



Welcome to the October 2023 Mental Capacity Report, which is much shorter than last month's blockbuster (to everyone's relief). Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: Brain stem death before the courts and conveyancing;
- (2) In the Property and Affairs Report: the Powers of Attorney Act 2023 gets Royal Assent, and how it will change the Mental Capacity Act 2005;
- (3) In the Practice and Procedure Report: revised guidance for Accredited Legal Representatives and anonymisation of clinicians in cases involving the MCA 2005;
- (4) In the Wider Context Report: a revised online ADRT service and a revised clinical guide for staff working with autistic people and those with a learning disability, and our Irish correspondents highlight two specific aspects of the Assisted Decision-Making (Capacity) Act 2015;
- (5) In the Scotland Report: attorneys as executors.

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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### The competence of appointment of an executor *qua* attorney

Mr Rae died leaving a Will under which his widow, Mrs Rae, was sole beneficiary, and in which he appointed two executors. Both executors predeceased him. Mrs Rae would have been entitled to be confirmed executrix, either in a nominate capacity by virtue of section 3 of The Executors (Scotland) Act 1900, or in a dative capacity *qua* relict of the deceased, except that she was considered to be incapable of competently acting as such. Mrs Rae had however appointed a Ms Gordon to be her attorney, with powers held to be adequate to enable her to seek Confirmation as Mr Rae’s executrix. It is perhaps surprising that more than 22 years after Part 2 of the Adults with Incapacity (Scotland) Act 2000 (“the 2000 Act”) came into force, there should have been any doubt about Ms Gordon’s entitlement to be confirmed executrix-dative *qua* attorney of Mrs Rae. It is helpful, however, that on 1<sup>st</sup> September 2023 Sheriff P Mann, sitting at Aberdeen Sheriff Court, granted Ms Gordon’s petition to be so appointed [*Gordon, Petitioner*, 2023 S.L.T. (Sh Ct) 187]. This decision follows, after a significant time lag, the decision in *B’s Guardian, Minuter* (Sh Ct Edinburgh, 21 July 2010, unreported, 2010 G.W.D. 33-690) that in similar circumstances it was competent to appoint a guardian as executor. Acting for the Minuter in that case was R A S MacLeod (then a solicitor, now an advocate). While it might be seen as unusual for one commentator to refer to another on the same case, it is significant that Mr MacLeod has now provided some helpfully researched

background in his article “The appointment of an attorney as an executor”, 2023 SLT (News) 135. Sheriff Mann’s decision is commendably succinct, extending to three columns. I recommend that Mr MacLeod’s article be read in conjunction with it.

What was the difficulty? The perceived difficulty was an assertion at paragraph 8-43 of the current edition (the 9<sup>th</sup> edition) of *Currie on Confirmation of Executors* that: “The power of attorney of a UK resident person will never enable the attorney to apply for confirmation on behalf of the *incapax*”. Currie bases that assertion on the judgment of Sheriff Macvicar in the case of *Leishman*, unreported December 17, 1980. However, Sheriff Mann made a distinction between cases where the granter of the power of attorney is at time of application to be appointed capable, or alternatively incapable: “*Leishman* does not appear to me to be authority for the proposition that it is incompetent to appoint an attorney of an individual who is *incapax*. I am inclined to disagree with *Currie* on this matter so far as it concerns an *incapax*. I take no exception to the proposition that it is incompetent to appoint an attorney in place of a UK resident who is *capax*.”

He could have added that in 1980, when *Leishman* was decided, the attorney would only have had power to act if the granter were capable at the time. The general view was that powers of attorney ceased to have effect upon the incapacity of the granter. That remained the position until it was reversed by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, that regime having lasted only until the relevant

provisions of the 2000 Act came into force in 2000. In other words, *Leishman* cannot have been authority after 1990 for the above quotation from *Currie*. More generally, one would have to say that it would be necessary to be cautious about the relevance of a decision made over 50 years ago during the first of three successive power of attorney regimes, each fundamentally different from its predecessor; and that any such reliance would require to be clearly justified. Interestingly, Mr MacLeod in his article points out that in this regard: "The commentary at p92 of the 7<sup>th</sup> edition of *Currie* is more permissive than that in the current edition".

Sheriff Mann in fact gave two cogent reasons why the attorney should be appointed. He said that: "I can see no reason in principle why it should not be equally as competent to appoint an attorney as to appoint a guardian or the holder of an intervention order to the office of executor-dative *qua* such in these circumstances. All such representative parties are subject to the terms of the Adults with Incapacity (Scotland) Act 2000 (at least where the attorney is appointed after the coming into force of that Act). All are thus subject to supervisory powers of the public guardian and the court. All would require to find caution. One could argue that an attorney appointed by the person with the right to be appointed executor, and in whom that person has placed his trust, has a better claim to be appointed than a person appointed by the court. In many, if not most, cases the person who might be appointed attorney might also be the person who would be appointed guardian or intervener."

He went further by referring to the public interest: "It seems to me that there is a compelling public interest to ensure that the estates of deceased persons should be administered with the least possible delay and with the least possible expense. In a case where there is an attorney in place for an *incapax* individual with the right to be

appointed executor, to insist that a guardian be appointed as a precursor to the appointment of an executor-dative does not satisfy that public interest." Mr MacLeod developed that further by pointing out that to insist on appointment of a guardian, where an attorney already had relevant powers, would contravene the section 1 principles of the 2000 Act, particularly the requirement that any intervention should be the least restrictive option in relation to the freedom of the adult (section 1(3)) and the mandatory requirement to take account of the present and past wishes and feelings of the adult (section 1(4)). One might add the obligation to comply with the European Convention on Human Rights: to disregard Mrs Rae's choice of who should act for her in the event of her own incapacity, and to insist upon a burdensome additional procedure which would not have been required but for her incapacity, would appear to contravene the right for respect to private and family life in Article 8, and in association with that to contravene the prohibition of discrimination under Article 14. That position is reinforced by (a) Principle 1 of Council of Europe Ministerial Recommendation CM/Rec. (2009)11 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; and (b) interpreting both the 2000 Act and those 2009 Principles by reference to the UN Convention on the Rights of Persons with Disabilities. Many of the provisions of the UN Convention are relevant, including the prohibition of "all discrimination on the basis of disability" in Article 5 and the requirement of Article 12.4 that the will and preferences of the adult be respected.

*Adrian D Ward*



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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 is leading a masterclass on approaching complex capacity assessment with Dr Gareth Owen in London on 1 November 2023 as part of the Maudsley Learning programme of events. For more details, and to book see [here](#).

Alex is also doing 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.

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Our next edition 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](mailto:marketing@39essex.com).

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