



Welcome to the February 2023 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: is depriving a person of their phone depriving them of their liberty, a reminder that the court is the ultimate arbiter of best interests and an Ombudsman comes belatedly to the rescue;
- (2) In the Property and Affairs Report: a reminder of the new process for applying for deputyship and how the Powers of Attorney Bill would amend the MCA 2005;
- (3) In the Practice and Procedure Report: the Vice-President intervenes on s.49 reports and new contempt rules;
- (4) In the Wider Context Report: Parliamentary consideration of the draft Mental Health Bill, a toolkit for supporting decision-making, and confidentiality and common sense;
- (5) In the Scotland Report: the Supreme Court dismisses an appeal against assessment for services and an opposed application for guardianship.

You can find our past issues, our case summaries, and more on our dedicated sub-site [here](#), where you can also sign up to the Mental Capacity Report.

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The picture at the top, "Colourful," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

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### Supreme Court dismisses appeal against assessment for services

The case of *McCue (as guardian for Andrew McCue) v Glasgow City Council*, on which we have reported previously, was appealed to the Supreme Court by Andrew McCue's guardian. We reported on the case at first instance in the [February 2020 Report](#) and upon appeal to the Outer House of the Court of Session in the [September 2020 Report](#). The appeal to the Supreme Court was heard on 18<sup>th</sup> October 2022. Judgment was given on 11<sup>th</sup> January 2023, [\[2023\] UKSC 1](#).

At first instance the court was asked to review the refusal by Glasgow City Council to take into account, in calculating charges to be made, of the full amount of the "disability related expenditure" of Andrew McCue, who has Down's Syndrome and lives with his parents. His mother, Terri McCue, is his carer and guardian. She brought the petition as her son's guardian.

Mr McCue was entitled to community care services from the Council in terms of section 12A of the Social Work (Scotland) Act 1968 and section 5 of the Social Care (Self-Directed Support) (Scotland) Act 2013. The question in the case was whether certain items of regular expenditure incurred by Mr McCue should be taken into account as deductions in calculating his income, in determining whether and to what extent he should pay charges. At first instance, Lady Wolffe concluded that the petitioner had an available alternative remedy in the form of a

complaint or application to the Ombudsman. She accordingly sustained the Council's plea of no jurisdiction. On that point, Lady Wolffe was overruled by the Inner House on appeal. However, Lady Wolffe had also given reasons why she would in any event have dismissed the appellant's claim on the merits. She held that the concession by Mr McCue that he did not challenge the appropriateness and sufficiency of the Council support plan undermined his case on the merits. The Inner House dismissed Mr McCue's appeal on the merits.

The Supreme Court dismissed the appeal and held that Mr McCue's claim failed, though not for the same reasons as the Inner House.

On appeal, the appellant continued to base his case on section 15 and section 20 (read with section 21) of the Equality Act 2010. The principal question under section 15 was whether the Council had treated Mr McCue "unfavourably" because of something arising in consequence of his disability (section 15(1)(a)). Under section 20, the issue was whether the Council had failed to make reasonable adjustments when applying its policy to Mr McCue's circumstances.

The Council's policy was based on a policy document agreed by the Convention of Scottish Local Authorities with a view to achieving uniformity of treatment across Scotland. On unfavourable treatment, the Supreme Court held that by reason of his disability Mr McCue was treated more favourably, rather than less

favourably. In accordance with the policy, costs that he incurred by reason of his disability were allowed in the calculation of whether, and if so how much, he should contribute towards the cost of his community care services. Where in the course of discussions he had demonstrated that some further costs were attributable to his disability in terms of the policy, they were allowed in addition to the original deductions.

By similar reasoning, the appeal concentrated on the way in which the Council, in following its policy, had assessed what it would treat as Mr McCue's disability related expenditure when calculating his available means and, in consequence, the charge that he should pay. Neither the Council's policy document nor the COSLA guidance state what substantive policy the Council would apply when deciding what costs it would treat as disability related expenditure for the purpose of applying section 87 of the Social Work (Scotland) Act 1968, under which the test was whether Mr McCue satisfied the Council "that his means are insufficient for it to be reasonably practicable for him to pay for the service the amount of which he would otherwise be obliged to pay for it". The court accepted that the Council was applying a practice according to which items are rejected if they do not relate to disability, or if – while relating to disability – a person receives a benefit to meet the cost in question, or if they represent discretionary spending and are not necessary to meet the disabled person's needs. The question accordingly was whether the Council's practice put Mr McCue, as a disabled person, at a disadvantage (as regards setting charges for services provided by the Council) in comparison with persons who are not disabled. The court held that it clearly did not, "for the simple reason that the practice only applies to disabled people". The policy does not allow any comparison to be made with the treatment of persons who are not disabled. Alternatively one could say that it

confers an advantage on disabled persons in comparison with non-disabled persons.

All of the above references are to the judgment of Lord Sales, with which the other participating Supreme Court Justices all agreed.

*Adrian D Ward*

### Opposed renewal of guardianship

On 20<sup>th</sup> January 2023 Sheriff C Lugton, at Falkirk Sheriff Court, granted to Falkirk Council renewal of a guardianship, in one of an apparently increasing number of cases where a young adult (in this case, an adult born in 1997) opposes renewal of guardianship. The case is Falkirk Council v D, [2023] SC FAL 4.

The sheriff accepted that for the purpose of the Adults with Incapacity (Scotland) Act 2000, D had a mental disorder. He had a diagnosis of Pervasive Developmental Disorder Autism Asperger's Syndrome, and possible Obsessive Compulsive Disorder. He also had a diagnosis of chronic low weight. D's Asperger's Syndrome was an organic, neurodegenerative disorder, resulting from D's brain development since birth. It is permanent. D had executive dysfunction, and in consequence had problems with directed behaviour, planning, flexibility and responding to changing environments. The sheriff found that D had capacity in relation to simple matters, such as watching television, but not to understand and act in relation to complex matters. He was underweight in relation to his height and age, had poor diet, and lived with his father in a dirty and cluttered property, though not to the extent of creating a health hazard.

Sheriff Lugton went carefully, and in sequence, through the steps required in order to determine the case. Practitioners are likely to find it useful to read all 52 pages of his judgment, and indeed it is to be welcomed that such a written judgment has been issued – a relative rarity in Scottish

practice, compared with the wealth of precedents continuously flowing from the Court of Protection in England & Wales.

This brief report selectively picks out two aspects of interest.

Counsel had submitted that the effect of section 1(3) of the 2000 Act, providing that if an intervention is ordered it should be the least restrictive option in relation to the freedom of the adult, meant that the purpose of the 2000 Act was not to allow intervention on an anticipatory basis: there must be a real need for intervention in an adult's life, and the court should take account of the potential availability of other orders should a future crisis arise. The examples given were compulsory treatment order or an emergency order under the Mental Health (Care and Treatment) (Scotland) Act 2003. However, the sheriff did not accept this argument. He pointed out that the least restrictive option in principle only falls to be applied after it has been decided that an intervention is required. It would not arise if an intervention was not required at the time, and that orders could be sought in future should the need arise. More generally, the sheriff expressed the view "*that the weighing up of risk and probability, together with the assessment of whether a proposed intervention will be beneficial, are inherently fact-sensitive exercises and much must depend on the circumstances of the individual case*".

The other feature of the decision identified for the purposes of this Report as notable is that the sheriff refused to grant a power, sought by the applicant, to determine where D should reside on a permanent or temporary basis. The sheriff noted that D gave evidence that his existing home was his favourite place to be. He also held that he was "*not satisfied that granting the power sought would be a benefit that could not be reasonably achieved without the proposed intervention*". What is surprising, however, is that

there appears to have been no mention of the fact that to have granted that crave would have empowered the guardian to deprive D of his liberty. That aspect of the application appeared to be similar in principle to the decision in Scottish Borders Council v AB, [2019] SC JED 85, on which we reported in the December 2019 Report. The sheriff did point out that if a need to determine residence arose, that could be the subject of an application for an intervention order. However, it is not entirely clear that it was recognised that even where power has been conferred to take action amounting to a deprivation of liberty, the actual exercise of that power requires to comply with the requirements of Article 5 of the European Convention on Human Rights.

Notwithstanding those concerns, my general commendation of this decision, and its potential usefulness to practitioners, still stands.

Adrian D Ward

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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](#).

### 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.

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Our next edition will be out in March. 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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