Mental Capacity Law Newsletter August 2016: Issue 68

Essex CHAMBERS

Scotland

Welcome to the August 2016 Newsletters. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: covert medication and deprivation and further findings in relation to state imputability;

(2) In the Property and Affairs Newsletter: statutory wills and charitable giving and OPG guidance on professional deputy costs;

(3) In the Practice and Procedure Newsletter: an update on Case Management, s.49 and Transparency pilots and habitual residence strikes again;

(4) In the Capacity outside the COP Newsletter: assistance wanted with questionnaires on powers of attorneys/advance decisions and mediation and relevant law reform developments around the world;

(5) In the Scotland Newsletter: the first AWI appeal determined by the Sheriff Appeal Court and Scottish observations on habitual vs ordinary residence.

With this Newsletter, we also roll out the next iteration of our capacity assessment guide, including a re-ordering of the stages of the test and summaries of (ir)relevant information for the most important decisions. You can find it on our dedicated sub-site here, along with all our past issues, our case summaries, and much more. And you can find 'one-pagers' of the key cases on the SCIE website.

We are now taking our usual summer break, but will return in early October with all the mental capacity news that is fit to print.

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Adrian Ward
Jill Stavert

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JM (Appellant) v Aberdeenshire Council (Respondent)

On 8th July 2016 the Sheriff Appeal Court issued its first decision ([2016] SAC (Civ) 5 XO5/16) in an appeal under the Adults with Incapacity (Scotland) Act 2000, an appeal by JM against a decision of Sheriff Summers in Aberdeen appointing the Chief Social Work Officer of Aberdeenshire Council to be welfare guardian to JM's brother JC. JC was described as having been diagnosed "with severe mental retardation and learning disability"; as requiring 24-hour support; and having "limited understanding and communication levels".

In April 1992 a guardianship order was granted in favour of the Council in respect of JC. It was renewed until December 2001. Although not narrated in the decision, that will have been guardianship with the fixed and limited powers provided for in the Mental Health (Scotland) Act 1984 to determine residence; to require attendance for medical treatment, occupation, education or training; and to require access to be given to any medical practitioner, mental health officer or other specified person. In May 2015 (when JC was aged 57) the Council applied for welfare guardianship under the 2000 Act. JM opposed that application and by Minute sought appointment of herself as guardian. The sheriff at first instance appointed the Chief Social Work Officer to be guardian for three years, and dismissed JM's Minute. JM appealed that decision. It appears that she was represented by a solicitor at first instance, but conducted the appeal herself. Accordingly, "for the appellant's benefit" the Appeal Court restated the law as to the limited role of an appellate court "as expressed most recently in a number of Supreme Court cases" by quoting Lord Reed in *Henderson v Foxworth Investments Limited* 2014 SC (UKSC) 203 (at para [67]) as follows:

> *t follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding in fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings in fact made by a trial judge only if it is satisfied that his decision cannot be reasonably explained or justified.*

This report comments upon only the first and the last of JM's five grounds of appeal.

The first was that the same mental health officer should not have prepared both the report for the appellant's application, and the report for her own application, on grounds of conflict of interest. The Appeal Court pointed out that the decision whether or not to appoint a guardian rested with the sheriff, not the mental health officer, and that the purpose of the statutory reports was to assist the sheriff in that task. The mental health officer could be expected to act in an independent manner from the local authority which sought appointment. The Appeal Court quoted with approval an unreported decision in Kilmarnock Sheriff Court dated 29th May 2009 in *JM v LM* criticising the provision of reports from two different mental health officers in a contest for appointment. In that case, the sheriff had commented:

> *I have to say that I thought it was unfortunate that the same mental health officer who prepared the suitability report in respect of the Applicant did not carry out the suitability report in respect of the Minuter. I was advised during the course of the proof by the two*

> *mental health officers who gave evidence, that they perceived a conflict of interest and did not consider it appropriate for the same mental health officer to carry out the suitability reports. Neither myself, nor Miss Kelly, the Safeguarder, quite understood this position and I think it would have been preferable if the same mental health officer had prepared both reports.*

In a clear and authoritative passage relevant to any future such contests, the Appeal Court concluded:

> *We do not know whether it is the practice in some jurisdictions for mental health officers always to decline to prepare a second report in such circumstances. But if there is such a practice we would discourage it. We readily acknowledge that there might be cases, probably rare, where the individual circumstances require a different approach, but we do not consider it to be either necessary or desirable as a matter of common practice.*

JM's last ground of appeal was that JC's views "had not been heard and, insofar as she [i.e. JM] had expressed them, had been ignored". It is perhaps surprising that the Appeal Court considered it satisfactory that the mental health officer, in both reports, recorded an attempt to meet JC and obtain his wishes and feelings about the order sought and the powers requested; that the interview was ended at an early stage to avoid distressing JC; and that it was "not possible to ascertain [JC's] view on this application". That sits uneasily with the description of JC as having "limited understanding and communication levels". Evidently, though limited, they existed. It also sits uneasily with the absolute obligation in section 1(4)(a) of the 2000 Act to ascertain the wishes and feelings of the adult by any possible means, and with the importance of the will and preferences of the adult (and thus of ascertaining them) in terms of Article 12 of the UN Convention on the Rights of Persons with Disabilities ("CRPD"). Those provisions are not referred to in the decision of the Appeal Court, nor is the apparent failure of the sheriff to have complied with the mandatory requirement upon him to consider whether a safeguarder should be appointed, with the possibility also of appointing some other person to represent the interests of the adult (2000 Act section 3(4)).

The decision of the Appeal Court is open to criticism in that it appears to proceed on the erroneous basis that the relevant test in such matters is the best interests of the adult. For example, the Appeal Court describes that in his Judgment "the sheriff explains why he decided that the grant of the respondent's application was in JC's best interests". That is not the statutory test with which the sheriff was required to comply. A best interests test was rejected by the Scottish Law Commission for the purposes of the 2000 Act in favour of the principles now appearing in section 1 of the 2000 Act (see paragraph 2.50 of the Commission's Report No 151 on Incapable Adults), a position now reinforced by the views of the UN Committee on the Rights of Persons with Disabilities as to the proper interpretation of Article 12 of CRPD.

A further point for some concern in the appeal decision is the reference, quoted above, to "severe mental retardation and learning disability". This implies that these are two different things. This commentator had always understood "mental retardation", "mental handicap" and "learning disability" to be synonymous, only the last of these being acceptable terminology in recent years.
Though mildly expressed, there is one further

general point in this decision to be noted by any practitioner conducting an appeal before the Sheriff Appeal Court. The decision narrates that JM felt unwell at the hearing but, rather than seeking adjournment, agreed that the Appeal Court should rely on a note which she had written and produced "which set out clearly the points she wished to make". What might be viewed as courtesy and assistance by the court to a party litigant should not, however, be seen as absolving a practitioner appearing before any court from the obligations of courtesy, and to provide assistance, to the court. Perhaps at least some of the points attracting critical comment in this report might not have arisen if that courtesy and assistance had been provided. However, such points were not made in the judgment of the Appeal Court, which on this aspect was limited to a single sentence: "Perhaps more surprisingly the solicitor for the respondent also advised that he was content to rely upon his written submissions which were brief to the point of being skeletal".

Adrian D Ward

Habitual residence, integration and deprivation of liberty

"DB and EC are two men born and raised in Scotland. Each has a profound learning disability and complex behavioural problems. They have both been receiving treatment in the same specialist hospital in England for several years. Proceedings in respect of each man have now been started in the Court of Protection. A preliminary issue has arisen as to whether each man has acquired habitual residence in England so as to vest jurisdiction in the Court." That is the first paragraph of the judgment of Mr Justice Baker in the conjoined (English) cases of *Re DB* and *Re EC* [2016] EWCOP 30 in which he concluded that both men had acquired habitual residence in England, for reasons reported and discussed in the principal coverage of this case in the Practice and Procedure section of this Newsletter.

Until the end of last century, that issue was unlikely to have arisen. Scotland had facilities, latterly at the Royal Scottish National Hospital at Larbert, to meet needs such as those described in the Judgment in respect of DB and EC. DB is described as having a severe learning disability, autism and epilepsy. He had a long history of highly aggressive behaviour with no apparent triggers. At one point he required a staff ratio of 4:1. The total cost of his care was £296,000 per annum. His needs were described as being "multi-layered and of a complexity only seen in a very small percentage of people with a learning disability".

EC was described as having severe learning disability, cyclic mood disorder, and autistic spectrum disorder with associated challenging behaviours. The cost of EC's care is not quoted. It would appear that the ordinary residence of DB and EC was deemed to have remained in Scotland, so that in each case care continued to be funded jointly by the relevant Scottish local authorities and health boards.

The specialist care given to each in England had been successful to the extent that after periods there of 7½ years and 6 years respectively, return to Scotland was in contemplation. Although the complexity of their needs indeed is limited to a very small proportion of people with learning disability, it is a proportion which will always exist, and for so long as specialist facilities to meet such needs do not exist in Scotland, such cases raising questions of whether habitual

residence has remained in Scotland, or transferred to a specialist facility elsewhere, will continue to arise. Mr Justice Baker commented that: "Although it is undesirable that an excessive amount of time in litigation should be spent in analysing this issue, it is essential for any court to satisfy itself that it has jurisdiction and to that end it must analyse properly the nature of the residence of the adult concerned in order to establish whether it has become habitual." That is clearly correct. Habitual residence is the primary ground of jurisdiction under the Adults with Incapacity (Scotland) Act 2000, the Mental Capacity Act 2005, and Hague Convention 35 on the International Protection of Adults. However, an obvious question arises as to whether within the United Kingdom the law in this regard should not be simplified. Perhaps one should refer to the position within the British Isles, given the extent to which specialist treatment for Irish patients is also frequently provided in England.

We have reported frequently, and with concern, upon difficulties in establishing ordinary residence, and the admitted differences of approach in that regard between England & Wales and Scotland. It is difficult to justify different approaches in each jurisdiction. Is it not perhaps also difficult to justify situations in which people such as DB and EC may have ordinary residence in one place and habitual residence somewhere else? Both DB and EC had families entirely in Scotland, with the costs of their care met by relevant Scottish local authorities and health boards. As Mr Justice Baker pointed out, "[t]he individual circumstances of both DB and EC mean that neither is able to integrate in a family or social environment anywhere in a conventional way. Wherever he resides, the life of each of them would be focused on his residential unit." That aspect, incidentally, identifies the extent to which the entirely commendable process of running down large institutions such as the Royal Scottish National Hospital had previously been, and transferring residence to placements "in the community", ran into fallacy for those for whom the only possible "community" is their care placement.

Even though such assimilation of ordinary residence and habitual residence cannot be achieved, there can surely be no good reason why within the United Kingdom (and perhaps within the British Isles) there should not be a "rule of thumb" for determining habitual residence in cases of no substantial controversy, such as a standard period of two or three years of residence in a different jurisdiction following which habitual residence would be deemed to have transferred to that jurisdiction.

Adrian D Ward

Scottish Government Consultation

'Following the conclusion of the Scottish Government consultation on the Scottish Law Commission's report on Adults with Incapacity, all publishable responses are available here, together with analysis of the responses available here.

Over the next couple of months we understand Scottish Government officials are meeting with a range of stakeholders and service users to discuss the findings from the consultation and to consider the way ahead.'

Adrian D Ward

Mental Welfare Commission for Scotland: Advice Note: Adults with Incapacity – Sexual Relationships and the Criminal Law

In July 2016, building on its previous related guidance *Consenting Adults?*, the Mental Welfare Commission published an advice note in response to concerns raised about the position under criminal law of staff supporting adults with learning disabilities in the context of such adults entering into non-exploitative sexual relationships.

In Scotland, concerns over the extremely complex issue about the extent to which it is permissible, or indeed required, to interfere in the sex lives of persons with learning disabilities was brought into sharp relief by the 2014 *LY*[1] ruling[2]. LY, a women with a learning disability, was subject to local authority guardianship specifically as a result of a former abusive and exploitative sexual relationship. However, she had subsequently entered into a non-abusive and non-exploitative sexual relationship and the local authority was seeking directions from the sheriff court as to whether or not it could authorise such relationship. The sheriff decided that as the application was made on the basis that LY lacked capacity to consent to sexual relations he could not give directions that would condone the criminal offence of rape.[3] He did, however, suggest that consideration be given to revisiting LY's ability to consent to sexual relations and a potential application for variation of the guardianship order.

The Commission's advice note acknowledges the very difficult balancing act that needs to take place when it comes to weighing up issues of autonomy and protection in these situations. It notes the need to give effect to, on the one hand, the right to respect for the adult's private and family identified in Article 8 ECHR and the right to equal recognition before the law identified in Article 12 UNCRPD and, on the other hand, the adult's right to freedom from exploitation, abuse and abuse identified in Article 16 UNCRPD. It acknowledges the problems involved and, consequently, is only able to give broad guidance in terms stating that guardianship powers that are used to protect an adult should be as specifically framed as possible and clearly justify when they may in practice be used to restrict the person from entering into a sexual relationship. Moreover, it states that every case must be considered on an individual basis bearing in mind the principles of the Adults with Incapacity (Scotland) Act 2000, with advocacy involvement and possibly involving requesting the court to appoint a curator *ad litem* or safeguarder.

In relation to the assessment of capacity to consent to sexual relations the Commission notes, in the absence of relevant Scottish jurisprudence, the English and Welsh Court of Appeal ruling in *IM v LM*[4] that the test for capacity (a) is whether the person is able to consent to sexual relationships in general and not whether a person can consent to sex with a particular person; and (b) should not be overly demanding and require a disproportionate level understanding on persons with capacity issues to on others. Importantly - and in line with the requirements of the Adults with Incapacity (Scotland) Act 2000 and Article 12 UNCRPD that people will be given support to assist them in taking decisions - the Commission also notes that capacity assessments should be based on the

[1] *Application for directions by West Lothian Council in respect of Y*, 2014 SLT (Sh Ct) 93.

[2] There is a dearth of case law in Scotland relating to such issues.

[3] S 1 Sexual Offences (Scotland) Act 2009, taken together with s 17 of the same Act, provides that sexual intercourse without consent or a reasonable belief of consent constitutes rape.

[4] [2014] EWCA Civ 37.

person's ability to take a decision with support. At the same time, however, it acknowledges that where there is evidence of a risk of exploitation, and the person cannot protect themselves against this, carefully justified guardianship may be appropriate.

Finally, the advice note sets out various non-prescriptive factors that the Lord Advocate has stated the Crown and Procurator Fiscal Service would consider in deciding whether or not to prosecute in the case of persons with capacity issues and sexual relations.

Jill Stavert

Mental Welfare Commission for Scotland reports of NHS wards in Scotland

On 20 July the Mental Welfare Commission published reports relating to recent visits to various NHS wards across Scotland.

The visits considered standards, care, treatment, support and participation, including physical health care, the use of mental health and incapacity legislation, activity and occupation and the physical environment. The good and the less good are noted and several recommendations are made.

The announced visits were to:

- Knapdale Ward, a twelve bed mixed sex dementia ward at Mid Argyll Community Hospital and Integrated Care Centre, Lochgilphead, where no recommendations were made.
- A six bed purpose built IPCU in Wishaw General Hospital (which takes both male and female patients) where one recommendation was made.
- A twelve bed IPCU at the Royal Edinburgh Hospital (with single bedrooms for women and men) where two recommendations were made.
- Three inpatient rehabilitation wards (Craiglea, North Wing and Myreside) at the Royal Edinburgh Hospital (catering for people with mental illness and complex care needs) where three recommendations were made.
- Two fifteen bed wards (one male (Parkside North) and one female (Parkside South) with a patient group whose ages range from mid-50s to mid-80s and who have spent most of their adult life in institutional care) where four recommendations were made.

The only unannounced visit was to an eighteen bed medium stay mixed sex rehabilitation ward, providing a rehabilitation service for adults, at Gartnavel Royal Hospital, Glasgow. On this occasion eleven recommendations were made.

The individual reports, which are available on the Commission's website, should be consulted for full and specific information. Although each and every recommendation certainly does not apply to all the wards visited by the Commission they highlight, in general terms, important issues such as the need for greater focus on recovery and rehabilitation and its reflection in care plans, patient participation and tailored support, the physical health needs of persons with mental

disorder, ensuring the appropriate use of mental health and incapacity legislation, consent to treatment authorisation, the use of and processes surrounding medication, ward conditions and the use of restrictions. Interestingly, although mixed sex wards can be contentious and there were a number of these here, this did not appear to raise any particular issues on these occasions.

Jill Stavert

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Conferences at which editors/contributors are speaking

4th World Congress on Adult Guardianship

Adrian will be giving a keynote speech at this conference in Erkner, Germany, from 14 to 17 September. For more details, see here.

Autism-Europe International Conference

Alex will be taking part in a panel discussion on deprivation of liberty at Autism-Europe's 11th international congress in Edinburgh on 16-18 September. For more details, see here.

ESCRC seminar series on safeguarding

Alex is a member of the core research team for an-ESRC funded seminar series entitled 'Safeguarding Adults and Legal Literacy,' investigating the impact of the Care Act. The third (free) seminar in the series will be on 'Safeguarding and devolution – UK perspectives' (22 September). For more details, see here.

Deprivation of Liberty in the Community

Alex will be doing a day-long seminar on deprivation of liberty in the community in central London for Edge Training on 7 October. For more details, and to book, see here.

Switalskis' Annual Review of the Mental Capacity Act

Neil and Annabel will be speaking at the Annual Review of the Mental Capacity Act in York on 13 October 2016. For more details, and to book, see here.

Taking Stock

Both Neil and Alex will be speaking at the 2016 Annual 'Taking Stock' Conference on 21 October in Manchester, which this year has the theme 'The five guiding principles of the Mental Health Act.' For more details, and to book, see here.

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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.

Alzheimer Europe Conference

Adrian will be speaking at the 26th Annual Conference of Alzheimer Europe which takes place in Copenhagen, Denmark from 31 October–2 November 2016, which has the theme Excellence in dementia research and care. For more details, see here.

Jordans Court of Protection Conference

Simon will be speaking on the law and practice relating to property and affairs deputies at the Jordans annual COP Practice and Procedure conference on 3 November. For more details and to book see here.

Other conferences of interest

Financially Safe and Secure?

Action on Elder Abuse (AEA) Northern Ireland is delivering its first national conference on 30 September, supported by the Commissioner for Older People for Northern Ireland (COPNI) and sponsored by Ulster Bank, to explore the nature and extent of financial abuse of older people and focus on working collaboratively to address what has been described as the 'crime of the 21st Century'. For full details and to book see here.

Chambers Details

Our next Newsletter will be out in early 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 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 is recommended as a 'star junior' in Chambers & Partners 2016 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 and is the creator of the website www.mentalcapacitylawandpolicy.org.uk. He is on secondment for 2016 to the Law Commission working on the replacement for DOLS. To view full CV click here.

Victoria Butler-Cole: vb@39essex.com

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.

Neil Allen: neil.allen@39essex.com

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.

Annabel Lee: annabel.lee@39essex.com

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.

Anna Bicarregui: anna.bicarregui@39essex.com

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.

Simon Edwards: simon.edwards@39essex.com

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.

Adrian Ward adw@tcyoung.co.uk

Adrian is a practising Scottish solicitor, 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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Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Incapacity Law, Rights and Policy and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.