Mental Capacity Law Newsletter June 2014: Issue 47

Scotland

Introduction

Welcome to the June issue of the Mental Capacity Law Newsletter family. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: the Court of Appeal revisits capacity (and the role of precedent); prohibiting contact; and advance decisions to refuse treatment;

(2) In the Property and Affairs Newsletter: the sequel to the infamous *Rolex* case;

(3) In the Practice and Procedure Newsletter: a rare award of costs in welfare proceedings; the proper place of the press in CoP proceedings; revisiting decisions on appeal; judicial contact with the subject of proceedings; joint instruction of experts in publicly funded cases, and a plea for assistance with streamlining directions hearings;

(4) In the Capacity outside the COP newsletter: two important cases involving capacity and children and two book reviews;

(5) In the Scotland Newsletter: a vitally important decision of Sheriff John Baird which casts significant doubt upon the validity of very many powers of attorney entered into in Scotland and upon the standard template available on the Scots OPG website.

We are also delighted to include with this newsletter a discussion paper on the Convention on the Persons with Disability and an analysis of both the MCA 2005 and the AWIA 2000 by reference to its requirements. This discussion paper, written by Lucy Series, Anna Arstein-Kerslake, Piers Gooding and Eilionóir Flynn, is vital reading for all practitioners (of whatever hue) seeking to understand the implications of this Convention for domestic law and practice in both England and Scotland.

ThirtyNine ESSEX STREET

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Hyperlinks are included to judgments; if inactive, the judgment is likely to appear soon at www.mentalhealthlaw.co.uk.

A majority of all Scottish powers of attorney invalid?

Application for guardianship in respect of NW: Opinion of Sheriff John A Baird (decision 29th April 2014)

Introduction

"Bombshell" is not an extravagant description for the opinion of Sheriff Baird that all continuing powers of attorney (CPA's) following the wording of the "sample" up till now published on the website of the Office of the Public Guardian ("OPG") are invalid. That opinion appears in the Judgment, available here on the Scotcourts website, now issued by Sheriff Baird in this case, which featured in a case update provided by Alison Hempsey of TC Young (who acted for the successful applicants) in last month's Newsletter.

The application began unremarkably. A niece and a cousin of an elderly widow suffering from Alzheimer's Disease sought appointment as her welfare and financial guardians under the Adults with Incapacity (Scotland) Act ("the Act", for all statutory references in this article). Only upon intimation of the application to OPG did they discover that a CPA in favour of a bank had been granted and registered in 2008. The applicants sought leave to amend to include a crave under s20(2)(e)(ii) for revocation of the appointment of the bank as attorney, and sought warrant to intimate to the bank. The bank opposed revocation. The proposal to appoint the applicants as welfare guardians was not opposed. As reported last month, Sh. Baird held that the CPA was not validly constituted. He appointed the applicants as both financial and welfare guardians. For reasons specific to the facts of the case, he held that even if the purported CPA had been validly constituted, he would nevertheless have so appointed the applicants, which – as he pointed out – would have *ipso facto* terminated the CPA by virtue of s24(2). Of general concern are Sh. Baird's two reasons for holding that the purported CPA was invalid. As noted last month, the document was in the bank's standard form, and the decision raised questions as to whether a large number of powers of attorney ("POA's") prepared in the bank's standard form are invalid. What is new in the Judgment now issued is that one of Sh. Baird's reasons for invalidity applies also to the "sample" CPA appearing on the OPG website.

The Judgment addresses many other issues of importance and should be read in full by any practitioner engaged in private client or adult incapacity work.

The statutory background

Sh. Baird quotes s18: "[A] *power of attorney granted after the commencement of this Act which is not granted in accordance with section 15 [or 16] shall have no effect during any period when the granter is incapable in relation to decisions about the matter to which the power relates*". He then quotes the prerequisites in s15 for validity of a CPA. Critically they include requirements that the POA document "*incorporates a statement which clearly expresses the granter's intention that the power be a continuing power*" (s15(3)(b)) and "*where the continuing power of attorney is exercisable only if the granter is determined to be incapable in relation to decisions about the matter to which the power relates, states that the granter has considered how such a determination may be made*" (s15(3)(ba)). Also relevant to discussion of this case is the provision of s15(2) that: "*In this Act a power of attorney granted under subsection (1) is referred to as a 'continuing power of attorney' and a person on whom such power is conferred is referred to as a 'continuing attorney'*". Of further relevance are the provisions in relation to welfare powers of attorney ("WPA's") that for validity they

require "*a statement which clearly expresses the granter's intention that the power be a welfare power to which section applies*" (s16(3)(b)); and that a WPA is not exerciseable unless either the granter is incapable (s16(5)(b)(i)) or the welfare attorney reasonably believes that the granter is incapable (s16(5)(b)(ii)).

The POA document and the two grounds of invalidity

Sh. Baird narrates that the only references, anywhere in the document, to the issue of subsequent incapacity or to the Act are in the initial clause which he quotes (in short) as saying: "*I appoint* [the Bank] *to be my continuing Attorney ("my Attorney") in terms of section 15 of the Adults with Incapacity (Scotland) Act 2000 and as it may be amended*". Sh. Baird held that the document was not a valid CPA because this wording did not meet the requirements of s15(3)(b) and because nowhere in the document were the requirements of s15(3)(ba) met. Regarding s15(3)(b) he narrates that he has seen very many POA's created since the passing of the Act, and that he: "*can therefore state with certainty that it is routine to find a specific clause in the document which contains words along the lines of 'The granter hereby declares that she intends that this document and the powers contained therein shall subsist and continue to have effect, notwithstanding that I shall have lost capacity in relation to the matters contained herein'*", or other fuller clauses including *inter alia* "*it being my intention that the powers shall subsist and remain in full force and effect notwithstanding incapacity, as defined by the Act, on my part*". He comments that: "*Any clause along the lines of those just quoted clearly represents the incorporation into the document of a statement which clearly expresses the granter's intention that the power be a continuing power. There is no such clause in the document in question here*"; and that the document in the present case: "*manifestly, does not incorporate a statement which clearly expresses the granter's intention that the power be a continuing power*" (emphasis in original). As regards s15(3)(ba) he refers – as many have done before – to the absurdity of a provision which requires granters to state that they have considered how incapacity should be determined, without explicitly requiring them to state the outcome of such consideration.

Regarding s15(3)(b), he concludes his Judgment by pointing out that the "sample" POA's on the OPG website are in the same terms – in that regard – as the bank's standard form; that "*As a matter of inexorable logic, all of such purported attempts to create continuing Powers of Attorney and which are in the same form as the one in this case will be contained in documents which will have no effect during the period of incapacity of the granters thereof*"; and that in consequence any document following the OPG sample "*has not validly created, in my opinion, a continuing Power of Attorney*".

Appeal

The bank has intimated an appeal, but has not appealed against the appointment of the applicants as guardians. The applicants accordingly have no reason to oppose the appeal, so there is likely to be no contradictor. Also, as the new sheriff court appeals structure proposed under civil courts reforms is not yet in place, the appeal decision will only be binding upon Sheriffs in the Sheriffdom of Glasgow and Strathkelvin.

Context and consequences

This decision comes at a time of increasing realisation that the major consequences of authorising someone to act and make decisions following impairment of capacity, coupled with the infinite variety of personal circumstances and associated needs and risks, necessitate a high

degree of skill and care of any professional taking instructions and preparing a CPA or WPA. Last year the Law Society of Scotland published guidance which remains the subject of ongoing review. There has already been disquiet at the concept of offering "one size fits all" samples on the OPG website, and at other aspects of those samples. An example is that their unfortunate failure to regulate adequately management by joint attorneys can and has resulted in attorneys at loggerheads simultaneously making contradictory decisions. More broadly on officially promulgated samples and styles under the Act, the Law Society of Scotland's Mental Health and Disability Sub-Committee has recently criticised the significant shortcomings of the style of guardianship application appearing in the Scottish Government publication "A Guide for Carers - Guardianship and Intervention Orders - Making an Application".

Because of the similarities between requirements in s15(3)(b) and s16(3)(b), Sh. Baird's "inexorable logic" potentially affects many WPA's. OPG reports that more than 500,000 POA's have now been registered under the Act and that a majority of them suffer from the defect identified by Sh. Baird, if defect it be. Regardless of the outcome of the appeal, and given that this will not provide a definitive ruling applicable throughout Scotland, solicitors and others preparing POA's using a limited range of styles as standard, and particularly those using styles similar to the OPG "samples", will no doubt wish to review their styles and procedures, and perhaps POA's already granted, just as it is understood that OPG is removing the "samples" from its website. There are widespread potential cost and liability consequences if significant numbers of POA's already granted do not achieve intended validity as CPA's and/or WPA's, whether replacement be fresh documents by competent granters or guardianship applications for granters who have already lost capacity. It may be that by the test in *Hunter v Hanley*, 1955 SC 200, and other relevant authorities, a "defect" apparently to be found in so very many documents prepared prior to judicial identification of the "defect" would not give rise to a finding of professional negligence; but provision of proper professional services may nevertheless require rectification now, particularly if Sh. Baird's decision were to be upheld. There are likely to be consequences for OPG, especially where members of the public have relied upon OPG's "samples" without engaging professionals.

Comment

Because of the immediate impact of Sh. Baird's decision, it would appear – unusually – not inappropriate to make some further comment in advance of the appeal hearing. On the s15(3)(b) point, it seems that the issue can simply be stated as to whether the words which did appear in the POA document, as quoted above, in fact met that requirement. The bank was appointed "*continuing attorney*" under the Act. Under s15(2) that can only mean a person to whom a CPA has been granted. Does "*clearly expresses*" mean "*conclusively demonstrates*" or does it mean "*states in explicit terms*"? If the latter applies, how explicit must the statement be? The examples quoted by Sh. Baird do not follow the wording of s15(3)(b) (or of s16(3)(b)) as explicitly as the style in Appendix 5 of Ward *Adult Incapacity* (Greens, 2003): "*I expressly declare that it is my intention that the powers conferred in terms of this provision* […] *be continuing powers in terms of section 15 of said Act* [or welfare powers in terms of section 16 of said Act]".

As regards s15(3)(ba), there is a question as to whether that provision was engaged at all, or whether in that regard the POA fails to clear an even earlier hurdle. CPA's may come into force at any time, including immediately upon granting,

upon subsequent request by the granter, upon the reasonable belief of the attorney that the granter has lost capacity, or upon actual incapacity. Only in the last event is s15(3)(ba) relevant. Combinations of these factors are not uncommon. A granter may provide that powers come into force either upon written request or upon the reasonable belief of a spouse as first attorney, but medical certification of incapacity in the case of substitute attorneys. A startling defect of the POA in this case, not identified by Sh. Baird, is that it apparently does not state when it is intended to come into force. The fallback position, in construing documents generally, that in absence of explicit statement to the contrary they come into force upon execution (in the case of a POA, which establishes a contract of mandate, that would mean the acceptance of appointment by the attorney, which in this case will have been by execution of the registration application form) cannot apply because, as narrated in the Judgment: "It was explicitly accepted in argument on behalf of the Bank that it was never intended that they should act as the granter's attorney and operate the powers conveyed while she retained capacity". So the POA document may have required further competent action by the granter if it were ever to enter into force at all, something of which the granter is apparently no longer capable. One has to note that the unacceptably poor drafting of the 2007 amendments to the Act extends to s16(3)(ba) which assumes that all WPA's require a determination of incapacity, ignoring the alternative quoted above in s16(5)(b)(ii).

Developments will be reported in this Newsletter as they occur. A statement narrating the position has now appeared on the Law Society of Scotland website, with link to a statement by the Scottish OPG.

Adrian D Ward

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Conferences at which editors/contributors are speaking

The Deprivation of Liberty Procedures: Safeguards for Whom?

Neil is speaking at the day-long conference arranged on 13 June by Cardiff University Centre for Health and Social Care Law and the Law Society's Mental Health and Disability Committee, to discuss the extent to which the DOL procedures comply with international human rights standards, and whether they offer adequate protection for the rights of service users and their carers. The Conference will focus on the implications of the ruling of the Supreme Court *Cheshire West* as well as the likely impact of the Report of the House of Lords Committee on the Mental Capacity Act. Other speakers include Richard Jones, Phil Fennell, Lucy Series, Professor Peter Bartlett, Sophy Miles and Mark Neary. Full details are available here.

End of Life Care and the Law – Wirral Hospice St John's and Hill Dickinson

Tor and Parishil are speaking at this conference in the North West on 25 June 2014 which covers end of life issues including DNACPR notices, advance decisions to refuse treatment, and the MCA and CoP. Full details are available here.

Other conferences of interest

Mental Health Lawyers Association COP Conference

The MHLA is holding its first COP conference on 6 June in London. The key-note speaker is Mr Justice Charles, Vice-President of the Court of Protection, and other speakers include representatives from the LAA and the Official Solicitor's office. Full details are available here.

BABICM Summer Conference

The British Association of Brain Injury Care Managers is holding its summer conference on 25 and 26 June 2014 at the Hilton Birmingham Metropole. Entitled "Nobody Does It Better! Current Practical Issues in Brain Injury," the conference will examine issues facing brain injury case managers: (1) sex, capacity and the law; (2) what constitutes privileged documentation;

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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.

and (3) the implications of the judgment in *Loughlin v Singh*. For more details and to register, please click here.

Chambers Details

Our next Newsletter will be out in early July. 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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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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Alex been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, works to which he has contributed including 'The Court of Protection Handbook' (forthcoming, 2014, LAG); 'The International Protection of Adults' (forthcoming, 2014, Oxford University Press), Jordan's 'Court of Protection Practice' and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). He is an Honorary Research Lecturer at the University of Manchester, and the creator of the website www.mentalcapacitylawandpolicylaw.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 previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. 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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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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