



Welcome to the May 2024 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: a rare successful capacity appeal, evicting someone from P's house and holistically approaching hoarding;
- (2) In the Practice and Procedure Report: when you can remove deputies, and publishing judgments in serious medical treatment and closed material procedure cases;
- (3) In the Mental Health Matters Report: when not to rely on capacity in the mental health context;
- (4) In the Wider Context Report: capacity, autonomy and the limits of the obligation to secure life, and the European Court of Human Right raises the stakes for psychiatric admission for those with learning disabilities;
- (5) In the Scotland Report: licence conditions and deprivation of liberty, and Executor qua attorney – a few steps back?

In the absence of relevant major developments, and on the basis people have enough to do without reading reports for the sake of reports, we do not have a property and affairs report this month. But some might find of interest the [blog](#) by Alex prompted by a question in the property and affairs context of whether you need to have capacity to consent to having your capacity assessed.

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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Release on licence conditions challenged

AB sought judicial review of the imposition of certain conditions upon his release from prison by the Scottish Ministers. The conditions had been imposed in accordance with the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”), section 12, upon the recommendation of the Parole Board for Scotland. The main relevance to this Report are questions about whether provisions of the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”) would have achieved the desired outcome and should have been preferred, and various grounds of challenge with reference to the European Convention on Human Rights, among other factors considered by Lord Lake in his decision issued on 14th March 2024 ([2024] CSOH 30, Case Reference P512/23). The circumstances were described by Lord Lake at the outset of his judgment:

“[1] AB was formerly a prisoner in HMP Edinburgh. He was convicted of two charges of rape at common law and two charges of contravention of the Criminal Law (Consolidation) (Scotland) Act 1995, section 6 (lewd, indecent or libidinous conduct to a girl between the ages of 12 and 16). His victims were his daughter and a friend of hers. The offending went on for an extended period. The victims were aged 13 to 15 at the time.

“[2] He was sentenced to imprisonment for a term of 16 years but,

on appeal, this was reduced to 12 years. In terms of the sentencing regime that applied to him, he was entitled to automatic release on licence on 22 March 2023. ...”

Lord Lake noted it as relevant that AB “continued to deny his guilt throughout his prison sentence and continues to do so. This meant that while he was in prison, he did not engage in work to address the risk of him committing further sexual offences and prior to his release it had not been possible for him to engage in unescorted community testing.” Later in the judgment, it was noted that in view of his denial of guilt he had not engaged in any offence-focused work during his sentence, that in consequence there was only limited insight into the triggers and motivations that caused him to offend, and his ability to desist from further offending was untested.

The challenged licence conditions included condition 12, which stated:

“Mental health

“12. You shall undertake an assessment by community mental health services, and cooperate with services after this, all as directed by your supervising officer;”

AB’s challenges included that the effect of condition 12 was to subject him to compulsory mental health care which should only be done under the provisions of the 2003 Act, and that it was improper to use the provisions of the 1993

Act to seek to achieve the same result, because that denied AB the safeguards contained in the 2003 Act. This, and other findings in the decision, founded on the underlying point that there is a very material difference between the requirement that prisoners released on licence require to be managed to mitigate the risk that they may present to the public at large that they will re-offend, which does not apply to relevant provisions of the 2003 Act. The assessment required by condition 12 was for the purposes of the 1993 Act, and Lord Lake was unable to identify any basis upon which assessment could have been enforced under provisions of the 2003 Act.

Among other conditions, and challenges to them, AB asserted that “park” and “associations” were too imprecise in the following conditions:

“17 You shall not enter parks, playgrounds or any other places where children who you know to be, or should have reasonable cause to believe to be under the age of 18 years are likely to be, or might reasonably expect them to be, without the prior approval of your supervising officer and subject to any restrictions that officer may impose, and shall immediately report any unavoidable or inadvertent entry to that officer;

“20 You shall:

- a) immediately inform your supervising officer of any friendships, associations, or intimate or domestic relationships that you enter into, with anyone;”

Lord Lake considered contrasting decisions about the test of enforceability in the English cases of *Kruse v Johnson* [1898] 2 QB 91 and *Percy v Hall* [1997] QB 924. He followed Lord Pentland in *B v Parole Board for Scotland* 2020

SLT 975 in favouring the latter, in which Simon Brown LJ said:

“A provision should only be struck down on the ground of uncertainty in the rare case where it can be given no sensible and practicable meaning in the particular circumstances of the case.”

Lord Lake held that both challenged words were ordinary words with readily understood meanings; and that the issue should not be tested “by hypothetical situations”. In reality, it had been submitted for the respondents that if there really was ambiguity, AB could seek clarification from his supervising officer.

Lord Lake quoted various precedents on challenges by reference to Article 5 of ECHR. He concluded that Article 5(4) does not apply to a decision to recall a prisoner on a determinate sentence, therefore it could not apply to imposition of a condition which, if breached, would result in such recall. Article 8 was not breached either on grounds of certainty, as identified above, or proportionality, as it was clear from the evidence that the purpose of the conditions was to manage safely such risk as AB might present to the community. The objective being public protection, Article 8 was not breached.

He also took the view that the conditions imposed did not give rise to a deprivation of liberty, observing that ““The level of freedom the petitioner retains as to how he wishes to conduct his daily life cannot be seen as a deprivation of liberty.”

As regards Article 14, AB cited as the comparator group prisoners who had their mental health needs addressed and met under the 2003 Act. While the comparator group need not be identical, Lord Lake held that in AB’s situation there was “a very material difference”, namely the

same difference as identified above between the requirement to manage to mitigate risk of re-offending in the case of prisoners released on licence, which does not apply to the comparator group.

For other grounds of challenge and how they were addressed, see Lord Lake's judgment. He refused the petition.

Adrian D Ward

Executor *qua* attorney – a few steps back?

In the October 2023 Report, we commended the decision by Sheriff Mann in the case of *Gordon Petitioner 2023 SLT (Sh Ct) 187* putting an end to the strange situation that while a guardian appointed by a court could take up the office of executor in place of an executor nominate who has lost sufficient capacity to act as such, existing authority up until then had held that an attorney appointed by the executor nominate could not do so. Three cheers to welcome that modernising decision may require to be reduced to one in light of an ensuing decision on 4th January 2024 by Sheriff P Paterson in *Petition of Joy Monique Cornforth and Andrew Cornforth, [2024] SC SEL 8*.

Having considered Sheriff Mann's decision in *Gordon*, Sheriff Paterson asked to be addressed further on a point that troubled him, namely "*the proposition that an appointment as executor is a personal one and accordingly it is not possible for an executor to delegate the legal duties incumbent on an executor under a POA – Currie 8-32.*" It was not clear to him "*how an adult granting a POA could grant their attorney a power, which they themselves did not possess i.e. the power to delegate the legal duties of an executor to themselves as attorneys.*" He was addressed on the point by RAS MacLeod, Advocate, who provided a commentary on the decision in

Gordon which I commended in the October 2023 Report.

The positive outcome is that Sheriff Paterson was prepared to grant the petition on the basis of each of two considerations. The first was Mr MacLeod's argument that, in the sheriff's words, "*the POA does not amount to a delegation of trust.*" The general management powers in the POA conferred on the attorney "*full power for me and in my name*". Sheriff Paterson was therefore willing to hold that there was no delegation of the duty of executor, but rather that the attorney would simply be acting in the name of the executor. He commented that "*It may be legitimately said that this is stretching a point in that the attorney is acting in the name of someone who does not have capacity. However, as it does not directly offend against the principle of non-delegation of the legal duties I am prepared to grant the petition on this basis.*"

The other submission which persuaded Sheriff Paterson was that the deceased's Will allowed for the appointment of substitute executors. This suggested to the sheriff that the intention of the deceased was that there was no *delectus persona* attached to the nomination of the deceased's wife. Therefore there was no bar to the delegation of the duties of executor.

Sheriff Paterson rejected arguments that as the wife had not expedited (the decision has "expended") Confirmation there was no delegation of trust by her *qua* trustee; that the attorney's duties required the attorney to act, given that the wife was the universal legatee of her late husband; and that the power of attorney reflected the wishes of the wife and as such should be respected (the judgment has "reflected"). The first two were rejected on the grounds that if powers could not be delegated after Confirmation, then the sheriff could "*see no a priori reason why the position should be any different prior to confirmation*"; and because the

second “*still involves a delegation of duties which crosses a ‘red line’ according to the authorities.*” The sheriff rejected the third because he considered that although section 1 requires adoption of the least restrictive option, that could not mean an option which in the sheriff’s view was unavailable.

One does not know from the relatively short judgment what were the full submissions by Mr MacLeod. What can be predicted is that there are likely to be further cases where sheriffs may ask to be addressed before deciding whether to accept or reject a similar application. Resolution of the matter by an Appeal Court would be helpful, provided that all relevant arguments are canvassed, starting with the obvious one that the granter of a power of attorney does not in these circumstances delegate. The granter empowers the attorney to do certain things, including to apply for Confirmation, just as under Council of Europe CM/Rec. (2009)11, Principle 14, a person may in advance give directions as to choice of guardian, should one be appointed. It would be odd if nominating a guardian who could apply for Confirmation as executor should be competent, but appointing an attorney to make the same application should not be.

It could be argued that this is more than odd. It would violate rights under ECHR and the UN Convention on the Rights of Persons with Disabilities, the first incorporated into Scots law and the second proposed to be so incorporated, and in the meantime applicable through ratification by the UK. Any flavour of revival of the long-discredited view that some degree of impairment of faculties causes a person to be discriminatorily labelled “incapax” and deprived of full status “on an equal basis with others”, and disqualified from making effective provision for such a situation, is arguably a violation collectively of Article 8 of ECHR, discriminatory in that regard under Article 14, and a violation of the

requirements of Article 12 of the Disability Convention for equal recognition before the law, the retention of “legal capacity on an equal basis with others in all aspects of life”, the obligation on states to ensure provision of support that may be required to exercise capacity, and effective safeguarding of respect for the person’s will and preferences. This is not a matter of delegation, but of effective safeguarding of the wife’s right (not in any way lost through any impairments of capabilities) to use an available mechanism to overcome the consequences of her disability. As was pointed out in the Three Jurisdictions Report support for the exercise of legal capacity may go beyond supporting people to act for themselves, to other forms of support for people who are incapable themselves of acting or deciding in any particular matter, even when all means of support have been provided. In the Three Jurisdictions Report this was formulated in the question: “What measures should be taken to support the exercise of legal capacity, both by supporting persons with disabilities to make decisions themselves wherever possible, and by supporting their ability to exercise their legal agency even in circumstances when they lack the ability to make the requisite decisions themselves?” (Three Jurisdictions Report, pages 13 and 14).

Adrian D Ward

Scotland: a human rights blackspot

It is anticipated that on 10 May 2024 Scots Law Times will publish the first instalment of Adrian’s three-part article entitled ‘Scotland in 2024: a human rights blackspot’. It illustrates that theme with discussion and commentary on various cases in Scotland, England and Ireland which have been described in the Report in recent months, and current themes of review and discussion including the definition of ‘mental disorder’ in Scots law, and a suggested interpretation of ‘unsound mind’ in Article 5.4 of

the European Convention, having regard to the versions in both English and French of the Convention, which have equal status.”

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Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click [here](#).



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Arianna practices in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in inherent jurisdiction matters. Arianna works extensively in the field of community care. She is a contributor to Court of Protection Practice (LexisNexis). To view a 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 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2022). 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. To view full CV click [here](#).



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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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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 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](#).

Adrian will be speaking at the following open events:

1. Adults with Incapacity at the Horizon Hotel, Ayr on 22 May 2024, organised by Ayr Faculty (contact [Claire Currie](mailto:claire@1stlegal.co.uk) claire@1stlegal.co.uk)
2. Adults with Incapacity Conference in Glasgow on 10 June 2024, organised by Legal Services Agency (contact [Susan Bell](mailto:SusanBell@lsa.org.uk) SusanBell@lsa.org.uk)
3. The World Congress on Adult Support and Care in Buenos Aires (August 27-30, 2024, details [here](#))
4. The European Law Institute Annual Conference in Dublin (10 October, details [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 edition will be out in June. 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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