

## Scotland

### Introduction

Welcome to the April 2015 Newsletters. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: ‘baby Bournemouth?’, an update on the long-awaited Guidance on Deprivation of Liberty, deprivation of liberty at home, the 7<sup>th</sup> IMCA report and an important ECtHR ruling on the acid test;
- (2) In the Property and Affairs Newsletter: an important decision on the interaction between the CICA and the COP, anonymisation of judgments and changes to LPA forms;
- (3) In the Practice and Procedure Newsletter: details of the first stage of reform of the COP rules, the new Practice Direction on contempt of court, vulnerable witnesses, and funding questions;
- (4) In the Capacity outside the COP Newsletter: an editorial comment on the Care Act and capacity, the House of Lords debates the Select Committee report, recruitment for the chair of the National Mental Capacity Forum, an extremely important decision of the Supreme Court on informed consent, and the publication of the first work on the international protection of adults edited (inter alia) by Alex and Adrian;
- (5) In the Scotland Newsletter: a bumper selection of important material, including news of a new project to consider compatibility of both Scots and NI legislation with the CRPD, the potential for the introduction of designated specialist sheriffs for adult incapacity work, and commentary on recent case-law of relevance to practitioners in the area.

We are also delighted to announce that, as of this month, Beverley Taylor, until recently the Deputy Official Solicitor, will be providing regular guest contributions.

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For all our mental capacity resources, click [here](#). Transcripts not available at time of writing are likely to be soon at [www.mentalhealthlaw.co.uk](http://www.mentalhealthlaw.co.uk).

## Deprivation of liberty update: *Stankov v Bulgaria*

### Introduction

Things rarely stand still for long in mental health and capacity law and rights. During March, for example, the European Court of Human Rights (the Court) delivered its judgment in [Stankov v Bulgaria](#) (Application no. 25820/07) which appears to reinforce the fact that guardians, even where they are family members, cannot consent to a deprivation of liberty of a person with incapacity in the absence of specific powers to do so and real and effective means to challenge such deprivation of liberty through the courts. A brief summary of the case follows although readers are referred to the case itself for more detail (the transcript is only available in French at the moment).

### Facts of the case

Mr Stankov was declared by a court to be partially incapacitated on the basis that he suffered from schizophrenia which caused a personality change and inability to handle his own affairs. His mother was appointed his guardian.

Shortly after this he was placed at his mother's instigation and with her agreement in two successive state-run social care homes for persons with mental disorder. There was no judicial authorisation and it appears to have been a contractual arrangement.

It was clear that Mr Stankov did not wish to be placed in these homes.

He subsequently applied to court to have his legal capacity restored on the basis that he was able to handle his own affairs. This was refused.

Mr Stankov argued that his being placed in the social care homes was a breach of his Article 5(1) ECHR right to liberty and the lack of ability to challenge the legality of such deprivation of liberty was a violation of his Article 5(4) ECHR (adequate procedural safeguards) right. The Court agreed with him<sup>1</sup>.

### Court's findings

#### 1. There had been a deprivation of liberty engaging Article 5 ECHR

This was on the following basis:

1. The objective element of deprivation of liberty was present in that Mr Stankov had been under the constant control of staff at the homes and was not free to leave without permission at any time<sup>2</sup>. This follows Strasbourg jurisprudence (in other words, *Bournewood*<sup>3</sup> and related Strasbourg jurisprudence) through to the UK Supreme Court's *Cheshire West*<sup>4</sup> ruling which has particular relevance to cases such as this.

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<sup>1</sup> Violations of Articles 5(5) (the *right* to compensation), 6(1) (right to a fair trial), 3 (inhuman or degrading treatment) and 13 (in conjunction with Article 3) (the right to effective remedy) were also found. However, Articles 5(1) and (4) are only considered here owing to their relevance to the recent Scottish Law Commission [Report on Adults with Incapacity](#).

<sup>2</sup> Para 87

<sup>3</sup> *HL v UK* (2005) 40 EHRR 32.

<sup>4</sup> *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.

It also noted that such deprivation of liberty was for an indefinite period of time given that no end date had been set<sup>5</sup>.

2. There was no valid consent provided to the deprivation of liberty (which would have taken it outside the ambit of Article 5<sup>6</sup>). Mr Stankov had not personally consented to his being placed in the homes. However, his mother, as his guardian, had instigated and consented to it on his behalf<sup>7</sup>. The Court was clearly uncomfortable with this. It observed that there are situations where the will of a person with incapacity may be validly replaced by that of third party acting as a protective measure and that sometimes it is difficult to ascertain the real wishes and preferences of such a person. However, it reiterated its comments in *Shtukaturov*<sup>8</sup> and *Stanev*<sup>9</sup> that an incapacitated person who has been deprived of their liberty may nevertheless still be capable of understanding their situation<sup>10</sup>. Indeed, the Court noted that domestic legislation gave some weight to the views of the applicant in such situations, that Mr Stankov appeared to understand his situation and that it was pretty clear that he disagreed with his placement given repeated attempts to leave the first home and expressed wish to leave the second<sup>11</sup>. It should also noted (see below) that the Court was not prepared to infer that the assessment of Mr Stankov's capacity and

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<sup>5</sup> Para 89.

<sup>6</sup> *Storck v Germany* (2005) 43 EHRR 96, paras 76-77; *JE v DE* [2006] EWHC 3459(Fam), per Munby J at para 77; *Stanev v Bulgaria* (2012) 55 EHRR 22, para 117

<sup>7</sup> Para 85, noting also *Stanev*, para 122 and *DD v Lithuania* [2012] ECHR 254, para 151).

<sup>8</sup> *Shtukaturov v Russia* (2008) ECHR 223, para 108.

<sup>9</sup> *Stanev*, para 130.

<sup>10</sup> Para 89.

<sup>11</sup> Paras 89-90.

granting of guardianship was for the purposes of depriving him of his liberty.

## 2. Deprivation of liberty was unlawful under Article 5(1)

For the deprivation of liberty to be lawful it had to be justified under the permitted exception, subject to appropriate safeguards, in Article 5(1)(e) permitting detention of persons of 'unsound mind'. In light of the fact that Mr Stankov had been medically assessed for the purpose of exercising his legal capacity and not specifically for whether he suffered from a mental disorder warranting detention the Court felt that the detention was unjustified<sup>12</sup>.

## 3. Inadequate procedural safeguards for compliance with Article 5(4)

The Court noted the requirement to be able to apply to a court to test the lawfulness of the detention<sup>13</sup> and found that in Mr Stankov's case there was a breach of Article 5(4)<sup>14</sup>. Strangely, it did not mention *MH v UK*<sup>15</sup> which provides for enhanced procedural safeguards in the case of persons with incapacity in order to comply with Article 5(4)<sup>16</sup> but it is clear that it expected there to be a real and effective ability to challenge the lawfulness of the detention.

Importantly, the Court noted that there been no court authorisation of the placement, only of the partial denial of legal capacity, and no subsequent periodic judicial review ability of such

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<sup>12</sup> Paras 92-105.

<sup>13</sup> *Stanev*, paras 168-171.

<sup>14</sup> Paras 111-115.

<sup>15</sup> (2013) ECHR 1008.

<sup>16</sup> See "Deprivation of liberty, adults with incapacity and Scotland: the ongoing debate", *Mental Capacity Law Newsletter*, [March 2015](#).

placements (indeed, Bulgarian law does not recognise such placements as a deprivation of liberty)<sup>17</sup>. Although it was also argued on behalf of the Bulgarian Government that it was open to Mr Stankov to apply for termination of the contract authorising his placement the Court remarked that it was unclear how such a request would be interpreted by the domestic authorities<sup>18</sup>. Moreover, as in *Stanev*<sup>19</sup>, it was noted that the Article 5(4) requirement were not met where the only person who was permitted under domestic law to challenge the legality of the guardianship was the guardian themselves<sup>20</sup>.

### Conclusion and implications for Scotland

In the [March 2015](#) issue of this newsletter, it was mooted whether the Scottish Law Commission's recommendations<sup>21</sup> to amend the Adults with Incapacity (Scotland) Act 2000 would be entirely Article 5(4) compatible. This is in light of developing ECHR case law, some of which is subsequent to the report, that appears to require enhanced procedural safeguards in the case of persons with incapacity and it was commented in the March issue that it is difficult to envisage how this can be effectively achieved otherwise than through automatic judicial review.

The Scottish Law Commission recommends provisions allowing for the prevention of and adult with incapacity from going out of hospital and for welfare guardians and attorneys to authorise a significant restriction of liberty for an adults with incapacity without automatic judicial

review. The *Stankov* ruling seems to strengthen the case for such automatic judicial review.

What is also notable is the lack of weight given by the Court to the exercise of legal capacity relative to the requirements of Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD) as interpreted in the Committee on the Rights of Persons with Disabilities General Comment<sup>22</sup>. Indeed, although the Convention is mentioned generally and Article 14 CRPD (the right to liberty) specifically as relevant international texts, as has generally been the case in Strasbourg judgments to date, there is no active use of the CRPD by the Court. However, as the situation currently stands in Scotland, by virtue of the Human Rights Act 1998 and Scotland Act 1998 it is the ECHR and its interpretation by the Court that takes precedence.

Readers may also want to note the comments made in the Health, Welfare and Deprivation of Liberty Newsletter as regards the implications of this decision for the position in England and Wales.

*Jill Stavert*

### Essex Autonomy Project: now going UK-wide

As many readers will be aware, in 2014 an Essex Autonomy Project ("EAP") research team, with support from the Arts and Humanities Research Council, provided technical research support to the UK Ministry of Justice in developing a formal Opinion as to whether the Mental Capacity Act

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<sup>17</sup> Para 112.

<sup>18</sup> Para 113.

<sup>19</sup> Paras 174-177.

<sup>20</sup> Para 114.

<sup>21</sup> Scottish Law Commission (2014) [Report on Adults with Incapacity](#), Report No.240, Edinburgh: The Stationery Office (the Report)

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<sup>22</sup> Committee on the Rights of Persons with Disabilities, General Comment No. 1(2014) *Article 12: Equal recognition before the Law*, adopted 11 April 2014.

2005 is compliant with the United Nations Convention on the Rights of Persons with Disabilities. The 2005 Act of course applies only to England & Wales, but the UK Government remains responsible in such international matters (even when they impact directly upon devolved topics<sup>23</sup>) for the whole United Kingdom. The omission of Scotland and Northern Ireland from this exercise, and the lack of any similar exercise for those jurisdictions, was discussed with concern between Professor Wayne Martin of Essex University, who led the EAP project, and Adrian at an event in London on 9<sup>th</sup> February 2015 in connection with the book “International Protection of Adults” (see [cross-reference]). It was agreed that it was important to move rapidly to make good this omission, and that an extension of the EAP project would be the best vehicle for doing so. Jill was rapidly drawn in to enlist the involvement of her Centre for Mental Health and Incapacity Law Policy and Practice at Edinburgh Napier University, as was Alex, in respect of his considerable involvement in the original EAP project and his membership of the Mental Health and Disability Committees of both the English & Welsh and the Scottish Law Societies. Adrian’s firm of TC Young LLP is also a sponsor of the project, and a first meeting of the core team who hope to drive this forward took place at TC Young’s Edinburgh office on 30<sup>th</sup> March 2015. As regards Scottish input, attendees included Sandra McDonald, Public Guardian, Colin McKay, Chief Executive of the Mental Welfare Commission, and Amy Woodhouse of Mental Health Foundation. Subject to funding, it is anticipated that the project will formally commence on 1<sup>st</sup> July 2015 and last for about 11 months. The purpose is to be able to offer further technical research support to HM Government, in parallel with and supplementary

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<sup>23</sup> See the item at page 8 on the constitutional implications of draft Scotland Clauses,

to the input of others, including Scottish Government and the UK human rights bodies. We shall keep readers advised of developments.

*Adrian D Ward*

## Adult incapacity: specialist sheriffs?

[Last month](#) we reported on the major address given by the Lord President, Lord Gill, to the Holyrood Digital Justice Conference on 28<sup>th</sup> January 2015, in which he set out the timetable for reform of the justice system following upon the Courts Reform (Scotland) Act 2014 and announced the appointment of Sheriff Principal Mhairi Stephen QC as President of the new Sheriffs Principal Appeal Court. We provided a link to the full text of Lord Gill’s speech. We did however comment with disappointment that the adult incapacity jurisdiction was not mentioned in the passages referring to the advantages of specialisation.

In the February Newsletter we reported on, and commended, the initiatives by Sheriff Principal Stephen in her own sheriffdom – Edinburgh – effectively introducing an element of specialisation there, and issuing a new Practice Note.

In recent correspondence with Adrian, Lord Gill has now indicated that he is “persuaded that the use of nominated specialist sheriffs in adult incapacity cases is sound in principle”. It is understood that he is ascertaining from Sheriffs Principal whether they would support the idea and, if so, whether they would consider that it would be practicable in the circumstances of their individual sheriffdoms. We shall report further on the Lord President’s initiative, whenever further information becomes available.

*Adrian D Ward*

## Scope of section 3(3) challenged

Section 3(3) of the Adults with Incapacity (Scotland) Act 2000 allows any party claiming an interest in the property, financial affairs or personal welfare of an adult to apply to the sheriff for an order giving directions to any person exercising any functions under the Act. According to the Scottish Law Commission (Report No 151 on Incapable Adults, September 1995, Recommendation 30) the purpose of this provision included conferring upon the court power “to give directions to a continuing or welfare attorney as to the exercise of his or her functions”. There have been unreported cases in which such exercise of the courts’ power has been sought. This is however one of the most wide-ranging standalone procedures in the Act. Persons exercising functions may seek directions as to how they themselves should proceed, as occurred in *B’s Guardian, Minuter* (Edinburgh Sheriff Court, 21<sup>st</sup> July 2010, see 2010 GWD 33-690) in which a guardian sought directions as to whether he could apply to be appointed sole executor dative of an estate in which the adult had been appointed sole executor. The Public Guardian has used the procedure several times for directions as to whether she should or should not register (typically) a revocation of a power of attorney and/or a fresh power of attorney (thus both of these in *Public Guardian, Applicant*, 2011 SLT (Sh Ct) 66). At least one such case went to appeal: in *Application by the Public Guardian re DC*, the sheriff at Glasgow directed the Public Guardian not to register a revocation on 14<sup>th</sup> August 2012, and that decision was upheld by the Sheriff Principal on appeal on 6<sup>th</sup> December 2012. The same *DC* subsequently raised proceedings in the Court of Session on which we reported at

[insert link], in which one of the issues raised was whether it was competent for a sheriff to direct the Public Guardian not to carry out a registration function which appeared to be mandatory (if relevant criteria were met) in terms of the Act: however, even in that comprehensively argued case there was no suggestion that the scope of section 3(3) was limited to Part 6 procedures. That however seems to have been the view of a sheriff who, on 29<sup>th</sup> January 2015, refused to warrant an application under section 3(3) for certain directions to be given to a continuing attorney. The relevant terms of the sheriff’s Interlocutor were: “refuses to warrant said application in respect that there is no process in this court to allow such a minute to be lodged”. Of course, the application was a standalone application as envisaged by section 3(3), not a minute. The sheriff does not appear to have taken account of the actual wording of section 3(3), nor of its intended purpose, nor of the previous history of use of the procedure.

An appeal against the refusal to warrant was lodged. The attorney took the action which the application sought to have him directed to take. The appeal was withdrawn.

*Adrian D Ward*

## Evidence needed – mental health officer reports

In [July](#), [August](#), [October](#) and [November](#) last year we narrated concerns and developments over delays in provision of mental health officer reports, under the heading “Damaging Illegality of Scottish Social Work Authorities”. Welfare guardianship applications, and applications for intervention orders with welfare powers, cannot proceed unless lodged in court with the required

reports, which include a report from the mental health officer (“MHO”). At time of passing of the Adults with Incapacity (Scotland) Act 2000 the Scottish Parliament was alert to the risk that delays in preparation of MHO reports could obstruct the process and could indeed in some cases be significantly damaging to vulnerable people. A specific time limit of 21 days for preparation of such reports was accordingly inserted in section 57(4) of the Act, which requires applicants (other than the local authority) to give notice to the Chief Social Work Officer of intention to apply for such an order, and requires the report to be prepared “within 21 days of the date of the notice”.

In July we narrated the creeping disregard by local authorities of this statutory obligation; an apparent pretence that the obligation was to allocate the matter to an MHO rather than to produce the report; slippage in even doing that; and ultimately a policy of intimidating delays (in one case) of 10-12 weeks from date of intimation for the preparation of a report “to be allocated”. One solicitor has subsequently reported a six month delay in preparation of a report. Other feedback, all of it unfortunately negative, was reported in August; then in October we reported the Parliamentary Question by Michael McMahon MSP, chair of the Parliament’s Cross-Party Disability Group, as to what proportion of reports are provided within the required timescale, and the entirely unhelpful written Answer that: “This information is not collected centrally”. In November we pointed out that the proposals in the recent Scottish Law Commission Report on Adults with Incapacity, and in the current Mental Health Bill, would if implemented both increase MHO workloads and worsen the situation.

Since then the Mental Health and Disability Sub-Committee (“MHDC”) of the Law Society of Scotland has been pursuing these concerns, and

had a helpful meeting on 18<sup>th</sup> March with the Mental Welfare Commission (“MWC”) and the Care Inspectorate. There was a shared general impression that, while there are variations from area to area, demands upon MHOs are outstripping currently available resources. MWC has for some time been concerned with the issue of MHO recruitment and retention, and has been highlighting those concerns to government, the Care Inspectorate and SSSC. It has called for a national strategy to address the issues.

At the meeting the Care Inspectorate advised that they were undertaking a scoping exercise to establish the extent of the problem. This will include meetings with Link Inspectors, the Chief Social Work Officer and other stakeholders, including the Law Society. While no timescale for this could be provided, once completed the Care Inspectorate intend to submit a proposal to Scottish Ministers and seek authority to proceed with a full project. The meeting identified deviances both in local authority practice and in practice of individual MHOs, some – for example – seeking medical reports before preparing their own report. There were potential time and cost implications here, particularly in legally aided situations.

Some of the delays seem to be organisational and procedural, such as delays in passing information internally. Delays appear to be longest in relation to younger people, people with learning disabilities, and people in the community. Amending the 2000 Act might alleviate some issues, but that will not happen in the current parliamentary term.

The Care Inspectorate in particular highlighted the difficulty of gathering relevant data, and this is where readers of the Newsletter can assist. Practitioners in the field are requested to send to

Alison Hempsey, a member of MHDC, at [amh@tcyoung.co.uk](mailto:amh@tcyoung.co.uk) a list of dates of receipt of all recent MHO reports with, against each, the local authority and the number of days since the section 57(4) intimation: for example “31<sup>st</sup> March 2015 – Glasgow – 20 days”. Ideally this should cover six months to 31<sup>st</sup> March 2015. If the period is shorter, it is still essential that all reports received within that period (whether timeous or not) are included.

Further comment is optional but would be helpful. Descriptions of the impact of delays in some individual cases, anonymised, could be particularly helpful. Other general comments could cover experience of trends, for example as regards delays or as regards quality of reporting.

We shall keep readers advised of developments as they occur.

*Adrian D Ward*

## Constitutional implications of draft Scotland Clauses

The Political and Constitutional Reform Committee of the UK Parliament has published a personal submission by Adrian, the main terms of which are as follows:

*“A significant omission from the constitutional provisions of the draft clauses is the lack of any equivalent to the Sewel Convention in relation to International Instruments which have direct implications for devolved areas of Scots private law.*

*A current example which causes concern is the UN Convention on the Rights of Persons with Disabilities. This potentially has a direct impact upon the Adults with Incapacity (Scotland) Act 2000 (asp4), which happens to*

*have been the first piece of major policy legislation by the Scottish Parliament. The terms of the Convention, and even more so the interpretation of those terms by the UN Committee on the Rights of Persons with Disabilities, are highly controversial. However, so far as can be ascertained, there was no meaningful consultation in Scotland either as regards the terms of the Convention, or as to the decision to ratify without reservations. It is reasonable to anticipate that if there had been proper consultation, then at least in relation to Scotland’s adult incapacity regime there would have been some reservations similar to those made by other states with broadly similar approaches.*

*There is in fact a converse consequence of this lack of engagement, which is that Scottish experience is not fed back into deliberations at international level. That is particularly relevant in relation to the Convention and statute mentioned above. Scotland’s incapacity legislation is seen to be world-leading. Thus I personally have been drawn into consultation and advice to the Nordic countries; as the only British member of a Council of Europe Expert Working Party; and more recently in advice in the Netherlands. These examples all reflect invitations personally to visit the states and organisations mentioned. Scotland was in fact the first jurisdiction in the world in respect of which the Hague Convention on the International Protection of Adults was ratified (it has not yet been ratified in respect of England and Wales). Thus not only has Scotland been denied engagement in the processes of drafting and implementing such International Instruments, but those processes have also failed to benefit from such input and experience as could be made available from Scotland.”*

*Adrian D Ward*

## **G v West Lothian Council**

Adult incapacity and mental health litigation concerning *JG* (an adult with severe debilitating dementia and osteoporosis, and significant mobility difficulties) generated three appeals to the Sheriff Principal at Edinburgh during 2013 and 2014, and now an interesting and carefully researched, but controversial, case commentary by Alan Eccles and Lindsay Watson (“E and W”) at 2015 SLT (News) 35.

The first appeal was determined by Sheriff Principal Stephen on 21<sup>st</sup> November 2013. She was not satisfied that the procedure adopted under which the Chief Social Work Officer of West Lothian Council (“CSWO”) was appointed interim guardian to *JG* on 28<sup>th</sup> August 2013 had been procedurally fair. She recalled that appointment and appointed *JG*’s son, BG, as interim guardian.

The second appeal was an appeal against a decision of the Mental Health Tribunal to make a compulsory treatment order (“CTO”) in respect of *JG*. That appeal was heard and determined by Sheriff Principal Stephen on 1<sup>st</sup> August 2014. *JG* had suffered serious fractures, resulting in lengthy in-patient hospital treatment, after suffering falls at home in late 2013. Having been taken home by BG against medical advice, she again suffered falls there, in consequence of which a short-term detention certificate was issued, followed by the CTO. The Sheriff Principal refused that appeal.

The third appeal, noted at 2014 GWD 40-730, was an appeal by BG against an appointment on 16<sup>th</sup> May 2014 of the CSWO as interim guardian for a period of six months. A major source of conflict throughout was what the Sheriff Principal described as a “fundamental disagreement” between social work and health professionals on

the one hand, in whose opinion *JG* – by the time of the third appeal – received round the clock specialised in-patient nursing care, and BG who believed that *JG* should nevertheless be cared for in her own home on the basis of her previously strongly expressed preference to be cared for at home. The Sheriff Principal further described as a “particularly difficult matter” BG’s unwillingness to accept that physical chastisement of an adult with severe debilitating dementia was not conducive to the adult’s welfare.

For a full account of relevant facts and history, and of the arguments and considerations in the third appeal, see the Sheriff Principal’s Judgment [here](#) and the article by E and W. We would regard two aspects of the decision and discussion thereof in the article as uncontroversial.

Firstly, the Sheriff Principal made it clear that interim guardianship is not something lesser than so-called “full” guardianship: “It is incorrect to equate interim guardianship with an interim protective order designed to maintain the status quo pending court proceedings”. The only difference between an interim appointment and a “full” appointment is that the interim appointment is made (usually) for a shorter period and pending final determination. However, during the interim period, as E and W put it, “the granting of an interim guardianship has the nature and quality of a ‘full’ guardianship – the proposed interim guardian must be suitable and the intervention must be necessary to achieve the benefit sought”.

Secondly, the Sheriff Principal also commented on the provisions of section 49 of the Adults with Incapacity (Scotland) Act 2000 which deal with the status of Part 5 authority to treat (under section 47) in circumstances where it is known that there is an application for an intervention or guardianship order. Under section 49, in that

situation and pending final determination of the application for the intervention or guardianship order, treatment authorised by section 47 may only be given if it is authorised by any other enactment or rule of law “for the preservation of the life of the adult or the prevention of serious deterioration in his medical condition”. In the appeal, BG had argued that there was no urgency or necessity to make an interim guardianship order because JG could receive necessary medical care and treatment either under ad hoc intervention orders, other procedures such as CTO, or to the extent permitted by section 49. The Sheriff Principal dismissed those proposals as being “unworkable and disproportionate” compared with covering the matter by an interim appointment of a guardian. Section 49 could not be relied upon as giving JG the level of care which she required, nor a desirable level of legal certainty in that regard. In such circumstances, as E and W put it, “a more permanent or at least stable/predictable intervention, such as guardianship, is desirable (subject to ensuring the adult’s freedoms are respected and skills and abilities are supported and encouraged)”.

Where we part company with E and W is in their acceptance of Sheriff Principal Stephen’s view as to the way in which the principles in section 1 of the 2000 Act should be applied. The Sheriff Principal saw the principles as essentially a hierarchy, in the order stated in the Act. The Sheriff Principal thus considered as being “the essential principle” the principle in section 1(2) that there should be no intervention unless the person responsible for authorising or effecting it “is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention”. The Sheriff Principal then went on to say: “*This is indeed the core principle namely that it is the welfare of the adult and the benefit to the adult which is the overarching principle. The court then has to*

*consider the least restrictive option and take into account the present and past wishes and feelings of the adult and the views of the nearest relative and the primary carer of the adult in so far as it is reasonable and practicable to do so. The sheriff also requires to take into account the views of any other person who appears to the sheriff to have an interest in the welfare of the adult*”. In their commentary, E and W put “then” in italics. They refer to other occasions on which they have suggested that “undue weight has arguably been given to notions of the (past) intentions and wishes of an adult to the extent that the fundamental tenets of section 1 appear to be substantially or even completely relegated in their importance”. They suggest that there is a detectable move away, in certain situations, from “benefit” having an “essential” position.

We would disagree with this approach for the following reasons.

Firstly, it is incompatible with the suggestion – for example in *Adults with Incapacity Legislation* (Ward) page 13 – that: “With due caution, “benefit” can reasonably be interpreted as encompassing overcoming the limitations created by incapacity, so as to permit something which the adult could reasonably be expected to have chosen to do if capable, even though of a gratuitous or unselfish nature”. Cited in support of that proposition are the provisions of section 66 of the 2000 Act regarding gifts from the estate of an adult under guardianship; section 51(4) regarding participation in research from which the adult will not benefit directly; and the commentary in the official Explanatory Notes to the original Act upon what is now section 30(2), qualifying the provision of section 30(1) that “any funds used by the withdrawer must be applied only for the benefit of the adult”. We would suggest that one cannot make proper judgements in accordance with the principles as a

whole in such matters, in individual cases, as to what might “benefit” that particular adult without knowing as much as possible about relevant past and present wishes and feelings of the adult.

Secondly, and more fundamentally, to regard “benefit” as a “gateway” without reference to the other principles, and particularly the extent to which they are designed to ensure that account is taken of the individuality of the particular adult, comes dangerously close to equating “benefit” with the “best interests” test now so clearly (and in our view correctly) rejected by the UN Committee on the Rights of Persons with Disabilities. Moreover, a “best interests” test was explicitly rejected by the Scottish Law Commission in its Report No 151 on Incapable Adults, in which the principles were formulated: “Our general principles do not rely on the concept of the best interests of the incapable adult .... We consider that “best interests” by itself is too vague and would require to be supplemented by further factors which have to be taken into account”. Those “further factors” are of course those which the ensuing principles in section 1 are designed to elicit.

Arguably, the requirements of the UN Convention on the Rights of Persons with Disabilities, and more importantly the interests of justice and of respect for the individuality of any adult the subject of proposed intervention under the Act, are better served by the developing importance accorded by the suggestion first proposed by HH Judge Hazel Marshall in the English case of *Re S and S (Protected Persons)* [2008] COPLR Con Vol 1074 that there should be a rebuttable presumption in favour of following the known will and preferences of the adult. That approach appears to be gaining growing support in England.

A “best interests” approach, and likewise a similar approach based on “benefit” viewed in isolation, is to be contrasted with the “constructing decisions” approach advocated in Chapter 15 of *Adult Incapacity* (Ward, 2003), which (put briefly) advocates the construction of decisions using as much as possible as can be derived from adults themselves or from all that is known about them, in each individual case.

*Adrian D Ward*

### In brief

1. With effect from 1<sup>st</sup> April 2015 the Scottish Court Service and the Scottish Tribunals Service have merged to create a new entity, the Scottish Courts and Tribunals Service.
2. The Special Case on powers of attorney, covered [here](#) has now been reported as *Great Stuart Trustees Limited v Public Guardian*, 2015 SLT 115.
3. George Kappler and Charlie Burns both retired from the Mental Welfare Commission for Scotland on 27<sup>th</sup> March 2015. This will be covered further in May.
4. The Centre for Mental Health and Incapacity Law, Rights and Policy held a very successful seminar on 23<sup>rd</sup> March entitled *Children and Young Persons and Mental Health* – speakers Dr Lesley-Anne Barnes Macfarlane, Edinburgh Napier University, Dr Ama Addo, Consultant, Child & Adolescent and Intellectual Disabilities Psychiatry at Yorkhill Hospital Glasgow and May Dunsmuir, President, Additional Support Needs Tribunal for Scotland and In-House Convener, Mental Health Tribunal for Scotland.

*Adrian D Ward and Jill Stavert*

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### Conferences at which editors/contributors are speaking

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#### Socio-Legal Studies Association

Alex is presenting a paper on “(Re)presenting P before the Court of Protection” and Jill a paper on “Addressing the *Bournewood* gap in Scotland” at the SLSA 2015 Annual Conference at the University of Warwick 1-2 April.

#### Commonwealth Legal Education Association

Jill will be presenting (with Rebecca McGregor) a paper on “Access to equal recognition before the law for persons with mental disabilities through supported decision making in Scotland” at the Commonwealth Legal Education Association 2015 conference in Glasgow 9-10 April.

#### Elderly Care Conference 2015

Alex will be speaking at Browne Jacobson’s Annual Elderly Care Conference in Manchester on 20 April. For full details, see [here](#).

#### Medical Issues and the Mental Capacity Act 2005

Tor will be speaking at a conference arranged by Clarke Willmott on 24 April, her topic being “The Court of Protection and medical treatment disputes: avoiding court and what happens if you can't.” Full details of the conference are available [here](#).

#### ‘In Whose Best Interests?’ Determining best interests in health and social care

Alex will be giving the keynote speech at this inaugural conference on 2 July, arranged by the University of Worcester in association with the Worcester Medico-Legal Society. For full details, including as to how to submit papers, see [here](#).

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Victoria Butler-Cole  
Neil Allen  
Annabel Lee  
Simon Edwards (P&A)

#### Guest contributor

Beverley Taylor

#### Scottish contributors

Adrian Ward  
Jill Stavert

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#### 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 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 Newsletter in the future please contact [marketing@39essex.com](mailto:marketing@39essex.com).

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Alex been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, works to which he has contributed including 'The Court of Protection Handbook' (2014, LAG); 'The International Protection of Adults' (2015, Oxford University Press), Jordan's 'Court of Protection Practice' and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). He is an Honorary Research Lecturer at the University of Manchester, and the creator of the website [www.mentalcapacitylawandpolicy.org.uk](http://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. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. 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.**



**Annabel Lee**  
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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.**



**Simon Edwards**  
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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**  
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Adrian is a practising Scottish solicitor, a partner of 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.**



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Dr Jill Stavert is Reader in Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. 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 2013 updated guidance on Deprivation of Liberty) and is a voluntary legal officer for the Scottish Association for Mental Health. **To view full CV click here.**