



Welcome to the March 2017 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the limits of wishes and feelings and a different take on Article 5;

(2) In the Property and Affairs Report: changes to EPA/LPA registration fees;

(3) In the Practice and Procedure Report: a further amendment to the CoP Rules, a major on the participation of P, a guest article on ground rules in cross-examination and HRA damages, costs and the LAA;

(4) In the Wider Context Report: tools to address coercive control, the MCA and immigration detention, and the second issue of the International Journal of Mental Health and Capacity Law;

(5) In the Scotland Newsletter: an important Sheriff Appeal Court decision about care charges and the divestment of assets

And remember, you can 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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### Scottish Contributors

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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

*Argyll & Bute Council v Gordon* Sheriff Appeal Court – [2017] SAC (Civ) 6 ..... 2  
 Clarification: *J, Solicitor* ..... 4

### *Argyll & Bute Council v Gordon – Sheriff Appeal Court [2017] SAC (Civ) 6*

We reported in the [October 2016 Newsletter](#) the significant decision at first instance in this case by Sheriff P J Braid at Edinburgh. Argyll & Bute Council had sought to recover costs of the provision of care to an elderly lady, since deceased, amounting to £42,750 from the defender. It was agreed between the parties that the lady had gratuitously alienated her dwellinghouse to the defender. It was also agreed that if the defender had a liability to the Council, that liability was correctly stated in the sum sued for. However, the defender contended that she was not liable because the Disposition of the dwellinghouse in her favour was not made knowingly and with the intention of avoiding accommodation charges. The Council argued that the defender could not contest liability on the basis of that defence because the Council's determination in the matter could only be challenged by judicial review. Sheriff Braid held that as between the Council and the elderly lady, any such determination was challengeable only by judicial review but that the determination was not binding upon the defender, as transferee. The defender was entitled to defend the action on the basis upon which she sought to do so. Unlike the position of the service user, this was not a matter which the defender could challenge

only by judicial review. Sheriff Braid allowed a proof.

The Council appealed to the Sheriff Appeal Court. In this decision dated 9<sup>th</sup> February 2017, the Sheriff Appeal Court refused the appeal.

The Council submitted that its determination that the service user had disposed the house to deprive herself of an asset was a finding in accordance with section 22 of the National Assistance Act 1948, section 21 of the Act 1983 and Regulation 20 of the National Assistance (Assessment of Resources) Regulations 1992. The Council submitted that if there is any ambiguity in the construction of the words used in the Act, the correct approach is to identify the mischief Parliament sought to address, under reference to Lord Hope in *Robertson v Fife Council* (2001) SC HL 145. If there is ambiguity then following *Pepper v Hart* 1993 AC 93, resort can be had to parliamentary material, such as clear statements by ministers or other promoters of a Bill. It was submitted that the Hansard report of the debate on the Health Services and Social Security Adjudication Bill which became the 1983 Act makes clear the intention was to reduce the administrative burden placed on local authorities for the assessment and collection of charges. The Council argued that the exercise of determining liability for care charges by the service user under the 1948 Act and the 1992 Regulations, and the determination of the liability of a third

party recipient of capital transferred by the service user knowingly and with the intention of avoiding charges, is a single scheme. It was erroneous of the sheriff to have found otherwise.

The Council further argued that the difference between “knowingly and with the intention of avoiding charges for the accommodation” in section 21 of the 1983 Act and “for the purpose of decreasing the amount that he may be liable to pay” in terms of Regulation 25 of the National Assistance (Assessment of Resources) Regulations 1992 is of no material difference; and likewise that there is no meaningful distinction between the terminology of inadequate consideration found in section 21 and deprivation of capital in Regulation 25.

Finally, the Council argued that the sheriff’s decision gave rise to an anomaly in that in terms of *Yule v South Lanarkshire Council (No2)* 2001 SC 203 the service user is prevented from founding upon the service user’s own subjective intention in order to dispute liability, whereas the recipient would be able to rely on evidence of the same subjective intention in order to resist liability.

The respondent submitted that the sheriff was correct in holding that there was a clear distinction between section 21 of the 1983 Act and section 23 of the 1948 Act. In particular, the sheriff was correct to hold that the powers under the 1948 Act and the 1992 Regulations to determine the amount paid for provision of accommodation, and the power to treat a resident as having deprived herself of capital for the purpose of decreasing her liability to pay,

does not empower the local authority to determine a third party should be liable to pay.

The Sheriff Appeal Court stated that it did not find it particularly useful to opine on whether there was a “unitary scheme”. It determined the matter simply on the terms of section 21, which it quoted in full. It held that the terms of the section do not empower the local authority to make the determination which they argued for. For that power to have been given to the local authority there would require to be specific statutory authority. Specific statutory authority does appear in section 22 of the 1948 Act. A decision under that section may accordingly be challenged by judicial review. But the Appeal Court agreed with the sheriff that the charging regime imposed by section 22 of the 1948 Act and the 1995 Regulations only apply in a question between the local authority and the service user. The Appeal Court considered that there was nothing untoward in parliament having determined that the separate question of whether a third party might be liable to pay should be left to the courts to resolve.

While the Appeal Court did not think that there was such ambiguity as would allow consideration to be given to parliamentary material to assist the court in the interpretation of section 21, it nevertheless noted a statement by Mr Kenneth Clark, then the relevant minister, in evidence to the Standing Committee on the Bill that became the 1983 Act (Official Report 19<sup>th</sup> April 1983,<sup>1</sup> page 581). Mr Clark stated: “The litigation would be taking place between the local authority and the beneficiary of the transfer of the asset and the proceedings would be for the

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<sup>1</sup> Note, this date was given in the judgment was 1993, but this must from context be 1983.

recovery of a civil debt. The plaintiff local authority would have to prove its claim and would have to satisfy the civil burden of proof for each element of its claim. When it came to the question of whether the resident had transferred assets "*knowingly and with the intention of avoiding charges*" the local authority would have to lead evidence to satisfy the court of its claim. That would be the general proposition which the court would have to apply to the facts of the case and to the evidence brought before it".

The Appeal Court pointed out that as the clause addressed by Mr Clark, and the section subsequently enacted, apply both in England & Wales and in Scotland, Mr Clark's statement supported the Appeal Court's interpretation "*were such support required*".

This case accordingly now goes back to the sheriff to hear proof.

*Adrian D Ward*

### **Clarification: *J, Solicitor***

I commented last month upon sequels to the original decision by Sheriff Braid at Edinburgh Sheriff Court dated 22<sup>nd</sup> March 2016 refusing to warrant an application by *J, Solicitor* for appointment of guardians to a client of hers under Part 6 of the Adults with Incapacity (Scotland) Act 2000. I commented that the original decision as appearing on the Scottish Courts and Tribunals Service website referred to it having been made "in respect of the child F". I printed it off as soon as it appeared, and referred back to that print when writing last month's Report. I am advised, and am happy to acknowledge and clarify, that the reference to "child" was a typographical error by a typist, which was promptly corrected so that the case

has since appeared online as being "in respect of the adult F". I am assured that the sheriff was fully aware that he was dealing with an adult.

*Adrian D Ward*

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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](#).



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## Conferences

### Conferences at which editors/contributors are speaking

#### Seminar on Childbirth and the Court of Protection

39 Essex Chambers is hosting a seminar in conjunction with the charity Birthrights about caesarean-section cases in the Court of Protection. The seminar aims to take a critical look at these cases, with a distinguished multi-disciplinary panel. The seminar is at 5pm-7pm on 8 March 2017, and places can be reserved by emailing [beth.williams@39essex.com](mailto:beth.williams@39essex.com).

#### Hugh James Brain Injury conference

Alex will be speaking at this conference aimed at healthcare professionals working with individuals with brain injuries and their families on 14 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](#).

### 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.

Our next Newsletter will be out in early April. 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](mailto:marketing@39essex.com).

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