](#).

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](#).

National IMCA Conferences

Alex is speaking on both litigation friends and a potential Vulnerable Adults Bill at the two Irwin Mitchell/Empowerment Matters National IMCA Conferences in [Sheffield](#) on 20 October and [London](#) on 10 November.

National Advocacy Conference

Alex is speaking on advocacy as a support for legal capacity at the National Advocacy Conference in Birmingham on 19 October. For more details, and to book tickets see [here](#).

Mediation Awareness Week

Tor is taking part in a [panel](#) on 16 October on "Mediating Medical cases after Charlie Gard" as part of Mediation Awareness week.

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 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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