Mental Capacity Law Newsletter November 2016: Issue 70

Scotland

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

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: the new COPDOL 10 form comes into force on 1 December, an *MN*-style case management decision, Baker J on life and death and Strasbourg's latest on deprivation of liberty;

(2) In the Property and Affairs Newsletter: trusts versus deputies, undue influence and wills, and useful STEP guidance for attorneys and deputies

(3) In the Practice and Procedure Newsletter: important practice guidance on participation of P and vulnerable witnesses, naming experts and child competence to instruct solicitors;

(4) In the Capacity outside the COP Newsletter: new guidance from the Royal College of Surgeons and the College of Policing, and an important decision of the German Federal Constitutional Court on forced treatment and the CRPD;

(5) In the Scotland Newsletter: new guidance on supported decision-making (of relevance also in England and Wales) and problems with MHOs.

We have also updated our guidance note on judicial deprivation of liberty and are very pleased to announce a new guidance note (written by Peter Mant) on mental capacity and ordinary residence.

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.

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Mental Welfare Commission for Scotland: Supported Decision Making: Good Practice Guide

The Mental Welfare Commission published supported decision-making guidance this month. This guidance, which is very much influenced by Article 12 CRPD and developing Article 8 ECHR jurisprudence, points out that the principles underpinning the Adults with Incapacity (Scotland) Act 2000, Mental Health (Care and Treatment) (Scotland) Act 2003 and Adult Support and Protection (Scotland) Act 2007 all seek to ensure respect for the exercise of a person's capacity and autonomy even where they have some impairment or disability. It identifies the types of support available, in the legislation and elsewhere, to ensure that when persons do have decision-making difficulties any decisions made by or about them genuinely reflect their choices.

Jill Stavert

[Editorial Note from Alex: Jill is too modest to note that she is the author of this guidance, which is both excellent and in its principles applicable far outside Scotland].

Lord Neuberger on the role of a constitutional court

This item should be read in conjunction with my report in the Capacity outside the Court of Protection section of this Newsletter on a decision of the German Federal Constitutional Court dated 26th July 2016 (and published on 25th August 2016), which is as fully relevant to readers in Scotland as to those in any other jurisdiction.

On 14th October 2016 Lord Neuberger, President of the Supreme Court of the United Kingdom, delivered the second biennial Lord Rodger Memorial Lecture to a packed and enthralled audience of members and guests of the Royal Faculty of Procurators in Glasgow. The first such lecture was given by Baroness Hale and is available here. Lord Neuberger's title was "The constitutional role of the Supreme Court in the context of devolution in the UK". The full text of his address is available here. This is not a report of that event. However, consideration of Lord Neuberger's exposition, in the context of the insight into the role of a constitutional court provided by the German decision of 26th July 2016, has potential significance for practice and pleading in the mental capacity and adult incapacity jurisdictions of the United Kingdom. Lord Neuberger described not only the developing role of the Supreme Court as a quasi-constitutional court (my term, not his), but also the extent to which any court might find itself applying the principles which the Supreme Court is developing, as described by Lord Neuberger.

Before I heard him, a draft of this report on the German decision made the obvious comment that the role played by the German Constitutional Court in its decision of 26th July 2016 was, in the case of the United Kingdom, "somewhat echoed – perhaps faintly" in the role of the courts in determining whether the legislation of a devolved legislature is within its competence (in the case of the Scottish Parliament, *inter alia* by reference to the provision that legislation is *ultra vires* if not compliant with ECHR).

This was, however, but one of the areas identified by Lord Neuberger where the UK Supreme Court is developing a role akin to that of a constitutional court. He described a modification to the application of the concept of the absolute supremacy of Parliament. Formerly, any statute

would be considered as repealed, even if not explicitly so, by a subsequent inconsistent Act of Parliament. Increasingly, the Supreme Court has recognised that some statutes have special constitutional status so that it will be more difficult to displace them. The Scotland Act is one such. Applying the principle of legality, provisions of such statutes – and rights conferred by them – may be so fundamental as not to be alterable by subsequent inconsistent legislation, unless the intention of Parliament to alter them is, in the words of Baroness Hale[1], "crystal clear".

One can compare this "two-tier" view with the treatment in the German decision of legislation incompatible with the GG. One could suggest that the principle of legality might cause the Supreme Court to echo the German Constitutional Court in declaring that an existing statute ought to be extended to fill a lacuna, pending corrective legislation.

Lord Neuberger suggested that the duty of the courts to prevent violation of the rule of law might result in outcomes unimaginable more than two decades ago. One might suggest that this could occur in relation to apparent incompatibility of UK or devolved legislation with fundamental rights enshrined not only in ECHR, but in instruments such as the CRPD. Similar issues could arise in relation to a determination as to whether legislation designed to secure compliance with such an international instrument might be within the competence of a devolved legislature. Among many examples could be a scenario considered at a seminar at Edinburgh Napier University also on 14th October 2016[2], namely legislation by the Scottish Parliament to remedy the lack of the safeguards required by Article 12(4) of the CRPD (as well as apparent violation of ECHR) in the current provisions for receipt and administration of state benefits by DWP appointees, which provisions are currently embedded in legislation in the reserved area of social security provision.

The potential impact of the developing principles described by Lord Neuberger, especially in relation to the rights and status of people with intellectual disabilities, is considerable. This could lead us more frequently into application, or at least consideration, of jurisprudence developed by constitutional courts formally established as such, as exemplified by the decision of the First Senate of the German Federal Constitutional Court in its decision of 26th July 2016.

Adrian D Ward

MHO shortages and delayed reports – again!

Over the last five years the number of applications under Part 6 of the Adults with Incapacity (Scotland) Act requiring reports from MHOs has more than doubled, legislative change has placed extra responsibilities upon MHOs, but the number of MHOs in post has not increased, and if anything has dwindled. We have already reported various aspects and consequences of this issue over the past couple of years. A further issue has emerged in relation to the renewal provisions contained in section 60 of the 2000 Act, as amended by the Adult Support and

[1] *Jackson v Her Majesty's Attorney General* [2005] UKHL 56, [2006] 1 AC 262, para 159,

[2] On Graded Guardianship in Incapacity Law, the first in a major series of three law reform seminars arranged and presented by the Mental Welfare Commission and the Centre for Mental Health and Incapacity Law, Rights and Policy at Edinburgh Napier University.

Protection (Scotland) Act 2007. Section 60(1) of the 2000 Act provides that a renewal application may be made at any time before expiry of a guardianship order "and where such an application is so made, the order shall continue to have effect until the application is determined". Where the renewal application relates to the adult's personal welfare, a report in prescribed form from an MHO must be lodged in court with the renewal application (in cases of inability to communicate only, the report is from the social work officer). Section 60 lacks an equivalent of the requirement for new applications under section 57(4) for MHO reports to be prepared within 21 days of notice of intention to apply – though much of our previous reporting has concerned the inability of local authorities to comply with that time limit, a situation likely to continue or even worsen until Scottish Government provides adequate resources to enable sufficient numbers of MHOs to be recruited, trained and retained.

In the case of renewal procedure under section 60, if for any reason the renewal application is not lodged in court before expiry of the existing order, the existing order will lapse, an adult whose needs require guardianship will lose the guardianship, and the extra trouble and expense of a fresh application will arise. What, accordingly, should practitioners do if the expiry date is drawing close, an MHO report has been requested, but there is no sign of it appearing timeously?

The whole adults with incapacity jurisdiction remains bedevilled by inconsistencies from one sheriffdom to another. Practice in Glasgow Sheriff Court, supported by a Practice Update of June 2016, offers a solution. The Practice Note provides that: "If a renewal application requires to be returned for correction the original lodging date will be retained, provided the corrected application is resubmitted within 14 days of receipt by the agents". We have previously reported cases where first applications have been submitted without the required MHO report, and with a crave seeking production of the report. We would suggest that good practice across the country would be for renewal applications to be received where they are submitted without an MHO report and it can be shown that such a report had been requested in good time but not yet received. Provided that the court is willing to hold the application in court unrejected until the MHO report materialises, the position would be covered.

Unfortunately, we have learned that in some courts an alternative practice has been adopted, at least sometimes, of backdating the submission date of renewal applications which have in fact been lodged late, only once the necessary MHO report has arrived. That would appear to be an entirely inappropriate solution. It gives rise to grave and obvious issues about the status of both adult and guardian, and of any purported acts of the guardian, once the original order has by operation of statute expired, until any renewal application is in fact lodged in court. The application may never be lodged. How long can potential retrospectivity be extended before that potential is cut off? In the case of guardianships which include financial powers, how can it be said that the protection of caution remains available during such an indeterminate period? The simple answer is that the clear provision of section 60 cannot be avoided in this manner. If a renewal application, albeit lacking the MHO report, is not received and accepted by the court before the expiry date, the guardianship expires and that is irretrievable. Put another way, any discretion by

the court that might permit continuation of the guardianship in the absence of the required MHO report must be exercised before expiry, to have any effect. The terms of statute cannot reasonably be stretched further than that. On the other hand, it is unlikely that a sheriff would be able to do other than permit the guardianship to continue until the missing MHO report is produced and can be lodged, as the sheriff in such matters is bound by the section 1 principles of the 2000 Act and it is unlikely that there would be benefit to the adult in allowing a guardianship to expire when there is nothing to suggest that the adult does not in fact continue to require a guardian, and everything which the applicant is able to do to ensure continuation of the guardianship has been done.

Adrian D Ward

PQ as attorney of Mrs Q against Glasgow City Council [2016] CSOH 137

The decision of Lord Boyd of Duncansby in this case, dated 5th October 2016, is detailed and helpful upon the issues which it addressed. An apparent but unexpressed assumption, however, upon which the decision proceeds means that the case before the court appears to have been addressed with tunnel vision, leaving wider points of interest unexplored.

PQ brought two petitions for judicial review in his capacity as attorney to his 86-year old mother Mrs Q, against Glasgow City Council. As Lord Boyd put it: "At the heart of the dispute is whether the respondent is required to pay for 24 hour one-to-one care at home or whether Mrs Q's needs could be provided for in a nursing home."

Mrs Q had been admitted to a nursing home on 28th April 2010. She was then admitted to hospital on 17th May 2010, where in consequence of vascular problems she underwent a below-knee amputation. She returned to the nursing home on 24th June 2010. Her family were dissatisfied with the care there. She returned to her own home, ostensibly for a short break, on 25th July 2010, but did not return to the nursing home. On 11th August 2010 the director of the nursing home gave notice of termination of the contract for her placement there. Ever since, the family have arranged and provided for her a high quality of care in her home.

Glasgow City Council were the responsible social work authority. In essence, their position remained the same as in an assessment dated 19th March 2010, before Mrs Q went into the nursing home, to the effect that she: "now requires 24 hour care to reduce the risk of falling and ensure that she receives an appropriate level of care. She is currently supported overnight by care purchased privately. This cannot be sustained indefinitely due to financial implications and placement in nursing care is required urgently."

PQ disputed this. In his submission, she could only be safely cared for in her own home, under the arrangements which the family had put in place. She had no understanding of the amputation and its consequences, so that whenever she tried to stand, she was liable to fall over. She had fallen eight times during her short stay in the nursing home. The decision narrates much evidence brought by both parties in support of their respective views. *PQ* had applied for direct payments on behalf of his mother. These were made with effect from September

2010. The proceedings focused upon a support needs assessment on 5th May 2015, setting direct payments at a level (subject to deduction of client contribution) equating to the cost of caring for Mrs Q in a nursing home.

There had been two petitions, and several conclusions in the second petition. Relevant to the final decision were the first and last conclusions of the second petition. The first sought declarator that the Council, in respect of a support needs assessment of 5th May 2015, had failed to perform its statutory duty towards Mrs Q under section 12A of the Social Work (Scotland) Act 1968. The last sought declarator that the Council had failed to perform its statutory duty towards Mrs Q under sections 4 and 5 of the Social Care (Self-Directed Support) (Scotland) Act 2013. Lord Boyd refused to pronounce either declarator. As ever in such cases, he restated the position of the court in such matters. He did so helpfully in the following terms: "[16] It is worth at the outset recalling a number of fundamental principles which guide the court in the judicial review of such decisions. First it is not for the court to take a decision which Parliament has empowered to a local authority. It is only if the local authority has acted outwith its powers, failed to take into account a relevant matter, omitted to take into account a relevant matter or the decision was *Wednesbury* unreasonable that the court can intervene. Even if there has been an error in law it will be for the local authority to remake the decision, possibly under the guidance of the court, not for the court to remake it."

In a passage which will no doubt be welcomed by those in local authorities trying to meet their responsibilities in a time of economic stringency, he recognised that: "local authorities have finite resources and the court has to recognise that it is for the local authority to determine where resources should be spent and in what manner." On the distinction between the position of a local authority exercising a power, and that of an authority performing a duty, he quoted with approval Lord Nicholls of Birkenhead in *R(G) v Barnet LBC*, 2004, 2 AC 208: "As a general proposition the more specific and precise the duty the more readily the statute may be interpreted as imposing an obligation of an absolute character. Conversely, the broader and more general the terms of the duty, the more readily the statute may be construed as affording scope for a local authority to take into account matters such as cost when deciding how best to perform the duty in its own area." (para 13).

At some length, Lord Boyd emphasised that assessments and care plan reviews prepared by social workers should not be addressed as if they had been prepared with legal precision, and criticised on that basis: "They are not drafted by lawyers, nor should they be. They should be construed in a practical way against the factual background in which they are written with the aim of seeking to discover the substance of their true meaning." (Lord Dyson JSC in *R (Macdonald) v Kensington and Chelsea Royal London Borough Council* [2011] UKSC 33, at paragraph 53). Later in his decision, Lord Boyd reinforced that point: "Lawyers are used to dealing with opinions from experts as evidence to be set alongside factual evidence. But this assessment was not written by a lawyer but by a social worker and as Lord Dyson said has to be construed in a practical way against the background in which they are written."

The second conclusion was based on averments that the Council had taken no steps to ascertain the cost of Mrs Q's assessed need of 24-hour

care in a nursing home, including the needs arising from her risk of falling. Lord Boyd noted that in the 2013 Act "relevant payment" is defined as "the amount the local authority considers is a reasonable estimate of the cost of securing the provision of support for the supported person". He took the view that such reasonable estimate "does not have to be a sum calculated to a degree of mathematical certainty". He accepted that the Council pays for a substantial number of its citizens in care, and would have a close and ongoing relationship with care providers. The Council would be expected to have an intimate knowledge of the cost of residential care in Glasgow. He was satisfied that there was no error of law in the way in which the Council had discharged its statutory duty under the 2013 Act.

Lord Boyd did narrate the provisions of section 12A of the 1968 Act, including the requirement upon the Council to take account "in so far as it is reasonable and practicable to do so, both of the views of the person whose needs are being assessed and of the views of the carer (provided that, in either case, there is a wish, or as the case may be a capacity, to express a view". Information about Mrs Q's own views, beyond the assertions of her attorney on her behalf, are sparse. It is narrated that she was recorded as not wishing to move from her home. As regards her capabilities, it was noted that the assessor and an occupational therapist had "noted that Mrs Q was able to read and do cross words and considered that she might well be able to understand them. They had suggested a cognitive assessment but this was rejected by the family on the basis that her cognitive ability had deteriorated since the last assessment and there was nothing to be gained from a further assessment".

It is in relation to the ascertainment of Mrs Q's views, and her own rights in the matter, that, except as quoted above, this decision is silent. That seems to be predicated upon the assumption that the care arrangements put in place by her family would continue, and that the sole issue in the case was the extent to which Glasgow City Council should contribute towards the cost. The decision, and presumably the submissions before the court, were silent on the issue of whether Mrs Q should in fact be removed from her own home against her wishes and placed in residential care. One might have expected to see an argument that as in the circumstances she could not be forcibly so removed, and as her family including her son as direct descendant did not in Scots law (in contrast to some other jurisdictions, such as Japan) have any obligation to maintain an ascendant, assessment should be on the basis that such family support could not be enforced and could be withdrawn at any time. It is difficult to conclude that Mrs Q's position under both the European Convention on Human Rights and the UN Convention on the Rights of Persons with Disabilities (neither mentioned in the decision) was irrelevant. Without addressing those aspects in any great detail, one would refer to the right to respect for private and family life under Article 8 of ECHR, which explicitly extends to one's home and which may be interfered with only in the limited circumstances in Article 8.2. Likewise, among several potentially relevant provisions of UN CRPD, ratified in respect of the whole United Kingdom without reservation, is the right of persons with disabilities to choose their place of residence, that they are not obliged to live in a particular living arrangement, and that they have a right to access to in-home residential and other community support services, including personal

assistance, to support living and inclusion in the community.

Adrian D Ward

New book: Mental Health, Incapacity and the Law in Scotland

Congratulations to Jill: the second edition of her work (edited by Hilary Patrick) on Mental Health, Incapacity and the Law in Scotland is now out, with full details available here.

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Conferences at which editors/contributors are speaking

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.

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 mid-December. 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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