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MENTAL CAPACITY REPORT: SCOTLAND

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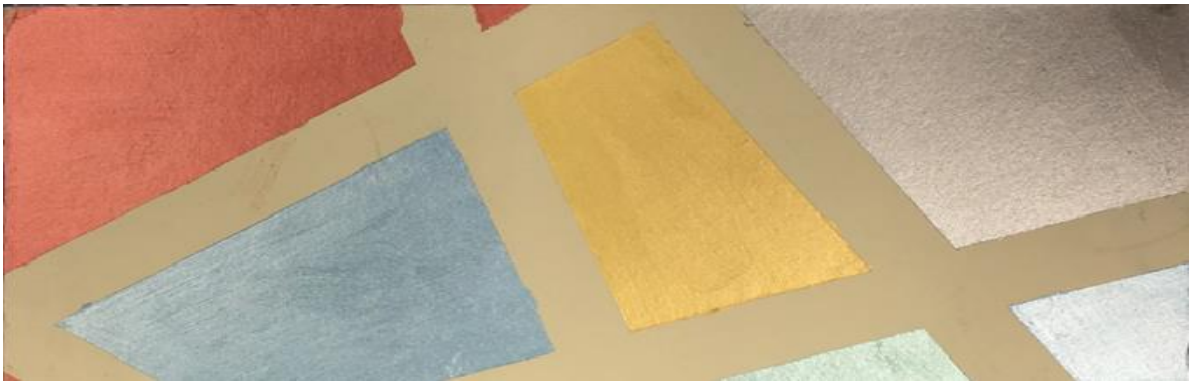

Welcome to the November 2017 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Court of Appeal considers parental consent to confinement, CANH withdrawal and the courts, and the latest DOLS figures;

(2) In the Property and Affairs Report: personal injury payouts and s.117 MHA 1983, calling in bonds and court approval of compromises through a human rights lens;

(2) In the Practice and Procedure Report: the Court of Protection Rules 2017 and what we can learn from the new Family Procedure Rules and PD concerning vulnerable witnesses;

(3) In the Wider Context Report: re-framing *Gillick* competence through MCA eyes, MHA changes coming into force, and CRPD developments and resources;

(4) In the Scotland Report: critical comments on practice rules, counter-proposals for guardians and parental consent to confinement from a Scottish perspective;

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. On our website, you can also find updated versions of our capacity and best interests guide, and new guide to without notice applications before the Court of Protection.

His fellow editors also take this opportunity to congratulate Neil on his very well-deserved nomination for the Bar Pro Bono award 2017.

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

Korean visit and World Congress 2018

Scotland's adult incapacity law, practice and administrative expertise continue to command worldwide respect and interest. At least since the 1990s, Scotland's Mental Welfare Commission has been recommended as a prime example of the "independent authority" recommended by the World Health Organisation. The functions of Scotland's Office of the Public Guardian, and the way in which the performance of those functions has been developed by Ms Sandra McDonald, the current Public Guardian, continue to be of worldwide interest. A particular focus has been upon the Scottish provisions for powers of attorney, and upon the increase in the volume of powers of attorney granted attributable in part to the unique "mypowerofattorney" campaigns.

Following the visit to Scotland on 23rd and 24th March 2017 by the Norwegian Central Guardianship Authority, on which we reported here, Scotland hosted a further similar visit on 23rd and 24th October 2017, this time from a team of four from the Office of Legal Counsel, Ministry of Justice, (South) Korea, accompanied by Professor Cheolung Je from Hangyang University. The first day of the visit was hosted by the Law Society of Scotland. Presentations were given by Sandra McDonald, Public Guardian; Jill Carson and her team from the "mypowerofattorney" campaigns; and Mike Diamond, Executive Director of Social Work, Mental Welfare Commission. The second day comprised a visit to the Office of the Public Guardian in Falkirk. The visitors then travelled south and took in a visit to the Offices of the Public Guardian for England and Wales on 25th October.

Professor Cheolung Je leads the organisation for the 5th World Congress on Adult Guardianship to be held in Seoul, Korea, on 23rd – 25th October 2018 (with an additional day of workshops, principally for Asian countries, on 26th October 2018). One of his principal purposes in joining the visit was to have lengthy discussions with me in my role as a member of the four-person steering group of the International Advisory Board for these World Congresses.

The website for the 2018 Congress is at http://koreanguardianship.or.kr/wcag2018/; see also the item in Wider Context on the Congress.

Adrian D Ward

North Strathclyde Practice Rules

The Sheriff Principal of North Strathclyde issued amended Practice Rules on 20th October 2017. Part 3 deals with applications under the Adults with Incapacity (Scotland) Act 2000. Unfortunately, they will not alleviate concerns at

inconsistencies in practice across Scotland or the variable quality of Practice Rules in different jurisdictions. Two peculiarities of the North Strathclyde Rules stand out.

Firstly, Rule 3.02(f) requires the Initial Writ to "contain averments as to the known existence or otherwise of any existing power of attorney granted by the adult", but only where the grant of financial powers is sought, and for unexplained reasons not where only welfare powers are sought. Experienced practitioners will no doubt continue to include averments broadly similar to Statement 2 of the Statements of Fact which I offered in Appendix 6 to "Adult Incapacity" (2003): "No guardianship or intervention orders in terms of [the Adults with Incapacity (Scotland) Act 2000] and no appointments which have become guardianship appointments in accordance with the transitional provisions of said Act are in force or have ever been granted in respect of [the adult]. [The adult] has no continuing attorney or welfare attorney." That last sentence can confidently be stated in absolute terms, as the registers of the Public Guardian can be accessed for this purpose, and are definitive.

Secondly, Rule 3.02(e) reads: "The Initial Writ must contain details of the names and addresses of all known next of kin of the adult, or, if there are no known next of kin, averments to that effect." Next of kin are neither referred to nor defined in the Adults with Incapacity (Scotland) Act 2000. It is necessary to specify (a) the "nearest relative", as defined in that Act, (b) the "primary carer", as defined in that Act, and (c) any "named person" as defined in that Act (or a statement that there is none). The sheriff is obliged to take account of the views of all of these (insofar as it is reasonable and practicable to do so), therefore the sheriff will need to know who they are in order to comply with the sheriff's obligations. Similarly, the sheriff will require to know the identity of "any guardian, continuing attorney or welfare attorney of the adult who has powers relating to the proposed intervention". Experienced solicitors generally consider themselves obliged to include an account of the persons, both relatives and non-relatives, significantly involved in the adult's life. The reasoning behind the reference to "next of kin", and how the phrase is intended to be interpreted for this purpose, are unclear.

There may of course be reasons peculiar to the Sheriffdom of North Strathclyde for picking out certain matters for prescriptive coverage in the Rules, and leaving others to the general responsibilities of applicants' solicitors to the court. This may be why there is no requirement to specify various further matters, such as whether the adult has a person providing independent advocacy services (with reference to section 3(5A) of the Act), or whether the adult resides in an "authorised establishment" (Summary Applications Rule 3.16.4(3)).

As with some other equivalent Acts of Court elsewhere, it seems to be directed almost exclusively to applications under Part 6 of the Act, and not the various other forms of application provided for in the Act.

Adrian D Ward

Minutes no longer required for counter-proposals for guardians

In *Aberdeenshire Council (Applicant and Respondent) v JM (Respondent and Appellant)*, [2017] CSIH 65, the Second Division of the Inner House refused the appeal by JM against the decision of the Sheriff Appeal Court on 8th July 2016 which we reported in the August 2016 Mental Capacity Law Newsletter. The Opinion of the Inner House was delivered by Lady Dorrian, the Lord Justice Clerk. The court held that there was "no merit in any aspect of this appeal". Accordingly, beyond the points which we reported previously and our comments on the decision of the Sheriff Appeal Court, the main interest for practitioners in the decision of the Inner House is on a procedural point not addressed previously in the history of this case, nor elsewhere above the level of decisions at first instance. The point concerns the procedure to be followed where a party other than the applicant in guardianship proceedings seeks to propose as guardian a person other than the person proposed by the applicant. Hitherto, relying upon *Arthur v Arthur*, 2005, SCLR 350 and *Cooke v Telford*, 2005, SCLR 367, the procedure followed was to make the counter-proposal by Minute, treating it as a "subsequent application" in terms of Rule 3.16.8, but not requiring a separate set of reports in terms of section 57(3) of the Adults with Incapacity (Scotland) Act 2000. The Inner House pointed out either a counter-proposal was a separate application to which the whole requirements of section 57(3) would apply "which would be absurd when there is no dispute that a guardianship order is required", or it was not. The Inner House concluded that: "The proper approach is that a counter-proposal such as this is not separate from the application to which it is a response nor is it an application subsequent to the earlier one. A Minute is not required, and the report-lodging requirements of section 57(3) do not apply." The counter-proposal is made during the currency of an application which the court is still considering, and may be advanced in Answers to the Summary Application. Such a counter-proposal in Answers is not subject to the report-lodging requirements of section 57.

Where an application has been made and refused, then a subsequent application would require to be made by Minute, and would be subject to the report-lodging requirements of section 57. Again, however, any counter-proposal in Answers to the Minute would not be subject to the report-lodging requirements.

The Inner House stressed the importance of the distinction between the guardianship and the person who is guardian, albeit only in the context of procedure upon an application. It is however a point that cannot be stressed often enough. Failure to recognise the distinction seems frequently to cause difficulties in practice. The following clear statement by the Inner House is accordingly to be welcomed: "It is important to recognise that there are two separate matters which the Court has to consider. One is whether a guardianship order is required; the other is who should be appointed guardian." These matters are dealt with respectively in sections 58 and 59 of the 2000 Act, though the Inner House understandably criticise as "infelicitous" the inclusion in section 58(4), rather than in section 59, of the provision that when granting an application the sheriff shall make an order "appointing the individual or office holder nominated in the application".

The Inner House also points out that although it is not a statutory requirement for a counter-proposal to be supported by a suitability report

from the mental health officer, the sheriff still requires to be satisfied as to the suitability of the individual proposed in the counter-proposal. The requirements of section 59 apply. It is competent for the sheriff to call for further reports under section 3. That may include a report from the mental health officer.

The foregoing is a summary of paragraphs [15] to [24] of the Opinion of the court delivered by Lady Dorrian, which should be required reading for any solicitor acting for the first time in an application where the choice of guardian is disputed, or consulted with a view to contesting the choice of guardian.

Adrian D Ward

To be or not to be 'an adult' is the question: the *Birmingham CC v D* ruling and deprivation of liberty

Just when we thought that things couldn't get any more complicated on the deprivation of liberty and persons lacking capacity front the English Court of Appeal published its *Birmingham City Council v D (a child)*[1] ('the Birmingham ruling') in October 2017. This was an appeal from an earlier ruling[2] by the Court of Protection which essentially determined that the parents could not consent to a deprivation of liberty for their 16 and 17year olds who lacked capacity. The Court of Appeal ruling reversed this and although its rulings are only persuasive and not binding in Scotland it nevertheless raises some issues worthy of consideration for this jurisdiction.

It is not intended to provide a full analysis of the *Birmingham* ruling here (although I would strongly recommend that readers read the Court of Appeal judgment, the excellent commentary on the Mental Capacity Law and Policy website and Neil Allen's commentary in the Health, Welfare and Deprivation of Liberty section of this Report) but rather to briefly consider its potential implications from a Scottish perspective.

As in England and Wales, we have been wrestling with the legacy of the *Bournewood* and *Cheshire West*, and related rulings, for some time now in Scotland particularly in regard to Adults with Incapacity (Scotland) Act 2000 interventions and section 13ZA Social Work (Scotland) Act 1968[3]. This has been discussed in earlier issues of the *Mental Capacity Law Newsletter*.[4].

In a nutshell, we now know that if a person who is unable to give consent to their living arrangements is under continuous supervision and control and is not free to leave (however well-intended the objective of these restrictions are) [5] then they are deprived of their liberty engaging Article 5 ECHR (the right to liberty). Moreover, where there is such a deprivation of liberty then the individual is entitled to certain legal and procedural safeguards, including a 'real and effective' ability[6] to apply to a court to have

[1] *Birmingham City Council v D* (a child) [2017] EWCA 1695.
[2] *Birmingham City Council v D*(A Child) [2016] EWCOP 8.
[3] Section 13ZA allows local authorities to move incapacitated adults to residential care.
[4] See March and April 2014 and March and April 2015 issues.

[5] *HL v UK* (2005) 40 EHRR 32, paras 91-91*; P (by his litigation friend the Official Solicitor) (Appellant) v Cheshire West and Chester Council and another (Respondents); P and Q (by their litigation friend, the Official Solicitor)(Appellants) v Surrey County Council (Respondent)* [2014] UKSC 19, per Lady Hale at 49.
[6] *Stanev v Bulgaria* (2012) 55 EHRR 22, para 170; *DD v Lithuania* (2012) ECHR 254, para 165; *MH v UK* (2013)

the lawfulness of such deprivation of liberty tested (Article 5(4)), and there is ongoing debate in Scotland about we are to achieve this.

Alongside this has been the issue of whether others may legitimately consent to a deprivation of liberty on behalf of a person who lacks capacity. Certainly, in the absence of clear direction from Strasbourg that this would definitely not result in a deprivation of liberty engaging Article 5 ECHR, it would appear that there is a need for additional safeguards to accompany welfare attorneys and guardians consenting to a deprivation of liberty[7]. Although Scottish courts have directed that welfare guardians (with appropriate powers) may authorise a deprivation of liberty [8] it would therefore appear that additional safeguards, not currently available under the Adults with Incapacity (Scotland) Act 2000, are required.

The 2000 Act defines an adult as someone who is aged 16 years or older[9] and the provisions of the Act will only apply, subject to its other underpinning principles and certain criteria, if the adult is functionally 'incapable' as defined by section 1(6) and implicit is a presumption of capacity. The Birmingham ruling, however, potentially complicates the issue. It states that parents with parental authority may consent to a deprivation of liberty of their 16 and 17 year olds who are *Gillick* incompetent [10] . Where such arrangements are attributable to the state then such consent would mean that Article 5 ECHR, and thus the requirement for its legal and procedural safeguards, would not be engaged. Noting that the *Gillick* test applies to children under 16 (as does the Age of Legal Capacity (Scotland) Act 1991 which makes similar provision), the ability of those with parental responsibility to consent to the deprivation of liberty of a young person who would be deemed to be extended to an 'adult' falling within remit of the 2000 Act.

This therefore begs the question about which stance should be adopted for an 'incapable adult' aged 16 or 17. Should it be the 'procedure light', perhaps more pragmatic on occasion, 'Gillick' approach but one where Article 5 ECHR safeguards are absent? Alternatively, should the more cumbersome, and expensive, welfare guardianship route be adopted? Although not 'Article 5 perfect' the latter does provide a level of protection under the 2000 Act at least in terms of judicial oversight of the powers that granted, recall and a requirement that the court considers, and guardians act in accordance with, the principles of the Act such as, as previously stated, the presumption of capacity and functional capacity assessment[11] as well as the requirement that any intervention provides a benefit to the adult not otherwise achievable[12] and is the least restrictive option[13].

ECHR 1008, paras 82-86; *Stankov v Bulgaria (Application No. 25820/07)* judgment of 17 March 2015.

[7] Scottish Law Commission, *Report Adults with Incapacity*, (Scot Law Com No 240), 2014, paras 3.56-3.60. The *Stankov* ruling also reinforces the need for caution here.

[8] *Muldoon, Applicant* 2005 SLT (Sh Ct) 52 at 58K,59B, Doherty (unreported), Glasgow Sheriff Court, 8 February 2005; *M, Applicant* 2009 SLT (Sh Ct) 185 at 84 and 87; *Application in respect of R* 2013 GWD 13-293.

[9] s 1(6).

[10] *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] UKHL 7.

[11] s 1(6).

[12] s 1(2).

[13] s 1(3).

Similar confusion appears to arise in relation to the compatibility of the Birmingham ruling with the Mental Capacity Act 2005 in England and Wales. It will therefore be interesting to see whether the Court of Appeal decision will be appealed to UK Supreme Court and, if so, how this will be addressed there. Meanwhile, in Scotland, it is suggested that pending the reform of the 2000 Act it is this Act that continues to be followed applying both its principles and the Article 12 UNCRPD requirement to provide appropriate support for the exercise of legal capacity for young persons of 16 and 17.

Jill Stavert

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 Scottish solicitor and a consultant at T C Young LLP, 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. To view full CV click here.

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

Deprivation of Liberty in the Community

Alex is delivering a day's training in London on 1 December for Edge Training on judicial authorisation of deprivation of liberty. For more details, and to book see here.

Deprivation of Liberty Safeguards: The Implications of the 2017 Law Commission Report

Alex is chairing and speaking at this conference in London on 8 December which looks both at the present and potential future state of the law in this area. 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 last report of 2017 will be out in 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 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

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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