



Welcome to the April 2018 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Government responds to the Law Commission's *Mental Capacity and Deprivation of Liberty* report, the Joint Committee on Human Rights rolls up its sleeves, and exploring the outer limits of best interests;

(2) In the Property and Affairs Report: a guest article by Denzil Lush on statutory wills and substituted judgment and the *Dunhill v Burgin* saga concludes;

(2) In the Practice and Procedure Report: an unfortunate judicial wrong turn on 'foreign' powers of attorney, the new Equal Treatment Bench book, and robust case management gone too far;

(3) In the Wider Context Report: appointeeship under the spotlight again, a CRPD update and the Indian Supreme Court considers life-sustaining treatment;

(4) In the Scotland Report: the Mental Welfare Commission examines advocacy, a new Practice Note from the Edinburgh Sheriff Court and a Scottish perspective on the judicial wrong turn on 'foreign' powers;

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#), and our one-pagers of key cases on the SCIE [website](#).

Editors

Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
Simon Edwards (P&A)

Scottish Contributors

Adrian Ward
Jill Stavert

The picture at the top, "Colourful," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

Contents

Mental Welfare Commission for Scotland Report: The Right to Advocacy - A Review of Advocacy Planning across Scotland.....	2
Edinburgh Sheriff Court – Applications under the Adults with Incapacity (Scotland) Act 2000	4
Powers of attorney – more cross-border trouble!.....	6

Mental Welfare Commission for Scotland Report: The Right to Advocacy - A Review of Advocacy Planning across Scotland

In March the Mental Welfare Commission for Scotland published a [report](#) on the provision and planning of advocacy services across Scotland.

Advocacy is an important form of support for persons with cognitive, intellectual or psychosocial disabilities in terms of ensuring full and non-discriminatory respect for rights including facilitating participation in decisions and enabling autonomy, not least the exercise of legal capacity. This importance and the need to make adequate provision for good quality service was recognised by both the Millan Review¹ (which led to the enactment of the Mental Health (Care and Treatment) (Scotland) Act 2003 (the 2003 Act)) and the later McManus Review on aspects of the 2003 Act.² Indeed, the Millan recommendations were reflected in section 259 of the 2003 Act which gives a right to anyone with mental disorder, whether or not they are subject to compulsion under the Act, to independent advocacy and a corresponding duty on health boards and local authorities to provide

this. This right was further reinforced by the insertion by the Mental Health (Scotland) Act 2015 of section 259A in the 2003 Act which places an additional duty on local authorities and health boards to inform the Mental Welfare Commission about how they have ensured access to advocacy services as well as how they plan provision for these in the future.

Whilst there is no specific right to independent advocacy in the Adults with Incapacity (Scotland) Act 2000 (AWIA) section 3(5A) does provide that sheriffs must take account of the wishes and feelings of the adult insofar as they are expressed by a person providing independent advocacy services. Section 6 of the Adult Support and Protection (Scotland) Act 2007 also requires that where a council decides to intervene in order to protect an adult at risk from harm then it must have regard to the importance of the provision of appropriate services which includes, in particular, independent advocacy.

Even outside of such legislative requirement to provide, or recognition of, advocacy the role that advocacy can play in terms of supporting the

¹ Scottish Government, *New Directions: Report on the review of the Mental Health (Scotland) Act 1984* (January 2001), pp xv and xvi, paras 1.13, 8.20, 11.90 and 12.19, Chapter 14 and Recommendations 14.1-14.7.

² Scottish Government, *Limited Review of the Mental Health (Carer and Treatment) (Scotland) Act 2003; Report* (March 2009) Chapter 3 and Recommendations 3.1-3.6

exercise of an individual's rights, not least those persons with cognitive, intellectual and psychosocial disabilities, is indisputable.

The significance of advocacy is also on the radar of the Committee on the Rights of Persons with Disabilities which it notes in its General Comment No 1 interpreting the right to equal recognition before the law identified in Article 12 Convention on the Rights of Persons with Disabilities (CRPD) as being an integral support for the exercise of legal capacity.³ Further, the European Court of Human Rights, in its Articles 5 and 8 ECHR jurisprudence,⁴ has increasingly expansively interpreted autonomy, including the exercise of legal capacity, and the requirement for meaningful effect to be given to European Convention on Human Rights (ECHR) rights for persons with mental disorder. This arguably infers the importance of support which would logically include advocacy.

The Scottish Independent Advocacy Alliance (SIAA) 2015-2016 *Map of Advocacy across Scotland*⁵ noted a steady increase in people accessing advocacy since 2011/12 to 30,500 in 2015/2016.⁶ However, at the same time, a continued overall trend in reducing resourcing (statutory and otherwise) for advocacy was identified⁷ with consequent gaps in provision in

relation to, amongst others, children and young persons, dementia, learning disabilities, autism, mentally ill persons in prison and collective advocacy⁸ and prioritisation of referrals (often in favour of those facing compulsory measures).⁹ This is clearly of concern and, of course, the numbers given for those accessing advocacy does not necessarily reflect all persons who actually require advocacy.

The Mental Welfare Commission report essentially reinforces this picture of planning and provision of advocacy services across Scotland. Like the SIAA map, it highlights significant gaps in service provision for children and young people, with services for adults facing compulsion often being prioritised. Strategies for monitoring and reviewing services are also found to be variable together with there being a lack of clarity about which organisation, be it health boards or the new health and social care partnerships, is actually responsible for co-ordinating the preparation of strategic advocacy plans and the involvement of advocacy providers and people using advocacy services in planning.

Alongside statutory provisions relating to advocacy ECHR rights have direct legal purchase in Scotland.¹⁰ The CRPD does not have

³ Committee on the Rights of Persons with Disabilities, *General Comment No.1 (2014): Article 12 – equal recognition before the law*, CRPD/C/GC/1, paras 17 and 29. The fact that the 2003 Act and AWIA associate the existence of mental disorder and/or mental incapacity with the provision of advocacy may mean that such legislative provision does not entirely meet the Committee's requirements.

⁴ For example, *Shtukurov v Russia* (2008) (Application No. 44009/05) ECHR 223; paras 87-89, *Sykora v Czech Republic* (23419/07/07) (2012) ECHR 1960, paras 101-103; *X v Finland* (34806/040) (2012) ECHR 1371, para

220; *A-MV v Finland* (Application no. 53251/13, decision of 23 March 2017).

⁵ Scottish Independent Advocacy Alliance *Map of Advocacy across Scotland 2015/2016*

⁶ *Map of Advocacy across Scotland 2015/2016* edition, p9

⁷ *Ibid*, pp2-8 and 15.

⁸ *Ibid*, pp11-12.

⁹ *Ibid*, p15.

¹⁰ ss 29(2) and 57(2) Scotland Act 1998; ss 2, 3 and 6 Human Rights Act 1998.

the same legal weight but is nevertheless influential¹¹ and the Scottish Government specifically refers to advocacy in its CRPD delivery plan.¹² Moreover, support for the exercise of legal capacity is also included in the Scottish Government's most recent AWIA reform consultation.¹³ If Scotland is to deliver under all these heads then clearly serious and urgent action needs to be taken regarding the adequacy of provision of advocacy.

Jill Stavert

Edinburgh Sheriff Court – Applications under the Adults with Incapacity (Scotland) Act 2000

The Sheriff Principal has issued a Practice Note (No.1 of 2018) in relation to applications under the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act"). It applies to all applications lodged at Edinburgh Sheriff Court on or after 9 April 2018.

The Practice Note does not alter the practice for most applications; its main focus is to update practice in light of *Aberdeenshire Council v JM* [2017] CSIH 65 when there is a counter-claim for appointment as guardian.

Paragraphs 2 and 3(v) of the Practice Note deal with the *Aberdeenshire Council* case. The wording of what is now paragraph 3(o) has been amended to emphasise the need to lodge material to enable the sheriff to be satisfied about the suitability of a person for appointment

and paragraph 3(w) deals with applications for variation under sections 74(4) and 57.

There have otherwise also been some alterations and/or additions to the wording of what are now paragraphs 1, 3(a), 3(b), 3(c), 3(d), 3(k), 3(l), 3(m), 3(p), 3(q), 3(r), 3(s), 3(t), 3(z) and 4(g) of the Practice Note as compared with the previous Practice Note, No 1 of 2016.

Copies of the Practice Note are available on the Scottish Courts [website](#) at and from the [webpage](#) for the Guardianship Court at Edinburgh Sheriff Court at edinburghawi@scotcourts.gov.uk

Commentary

We are grateful to Edinburgh Sheriff Court for preparing the above notice, specifically for inclusion in this Report. This latest Practice Note is of course essential reading for practitioners in that court. We commend it to practitioners everywhere as a helpful checklist of the minimum requirements for applications, minutes and appeals within the scope of paragraphs 1 and 2 of the Practice Note. It is helpful that the precise scope of the Practice Note is defined. As we have observed, some Practice Notes purport to apply to all applications under the Adults with Incapacity (Scotland) Act 2000, but have content

¹¹ Noting the UK's obligations, as a CRPD state party, under international to give effect to its rights and the fact that proposed devolved legislation and Ministerial actions in Scotland can be prevented for non-compliance (ss 35(1)(a) and 58(1) Scotland Act 1998).

¹² Scottish Government, *A Fairer Scotland for Disabled People: Our Delivery Plan to 2021 for the United Nations*

Convention on the Rights of Persons with Disabilities (December 2016) although its *Mental Health Strategy 2017-2027* does not specifically mention advocacy.

¹³ Scottish Government, *Adults with Incapacity (Scotland) Act 2000: Proposals for reform* (January 2018).

apparently directed exclusively to proceedings under Part 6 of that Act. Broadly, the latter is the scope defined in paragraphs 1 and 2 of this latest Edinburgh Practice Note.

As is highlighted above, the Note takes account of the helpful guidance given by the Inner House in *Aberdeenshire Council v JM*, on which we reported in our [November 2017](#) Report. The Note helpfully avoids undefined, and apparently irrelevant, references such as to “next of kin” that have appeared in equivalent Notes in other sheriffdoms, and is specific about matters such as specification of nearest relative, primary carer, and so forth. Of course, such points ought to have been standard practice ever since Part 6 of the Act, the relevant court rules and amendments to both, came into force. It is helpful to have a checklist of such points, though perhaps unfortunate that it should still be necessary. Subject to subsequent changes and developments in practice, the basic requirements all appear in the styles which I offered in Appendix 6 to *Adult Incapacity*, published a year after Part 6 of the Act came into force. If this latest Note should however be approached with the eye of a reviewer, then one might query whether the requirement in paragraph 3(c) of the Note for a statement of the circumstances in which the appointment of a substitute guardian would be triggered is either necessary, or indeed competent, given that the circumstances are defined in section 63(1) of the Act; and whether the requirements of paragraph 3(p) for a letter from each proposed guardian might not usefully also include a requirement for an explicit statement of that person’s willingness to be appointed and to act, coupled with statements about the extent to which that person has been informed about the role,

requirements and responsibilities of a guardian, and a statement of the source of such information.

I describe the contents of the Note as minimum necessary requirements because they do not, for example, extend to information necessary to demonstrate compliance with the UN Convention on the Rights of Persons with Disabilities, even as far as the limited proposals contained in the current Scottish Government consultation document, on which we reported in our [March 2018](#) report. The consultation document suggests just one new principle, in the following terms: “*There shall be no intervention in the affairs of an adult unless it can be demonstrated that all practical help and support to help the adult make a decision about the matter requiring intervention has been given without success.*” It would now be good practice to demonstrate, and of assistance to the court in discharging the court’s responsibilities, at least that much in applications under Part 6 of the Act.

It is helpful that the Note draws attention to the need to separate clearly matters of powers relating to property and financial affairs, on the one hand, and those relating to personal welfare, on the other, coupled with drawing attention specifically to section 74(4) of the Act, under which an application for variation to introduce personal welfare powers where previously only powers in relation to property and finances are held, or vice versa, in effect seek creation of a new guardianship.

Adrian D Ward

Powers of attorney – more cross-border trouble!

It is sadly necessary to draw the attention of Scottish readers to the English case of *Re JMK* [2018] EWCOP 5, and the report of it by Alex in the Practice and Procedure section of this Report under the mild heading “Foreign powers of attorney – an unfortunate judicial wrong turn”. With a degree of generosity, Alex commences by pointing out that both parties in this case were litigants in person. The first wider lesson from the case is that, even before specialist judges, the penalties for lack of expert representation in adult incapacity cases can be high. The time and trouble at public expense that can result from “unfortunate” outcomes, including the results of inexpertly prepared powers of attorney or court applications, will often far outstrip any savings to the public purse resulting from inappropriate restrictions on availability of Legal Aid; quite apart from the human cost in terms of human rights violations.

As is narrated in the item cross-referred to, the *JMK* case appears to have concerned a Canadian power of attorney by a granter habitually resident at time of granting in Canada, but relevant considerations could be equally applicable to a Scottish power of attorney by a granter habitually resident in Scotland. The judge in *JMK* was asked the wrong question, did not identify what should have been the right question, and in consequence gave the wrong answer. One difference with Scotland is that the Canadian power of attorney (specifically, a power of attorney granted in Ontario) could not have been a “protective measure”, even under the revised paragraph 146 of the Explanatory

Memorandum to the 2000 Hague Convention on the International Protection of Adults (“Hague 35”), because under the procedure in Ontario it was not approved or registered by a court or other authority. It always was arguable, and that argument is strengthened by the crucial amendments to paragraph 146, that a power of attorney registered, as for example in Scotland by a public authority, is a protective measure under Hague 35, thus attracting automatic recognition and enforceability.

In case of doubt or dispute in England and Wales, a “foreign” power of attorney can now be the subject of an application under Rule 23.6 of the Court of Protection Rules.

The converse position in Scotland is that English powers of attorney have the same status here as do Scottish powers of attorney, on the authority of *C, Applicant*, Airdrie Sheriff Court, 2nd April 2013. While that case remains unreported, it may now be cited by reference to my description of it in a case commentary at 2018 SLT (News) 26. That commentary was principally upon the case of *Darlington Borough Council, Applicants*, described in January 2018 Report, and now reported at 2018 SLT (Sh Ct) 53.

Please see the article by Alex cross-referred to for a full description of relevant features of the *JMK* case, and a link to it.

Adrian D Ward

Editors and Contributors



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 Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. 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 has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. She sits on the London Committee of the Court of Protection Practitioners Association. To view full CV click [here](#).



Nicola Kohn: nicola.kohn@39essex.com

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 4th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2015). To view full CV click [here](#).

Editors and Contributors



Katie Scott: katie.scott@39essex.com

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, and is chair of the London Group of the Court of Protection Practitioners Association. 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 recognised national and international expert in adult incapacity law. While still practising he acted in or instructed many leading cases in the field. 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; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.



Jill Stavert: j.stavert@napier.ac.uk

Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law 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](#).

Conferences

Conferences at which editors/contributors are speaking

Law Society of Scotland: Guardianship, intervention and voluntary measures conference

Adrian and Alex are both speaking at this conference in Edinburgh on 26 April. For details, and to book, see [here](#).

Medical treatment and the Courts

Tor is speaking, with Vikram Sachdeva QC and Sir William Charles, at two conferences organised by Browne Jacobson in [London](#) on 9 May and [Manchester](#) on 24 May.

Other conferences of interest

Towards Liberty Protection Safeguards: Implications of the 2017 Law Commission Report

This conference being held on 20 April in London will look at where the law is and where it might go in relation to deprivation of liberty. For more details, and book, see [here](#), quoting HCUK250dols for a discounted rate.

UK Mental Disability Law Conference

The Second UK Mental Disability Law Conference takes place on 26 and 27 June 2018, hosted jointly by the School of Law at the University of Nottingham and the Institute of Mental Health, with the endorsement of the Human Rights Law Centre at the University of Nottingham. For more details and to submit papers 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 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 report will be out in early May. 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.

Michael Kaplan
Senior Clerk
michael.kaplan@39essex.com

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

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



International
Arbitration Chambers
of the Year 2014
Legal 500



Environment &
Planning
Chambers
of the Year 2015

clerks@39essex.com • **DX: London/Chancery Lane 298** • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

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

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.

39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.