



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

(1) In the Health, Welfare and Deprivation of Liberty Report: *Re Y* update, a further round in the *Re X* saga, a briefing note on PJ/MM, the Chief Coroner's annual report and Manuela Sykes' obituary;

(2) In the Property and Affairs Report: case-law and OPG guidance on gifts, and whether its effect on a will is information relevant to the test of whether a person has capacity to marry;

(2) In the Practice and Procedure Report: fluctuating capacity in the face of the court, Court of Protection statistics and a useful case for human rights claims arising out of the misuse of the MCA;

(3) In the Wider Context Report: interim guidance on CANH withdrawal, the NICE consultation on decision-making and capacity, an important study on everyday decision-making under the MCA and a book corner with recent books of interest;

(4) In the Scotland Report: Court of Protection orders before the Scottish courts and an update on the Scottish Government consultation on adults with incapacity;

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](#).

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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

<i>Application by Darlington Borough Council in respect of the adult: AB: Note by Sheriff A M Mackie, Glasgow Sheriff Court, 19th January 2018</i>	2
Adults with Incapacity: Scottish Government Consultation.....	4

Application by Darlington Borough Council in respect of the adult: AB: Note by Sheriff A M Mackie, Glasgow Sheriff Court, 19th January 2018

It is commonplace for adults with cognitive impairments to be transferred across borders within the UK, often for reasons or combinations of reasons including availability of specialist treatment or specialist residential facilities; return following such placements, which may have been of long duration; following or re-joining family; and so forth. Where such adults are incapable of making valid decisions about such moves, one would expect – given their frequency – that procedures would be clear and that, in absence of significant dispute, they would operate smoothly. In practice, various unhelpful difficulties have arisen. This important decision by Sheriff Andrew Mackie, issued on 19th January 2018, has authoritatively resolved one of those difficulties. It also helpfully explains the relevant procedural steps and issues to be considered where such an adult is transferred to Scotland. Indeed, it is a decision which may usefully be referred to by any Scottish practitioners consulted or instructed regarding such a transfer.

AB resided in a care home in Darlington (referred to in the decision as “the English Care Home”). During 2017 the Court of Protection decided that

it would be in her best interests to move to a care home within the sheriffdom of Glasgow & Strathkelvin (“the Scottish Care Home”) for a trial period, in accordance with arrangements made by Darlington Borough Council (“Darlington”). The Court of Protection held that *AB* was lawfully deprived of her liberty in the English Care Home; that she might be deprived of her liberty in consequence of the restrictions set out in Darlington’s transition plan, but that those restrictions were necessary, proportionate and in her best interests, and lawful; as would be the arrangements to transfer her back to the English Care Home if the trial placement in the Scottish Care Home were to be unsuccessful. *AB* would be deprived of her liberty during the trial placement pursuant to the arrangements set out in Darlington’s Care and Support Needs Plan, which however were also necessary, proportionate and in her best interests, and lawful. The Court of Protection also ordered, under section 16(2)(A) of the Mental Capacity Act 2005, that *AB* should travel to the Scottish Care Home, and reside and receive care there, for a trial period of approximately six weeks pursuant to Darlington’s arrangements; that Darlington might extend the trial period if it considered that there were good reasons to do so; and that *AB* should return to the English Care Home pursuant to Darlington’s arrangements if it were to be agreed that the placement was

unsuccessful (such return not requiring a further order of that court).

The order of the Court of Protection was made on 27th April 2017, and AB was moved to the Scottish Care Home on 22nd May 2017. Darlington then applied to Glasgow Sheriff Court for (a) an order for recognition of the Court of Protection order of 27th April 2017 and (b) a direction to the Office of the Public Guardian in Scotland to register the Court of Protection order in the Register of International Measures maintained by the Public Guardian. The relevant provisions of the Adults with Incapacity (Scotland) Act 2000 are set out respectively in paragraph 7(1) and paragraph 8(1) of Schedule 3 to that 2000 Act. The procedure is described in an Appendix at paragraph 12.106 of "The International Protection of Adults" (Frimston et al, Oxford University Press, 2015) contributed by Alison Hempsey of TC Young LLP, Solicitors, who acted for Darlington in Darlington's application.

For all of the statutory provisions quoted and considered by Sheriff Mackie, see his Note. This report concentrates on one element which has caused considerable difficulties in such situations in the past, and which had been raised as a potential difficulty in relation to AB's transfer to Scotland. Paragraph 7(3) of Schedule 3 to the 2000 Act lists circumstances in which recognition of "[a]ny measure taken under the law of a country other than Scotland for the personal welfare or the protection of property of an adult with incapacity" may be refused. If, as in the present case, the measure would have the effect of placing the adult in an establishment in Scotland, under paragraph 7(3)(e) recognition may be refused if "(i) the Scottish Central Authority

has not previously been provided with a report on the adult and a statement of the reasons for the proposed placement and has not been consulted on the proposed placement; or (ii) where the Authority has been provided with such a report and statement and so consulted, it has, within a reasonable time thereafter, declared that it disapproves of the proposed placement". Darlington had faxed and sent the required report and statement of reasons to the Scottish Central Authority on 18th January 2017. The Authority did not declare that it disapproved of the proposed placement, but declined to approve or disapprove it. As in other such cases, it pointed out that Hague 35 (the Hague Convention on the International Protection of Adults) has not been ratified in respect of England, and expressed the view that the relevant provisions of Schedule 3 of the 2000 Act relate only to transfers between countries in respect of which Hague 35 has been ratified.

Sheriff Mackie disagreed. He determined that those provisions did apply to the present case. He pointed out that, in accordance with paragraph 7(1) of Schedule 3, recognition by the law of Scotland is dependent upon two conditions set out in paragraph 7(2). The first is that jurisdiction for the measure taken by the other country was based on the adult's habitual residence there. The second is that the UK and the other country were both parties to Hague 35, and the jurisdiction in the other country was based on one of the grounds provided for in Hague 35. However, and crucially, paragraph 7(1) is explicit that these conditions are alternatives. Paragraph 7(1) provides that the non-Scottish measure "*shall, if one of the conditions specified in sub-paragraph (2) is met, be recognised by the law of Scotland*".

As is narrated in Sheriff Mackie's decision, Darlington explicitly sought warrant to intimate their application to the Authority. That warrant was granted and duly implemented. The Scottish Central Authority thus had the opportunity to enter the process and seek to justify its view, but did not do so. I am bound to comment that I am not aware that anyone has identified any potential reason which might support the Authority's previous view, nor to obtain any such potential justification from the Authority, in the face of what appears to be the entirely clear wording of paragraph 7(1). Indeed, such an interpretation would place an entirely unhelpful – and unnecessary – hurdle in the way of cross-border cases as between England and Scotland. Sheriff Mackie has now authoritatively dealt with the matter, and one trusts that it will not raise its head again.

Adrian D Ward

Adults with Incapacity: Scottish Government Consultation

An augmented Scottish Government team is nearing completion of its current stage of work on review and amendment of the Adults with Incapacity (Scotland) Act 2000 and associated legislation. The review process was initiated following issue by Scottish Law Commission of its report and recommendations limited to addressing the issue of compliance with the deprivation of liberty requirements of Article 5 of the European Convention on Human Rights. The team was responsive to suggestions that a full review of relevant legislation would be appropriate, including (but not limited to) ensuring compliance with the UN Convention on the Rights of Persons with Disabilities.

It is expected that the consultation document will be issued by the end of January, which will permit us to include at least preliminary coverage in the February Report.

Adrian D Ward

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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](#).

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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](#).

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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](#).

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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](#).

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Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 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](#).

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Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes, and is chair of the London Group of the Court of Protection Practitioners Association. To view full CV click [here](#).

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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 non-practising Scottish solicitor 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.

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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

5th UCLH Mental Capacity Conference

Alex is speaking at the 5th University College London Hospital mental capacity conference on 20 February, alongside Sir James Munby P and Baroness Ilora Finlay. For more details, see [here](#).

Edge DoLS Conference

The annual Edge DoLS conference is being held on 16 March in London, Alex being one of the speakers. For more details, and to book, see [here](#).

Other conferences of interest

SALLY seminar

The next seminar in the ESRC-funded seminar series on Safeguarding Adults and Legal Literacy will be held on 16 February at the University of Bedfordshire's Luton campus, the topic being "Safeguarding Adults Boards and Reviews." See [here](#) for more details.

COPPA seminars

The Court of Protection Practitioners Association have a packed programme of seminars coming up, including (in the North West) a seminar on differing perspectives on proceedings on 31 January and (in London) a seminar on financial abuse on 7 February. For more details, and to book, see [here](#).

Finder's Deputy day

The Third Finder's International Deputyship Development Day is taking place on 1 March in York. It is a free event open to all local authorities carrying out deputyship and appointeeship work, and includes a specific focus on hoarding. For more details, 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 late 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 Report in the future please contact: marketing@39essex.com.

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