MENTAL CAPACITY REPORT: SCOTLAND

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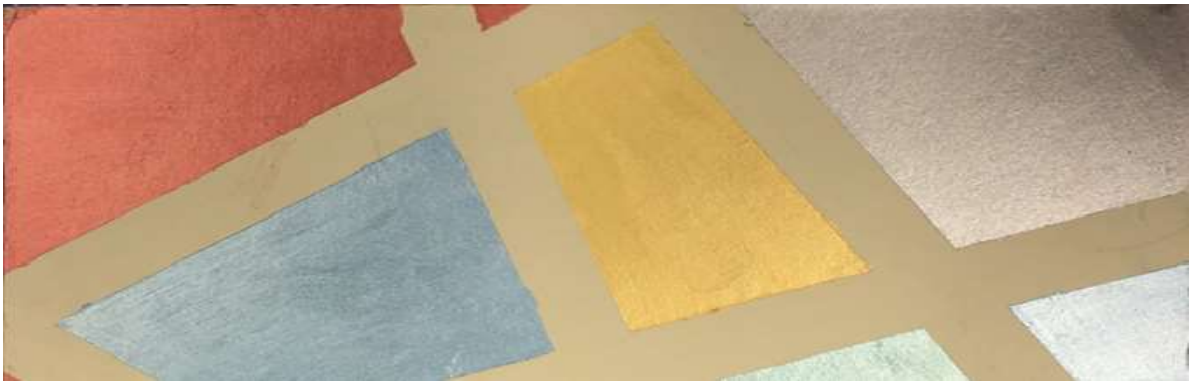

Welcome to the March 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: two cases each on vaccination, how long to keep going with life-sustaining treatment and obstetric arrangements, and important decisions on both family life and sexual relations;

(2) In the Property and Affairs Report: Mostyn J takes on marriage, ademption and foreign law, and updates from the OPG;

(3) In the Practice and Procedure Report: reasonable adjustments for deaf litigants and a new edition of the Equal Treatment Bench book;

(4) In the Wider Context Report: DNACPR guidance from NHS England, NICE safeguarding guidance, reports on law reform proposals of relevance around the world and (an innovation) a film review to accompany book reviews and research corner;

(5) In the Scotland Report: Scottish Parliamentary elections, Child Trust funds and analogies to be drawn from cases involving children.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find updated versions of both our capacity and best interests guides. We have taken a deliberate decision not to cover all the host of COVID-19 related matters that might have a tangential impact upon mental capacity in the Report. Chambers has created a dedicated COVID-19 page with resources, seminars, and more, here; Alex maintains a resources page for MCA and COVID-19 here, and Neil a page here.

If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

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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.

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Scottish Parliament Elections

It is still anticipated that the elections for the 6th session of the Scottish Parliament will take place on 6th May 2021. Normally the Parliament would have been dissolved six weeks before that, on 25th March 2021. However, it is understood that on this occasion the Parliament will go into recess, rather than being dissolved, so that it can be re-convened if required for urgent purposes related to the pandemic.

As is customary, the Law Society of Scotland has issued its priorities for the elections. The overarching principle of the Society's submission is respect for the rule of law. Under "Priority areas for law reform" and addressing "incapacity, mental health and adult support and protection", the Society has written:

> *"The Scottish Parliament established Scotland as a world leader in adult incapacity, mental health, and adult support and protection law and practice with its legislation of 2000, 2003 and 2007. Excellent work is currently being undertaken on reviewing and updating these areas of law in light of human rights and other developments, including emerging needs highlighted by the pandemic such as reform of deprivation of liberty situations. We are in danger of falling behind other jurisdictions in an area in which Scotland has recently led the way.*
>
> *"We urge parties to:*
>
> - *Commit to the delivery and implementation of coordinated and updated legislation across adult incapacity, mental health, and adult support and protection law and practice in the next Session."*

Adrian D Ward

Child Trust Funds

There are tendencies in some quarters to see guardianship as the only available response where an involuntary measure is shown to be required. In fact, it is a last resort. Under section 58(1)(b) of the Adults with Incapacity (Scotland) Act 2000, a sheriff may not grant a guardianship order unless "no other means provided by or under [the 2000 Act] would be sufficient to enable the adult's interests in his property, financial affairs or personal welfare to be safeguarded or promoted". Section 1(3) of the

Act casts the net beyond the scope of the Act to encompass all options: guardianship, as with any other intervention under the Act, must be "the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention".

In the November Report I explained my conclusion that there is a culture of institutional ageism and disability discrimination, revealed by the pandemic. There have however been many other manifestations, including the tendency of legislatures to legislate without regard to the position of people with mental or intellectual disabilities. Thus, unfortunately, provision by the UK Parliament for Child Trust Funds ("CTFs") did not appear to have addressed the question of how the funds could be accessed by young persons with impairments of relevant capabilities. In response to concerns quoted in the media, the UK Ministry of Justice announced that court fees to access the funds would be waived. That however was limited to court fees for applications to the Court of Protection in England & Wales, ignoring the need for similar access in Scotland. Enquiries as to whether the Public Guardian's fee of £91 for an Access to Funds ("ATF") application in Scotland would be waived were met initially with an assertion that ATF was not available because CTFs are not held in current accounts. However, section 26(3) of the 2000 Act applies a specialised definition of "current account" for the purpose of the ATF provisions in Part 3 of that Act. The words "current account" mean any account within the provisions of section 26(1) and 26(2), that is to say, "an account held by a fundholder in the adult's sole name". A "fundholder" is defined in section 33(2) as "a bank, building society or other similar body which holds funds on behalf of another person". Thus ATF would appear to be applicable to all CTFs provided that, where the funds are invested and the account categorised as a "stakeholder or shares-based" account, the fundholder is authorised by the terms of the arrangement establishing the CTF to realise investments, so that they can then be accessed as a fund in terms of ATF provisions.

Scottish Government have now confirmed that "with the combination of the Legal Aid system and the ATF fee waiver" there are no financial barriers to an adult being able to access CTFs.

Adrian D Ward

The meaning of "personally seen" and "personally examined"

Concerns were initially caused in Scotland, particularly to medical practitioners, by the decision in *Devon Partnership NHS Trust v Essex HC* [2021] EWHC 101 (Admin), that the phrases "personally seen" and "personally examined" in the requirements for recommendations by medical practitioners for detention of patients suffering from mental disorders, under the (England & Wales) Mental Health Act 1983, required physical presence and that guidance from NHS England that doctors might lawfully use video assessments during the pandemic was wrong (see the February Report for an account of the case as it applies to England & Wales). The case could only potentially have persuasive effect in Scotland, and even that only if relevant legislation in Scotland employs the same phrases "personally seen" or "personally examined", or perhaps some other use of "personally". In fact, such phrases do not appear in relation to any procedures under either the Adults with Incapacity (Scotland) Act 2000 or

the Mental Health (Care and Treatment) (Scotland) Act 2003.

Beyond the scope of those Acts, concerns have been expressed in relation to "presence" in section 9 of the Requirements of Writing (Scotland) Act 1995. However, the requirement is not "personal presence" or "physical presence", simply "presence", and one would doubt whether two persons interacting by electronic means, seeing each other, and simultaneously applying their minds to the same subject, are not in each other's "presence" (compare, for example, phrases such as "presence of mind"). The Coronavirus (Scotland) (No 2) Act 2020, in Schedule 4, Part 7, does in paragraph 9(1) disapply any requirement "for a relevant person to be physically in the same place as another person when that person" signs or subscribes a document, takes an oath, or makes an affirmation or declaration. It would be interesting to know whether anywhere across the entire range of Scots law there is any requirement to "be physically in the same place" for any such purposes, and whether in such event there is any definition of what is "the same place": the same enclosed space, the same unenclosed space and if so of what maximum dimensions, the same building, the same town, or what?

The Minutes of the Meeting on 10th February 2021 of Scottish Government's Short Life Mental Health Legislation Commencement Consideration Group include a note that does not mention the *Devon* case but clearly refers to it. It concludes that "Scottish legislation is not affected by this ruling".

Adrian D Ward

"16 going on 17" – or going back to childhood?

"You need someone older and wiser, telling you what to do". *L* was 17 years old. In her case, the complications of being a "young person" between her 16th and 18th birthdays were not improved by rather many people in her life seeking to tell her what to do, and in dispute if not as to who was oldest, certainly as to who was wisest. Her case ended up before the First Division of the Inner House of the Court of Session, presided over by the Lord President, and is reported as *L v Principal Reporter* [2021] CSIH 4; 2021 SLT 173. Whether she will benefit – if "benefit" is the right word – from the even more elevated wisdom of the Supreme Court is not yet known.

At age 17 she was of course in matters of private law an adult. That was her status, for example, under the Age of Legal Capacity (Scotland) Act 1991 and the Adults with Incapacity (Scotland) Act 2000; and, more significantly for present purposes she was no longer a child in accordance with the definition in section 199 ("a person who is under 16 years of age") in the Children's Hearings (Scotland) Act 2011. Unfortunately, a question arose as to whether her position was governed by Regulation 9 of the Secure Accommodation (Scotland) Regulations 2013, which deals with the placement in secure accommodation of looked after "children", and whether that Regulation could apply to someone up to age 18. *L* was a "looked after" "child". Social workers had concerns for her welfare. She was placed in secure accommodation and referred to a Children's Hearing, which made an interim compulsory supervision order (ICSO), including an authorisation that she be placed in

secure accommodation. She appealed against the ICSO to the sheriff, who refused her appeal. The sheriff held that the procedure under which she had been placed under the ICSO was lawful. She petitioned for Judicial Review, seeking declarator that she had been unlawfully deprived of her liberty. She sought reduction or suspension of the ICSO on the basis that referral of her to the Children's Hearing, the ICSO, and implementation of the ICSO, were all unlawful because, for the purposes of the relevant legislation, she was not a "child". The Lord Ordinary refused her application. She appealed to the Inner House.

The Opinion of the Inner House was delivered by Lord Malcolm. The court noted that section 75 of the Children (Scotland) Act 1995 enables Scottish Ministers to promulgate regulations making provision for placing in secure accommodation "looked after children" who have not been involved in the Children's Hearing system. A child in terms of section 75 is "a person under the age of 18 years", as defined in section 93(2)(b)(i) of the 1995 Act. The 1995 Act is one of the enabling provisions cited in the preamble to the 2013 Regulations. Also cited, among others, are sections 152 and 153 of the Children's Hearings (Scotland) Act 2011. There is no intrinsic definition of "child" in the 2013 Regulations.

It is well known that under section 199 of the 2011 Act "child" means a person who is under 16 years of age, but the exceptions to that definition include a person who is 16 or over in respect of whom information in terms of section 66 of the 2011 Act had been passed to the Principal Reporter before the person's 16th birthday. *L* did not fall within that exception.

The Inner House determined the matter by reference to Rule of Court 58.3(1), which provides that a Petition for Judicial Review may not be lodged if the application "could be made by appeal or review under or by virtue of any enactment". The court held that the mechanisms for challenging decisions of a Children's Hearing are as set down in the 2011 Act. Such challenges can include issues as to competency or jurisdiction. The court was not persuaded by *L*'s submission that she could not invoke those procedures because she is not a child. She had in fact already invoked those procedures in respect of a previous ICSO.

Notwithstanding that determination, the court proceeded to express a view on the legal issue raised as to whether *L* was subject to the statutory provisions under which the chief social work officer and other parties had proceeded. *L*'s central argument was that the definition of "a child" in section 199 of the 2011 Act is exhaustive and applied to the circumstances under consideration. As she was not a child, she could not be referred to the Children's Hearing. The Hearing had no power to impose compulsory measures depriving her of her liberty. It was argued that she was in no different position from someone aged 25.

The view expressed by the Inner House was that section 75 of the 1995 Act was the enabling provision. It envisaged someone such as *L* being referred to the Children's Hearing system. That did not import the definition of a child contained in section 199 of the 2011 Act. That definition "is not exhaustive for all proceedings before a Children's Hearing".

One is left to speculate about the potential effect on *L*'s circumstances of relevant provisions of Part 1 of the Adult Support and Protection (Scotland) Act 2007. It is clear from section 53(1) of that Act that in Part 1 childhood ends at the age of 16, beyond which – without any exceptions – a person is an "adult" for the purposes of Part 1. The "general principle" in section 1 of the 2007 Act is of similar effect to the "benefit" principle in sections 1(2) and (3) of the 2000 Act. A person may intervene, or authorise an intervention only if satisfied that the intervention "will provide benefit to the adult which could not reasonably be provided without intervening in the adult's affairs" and "is, of the range of options likely to fulfil the object of the intervention, the least restrictive to the adult's freedom". Section 4 of the 2007 Act brings within the scope of the provisions of Part 1 a situation where a Council believes that a person is an adult at risk and that it might need to intervene by performing functions under Part 1 "or otherwise". It is not possible to ascertain from the report of *L*'s case whether relevant principles of the 2007 Act were applied, and in particular what options were considered in order to comply with section 1.

Adrian D Ward

Two more children's cases with implications for adults

The whole ethos of the Adults with Incapacity (Scotland) Act 2000 is predicated upon the explanation by Scottish Law Commission in paragraph 2.50 in its "Incapable Adults" Report of 1995 that adults with impairments of their capabilities are not children. However, the greater volume of reporting of children's cases, compared with reported decisions under the 2000 Act, does mean that from time to time points of principle in a children's case can reasonably be "read across" to adult law requirements, as we did with the case of "The girl who did not want to return to Poland" in the February Report. We briefly note two further such cases here.

M v C [2021] CSIH 14 contained criticism by the Inner House of a sheriff at first instance for not adequately addressing the requirements to seek the views of the child at the centre of that case. In allowing an appeal against the sheriff's decision, the Inner House relied substantially on the Convention on the Rights of the Child ("CRC"). The decision would certainly be of potential relevance to the requirement under section 1(4)(b) of the 2000 Act to take account of the present and past wishes of an adult. It might also be a pointer towards the extent to which the courts would be prepared to take guidance from the UN Convention on the Rights of Persons with Disabilities ("CRPD"). Legislation to incorporate CRC in Scots law is proceeding through the Parliament. The National Task Force for Human Rights Leadership has now established a Reference Group to consider similar incorporation of CRPD. CRPD is perhaps less easily to be converted into statute than CRC, as it contains principles which require to be balanced: in several cases, blinkered adherence to one principle would violate another. Nevertheless, it is the business of the courts to balance the application of relevant principles to particular factual circumstances, and it would be unsurprising if we were to see increasing reference by the judiciary to CRPD.

The other potentially relevant case is *MB v Principal Reporter* [2021] CSOH 19. A pandemic-

related series of four successive Interim Compulsory Supervision Orders by a Children's Hearing was held by the Court of Session to amount to a failure to act compatibly with the procedural aspects of Article 8 (the right to private and family life) of the European Convention on Human Rights.

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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.

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Adrian is a recognised national and international expert in adult incapacity law. 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; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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Conferences

Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

Adrian is speaking at a webinar organised by RFPG on 25 May at 17:30 on Adults with Incapacity. For 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 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 edition will be out in 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.

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