Mental Capacity Law Newsletter December 2016: Issue 71

Essex CHAMBERS

Scotland

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

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: DOLS and objections, the scope of s.21A appeals and best interests in treatment withdrawal;

(2) In the Property and Affairs Newsletter: capacity to revoke an LPA, capacity and IVAs, and litigation friends, influence and trusts;

(3) In the Practice and Procedure Newsletter: the Court of Appeal looks at committal, dismissing vs withdrawing proceedings, and the acceptable limits in criticising witnesses;

(4) In the Capacity outside the COP Newsletter: news from the National Mental Capacity Forum, new consent guidelines for anaesthetists, an important Serious Case Review regarding self-neglect, an update on the international protection of vulnerable adults and a Christmas book corner;

(5) In the Scotland Newsletter: delegation by attorneys and getting it backwards as regards capability to stand trial.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site here. 'One-pagers' of the cases in these Newsletters of most relevance to social work professionals will also shortly appear on the SCIE website.

We will be back in early February, and wish you all a very happy holidays in the interim.

Editors
Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Anna Bicarregui
Simon Edwards (P&A)

Guest contributor
Beverley Taylor

Scottish contributors
Adrian Ward
Jill Stavert

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Delegation by attorneys: comparisons

There is concern in England & Wales about the practical application of guidance from their Public Guardian on delegation by attorneys to discretionary investment managers of investment management decisions under Lasting Powers of Attorney ("LPAs"). Under the guidance an attorney under an LPA can appoint a bank or IFA to make investment decisions provided that there is specific authority in the LPA. However, where an attorney is already using a discretionary manager without express power in the LPA, it would appear that retrospective consent is required from the Court of Protection.

This gives rise to comparisons both between the Scottish position and that in England & Wales, and also comparisons between guardians and attorneys under Scottish legislation. Cross-border, there is a major contrast between the standard forms for LPAs in England & Wales, with boxes to tick for matters excluded; and the freedom of form in Scotland, subject to certain basic statutory requirements, but the converse starting-point that the attorney only has whatever powers are conferred, rather than presumed powers with stated exceptions. The issue now causing concern in England & Wales points to a similarity in both systems in that some powers are of a "higher level" nature and always require to be explicit. That now appears to be the position in England & Wales for power to appoint a discretionary fund manager. Similarly, in Scotland we have the position established in *McDowall's Executors v IRC* [2004] STC(SCD) 22 that power to make gifts must be clear and explicit, rather than apparently encompassed within more general powers, to be effective. Otherwise, as in that case, gifts made even seven years before death will be ineffective for IHT purposes! In the area of welfare powers, the same principle is thought to apply to power to authorise a deprivation of liberty: it must be clear and explicit. Strangely, however, and as we have commented before, power to authorise a restriction of liberty would be automatically deemed to have been conferred upon any welfare guardian or welfare attorney, without any explicit such power, under the proposals to address deprivation of liberty issues from Scottish Law Commission. Following consultation earlier this year, Scottish Government is understood to be moving forward with consideration of that and related issues.

Within Scotland, we are left with concerns about the differences in provisions in the Adults with Incapacity (Scotland) Act 2000 for attorneys and guardians respectively, and the basic interpretation question of whether a provision applied to one and not the other must be regarded as deliberately excluded for the other. Thus, to take examples, the Public Guardian can give instructions under section 64(7) to guardians but not to attorneys (with a degree of protection for guardians, provided that something does appear to be within their powers); attorneys but not guardians benefit from the provisions in section 17 that they are not obliged to do things which "would, in relation to …. value or utility be unduly burdensome or expensive"; and in the case of joint appointments where matters are not explicitly regulated, guardians but not attorneys have the "fall-back" provisions of section 62(6)–(9).

On the question of delegation of authority, guardians have express power to delegate under section 64(6). Although this is not replicated in the provisions for attorneys, the editors understand that the Public Guardian (i.e. Scotland's Public Guardian) takes a "read-across" from guardianship in relation to attorneys,

allowing attorneys to appoint a portfolio manager if there is power to invest and power to appoint experts, but this is a "temporary fix" pending clarification by legislation. In making such judgements, the Office of the Public Guardian helpfully apply the principles and the broad issues of benefiting the adult, safeguarding the adult, and general duties to the adult.

By way of postscript, it is notable that an item in a recent STEP bulletin regarding the issue under LPAs refers to "The England & Wales Office of the Public Guardian". While technically not quite correct, that is a considerable improvement upon the failure of that Office to make it clear that it is the Office so named for England & Wales, established subsequently to "The" Office of the Public Guardian under the 2000 Act. While not required to do so, Scotland's Public Guardian helpfully applies the qualification "Scotland" while the counterpart in England & Wales, obliged by convention as the subsequent statutory creation to make a distinction, unhelpfully fails to do so.

Adrian D Ward

"A fairer Scotland for disabled people"

Scottish Government has published its Delivery Plan for the United Nations Convention on the Rights of Persons with Disabilities, available here. It sets out 93 actions which Scottish Government has committed to take forward during the current parliamentary term. These include reviewing policies on guardianship, and considering circumstances in which supported decision-making can be promoted. Scottish Government confirms that it plans to work with disabled people and organisations that represent them to develop changes to the Adults with Incapacity (Scotland) Act 2000 in relation to deprivation of liberty, and to assess compliance with the UN Convention on the Rights of Persons with Disabilities by 2018. Scottish Government has also made a commitment to work with the Law Society of Scotland in promoting a specialism in disability discrimination law.

In his capacity as convener of the Mental Health and Disability Sub-Committee of the Law Society of Scotland, Adrian welcomed the commitments in the Plan and confirmed that the Society looked forward to continuing to work with Scottish Government in these areas. That was referred to in the debate in the Scottish Government on the Delivery Plan on 8th December 2016 when George Adam (Paisley) (SNP) said: "The delivery plan recognises the human rights of disabled people and it must underpin all our activities across the whole range of policy and legislation that affects disabled people. The Law Society of Scotland praises the Scottish Government for taking a groundbreaking approach."

Adrian D Ward
Jill Stavert

Capability to stand trial: doing it back to front

On 1st December 2016 the High Court of Justiciary Appeal Court issued its decision in *Charles Murphy v HM Advocate* [2016] HCJAC 118, allowing an appeal against the decision of a trial judge to refuse a plea in bar of sentence. The appellant had been convicted in January 2015 of seven charges involving serious assault, rape, lewd and libidinous practices, indecent assault and assault with intent to rape. The jury found him guilty. He had been on bail during the trial. He was remanded in custody pending sentence. The court sought a social work report.

The social work department indicated that they were unable to prepare a report due to the poor presentation of the appellant and his apparent dementia, and recorded that the prison social worker had expressed concerns about his mental health and that he "appeared to fail to understand the Court process, what he had pled, or why he was due in Court on 26 February 2015". It was felt that his mental status required to be clarified by means of a psychiatric assessment. That psychiatric assessment concluded that the appellant suffered from mixed Alzheimer's and vascular dementia; that he was incapable of giving instructions or participating effectively in the sentencing process; that he was likely to have been unfit at trial; that his disorder was progressive and treatable only with palliative care; and that there was no medical basis for compulsory measures of treatment. The trial judge refused a plea in bar of sentence and sentenced the appellant to five years imprisonment.

The judgment of the Appeal Court narrates a lengthy history. This note should be read subject to consideration of the full history. This note records only the indicators suggesting that there should have been a plea in bar of trial before the trial took place in January 2015, or failing that, that the position should have been addressed during the trial.

In May 2014 the solicitors then acting for the appellant were advised of the appellant's diagnosis of mild dementia or Alzheimer's. They thereupon advised the Crown of that diagnosis, with the suggestion that the Crown might wish to obtain a report from the doctor concerned. No such report was instructed. Also in May 2014, the defence agents spoke to a doctor who confirmed the diagnosis and who advised that if written confirmation of the diagnosis was required "for practical purposes he [the appellant] should need a report from a forensic psychiatrist". Again, no such report was obtained. It would appear that the defence agents proceeded solely upon their own assessment that the appellant was fit to instruct them.

In September 2014 the appellant's granddaughter, upon whom he relied to a considerable extent, texted the defence agents *inter alia* saying that "My granddad has comp confused me about the case". This does not seem to have prompted any re-consideration.

During the trial itself the granddaughter texted *inter alia* "I was jst wondering how it went today my granddad cant really tell me anything bcos he cant remember and can only give us bits and pieces that don't make sense. Its really frustrating". The following day she texted *inter alia* "again my granddad is frustrating me and cant tel me how he feels it went today".

Subsequent medical assessment was found by the Appeal Court to be "particularly telling" in that it included the comment that it was "strongly indicative that [the appellant] cannot convey to the people that he trusts what is going on". As so often happens, it was noted that despite findings indicative of "very significant impairment/dementia" people with such a condition "can present as superficially plausible" – a situation widely recognised by solicitors and other professionals engaged in the field of intellectual disabilities. It was pointed out - again in the subsequent medical evidence – that what lies beneath the plausibility is often an inability to understand and take account of changing and developing circumstances, such as the appellant would have heard while listening to the evidence.

It is disappointing that in a situation where, on a fair reading of all of the information and evidence

before the Appeal Court, the extent of impairment of the appellant's intellectual capabilities by the time that he stood trial, if then fully and properly assessed, would probably have supported a plea in bar of trial, all concerned – including the trial judge at time of sentence – proceeded regardless, and it was only upon appeal that the situation was assessed and addressed. Justice did prevail, but was seriously delayed.

Adrian D Ward

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Conferences at which editors/contributors are speaking

Royal Faculty of Procurators in Glasgow

Adrian will be speaking on adults with incapacity at the RFPG Spring Private Law Conference on 1 March 2017. For more details, and to book, see here.

Scottish Paralegal Association Conference

Adrian will be speaking on adults with incapacity this conference in Glasgow on 20 April 2017. For more details, and to book, see here.

Editors
Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Anna Bicarregui
Simon Edwards (P&A)

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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.

Chambers Details

Our next Newsletter will be out in early February. 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.

David Barnes
Chief Executive and Director of Clerking
david.barnes@39essex.com

Alastair Davidson
Senior Clerk
alastair.davidson@39essex.com

Sheraton Doyle
Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Practice Manager
peter.campbell@39essex.com

London 81 Chancery Lane, London, WC1A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

Manchester 82 King Street, Manchester M2 4WQ
Tel: +44 (0)161 870 0333
Fax: +44 (0)20 7353 3978

Singapore Maxwell Chambers, 32 Maxwell Road, #02-16,
Singapore 069115
Tel: +(65) 6634 1336

For all our services: visit www.39essex.com

Editors

Alex Ruck Keene
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Neil Allen
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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

Alex Ruck Keene: alex.ruckkeene@39essex.com

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 Trust Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. He is on secondment 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.

Jill Stavert: J.Stavert@napier.ac.uk

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.