MENTAL CAPACITY REPORT:
SCOTLAND
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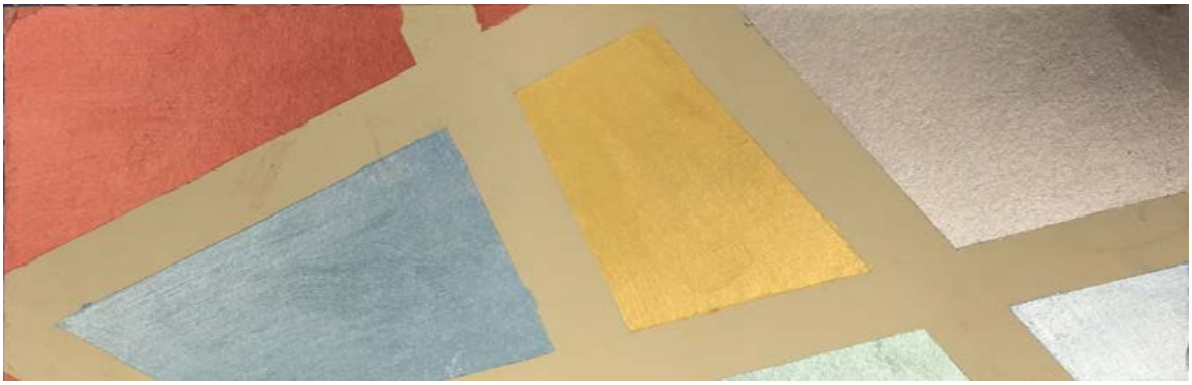

Welcome to the March 2023 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: fluctuating capacity and emotional dysregulation;

(2) In the Property and Affairs Report: the Court of Protection divorce, refreshed deputy standards and relevant legislative developments;

(3) In the Practice and Procedure Report: 'closed hearings' guidance and Forced Marriage Protection Orders;

(4) In the Wider Context Report: covert medication guidance, an updated litigation capacity certificate, the malign influence of Andrew Wakefield, and changes afoot in Ireland;

(5) In the Scotland Report: a Scottish perspective on the Powers of Attorney Bill and implementation of the Scott Report.

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.

This report also marks an important transition, Hayden J having served his term as Vice-President of the Court of Protection and being replaced by Theis J. We hope that our readers will join us in thanking Hayden J for his tireless service during undoubtedly the most tumultuous and difficult years of the Court's life; Alex will certainly never forget some of the meetings of the HIVE group that Hayden J convened in the early months of the pandemic, nor the speed with which Hayden J (together, we know he would want it to be emphasised, with the other members of the judiciary and the court staff), managed to recast the court and its practices to keep it going against all the odds.

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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.

Contents

A dissatisfied beneficiary where an executor was attorney

In recent years situations have arisen with increasing frequency where the same person has been appointed attorney and executor, and after death a beneficiary claims to have reason to suspect that the attorney has acted improperly as attorney in disposing of funds or assets of the granter, diminishing the estate on death to the disadvantage of the dissatisfied beneficiary.

Much of the discussion of this situation has focused upon provisions of the Adults with Incapacity (Scotland) Act 2000. Both the current Public Guardian and her predecessor have adopted the view that their functions of receiving and investigating complaints under section 6(2)(c) of that Act are not exerciseable following the death of the adult – being the adult who was granter of a power of attorney in the case of complaints about a continuing attorney relating to the property or financial affairs of the adult. The view that these provisions apply only where the adult is still alive, and cease to be exerciseable upon the death of the adult, are widely accepted. Section 81 provides that where *inter alia* a continuing attorney and/or a welfare attorney uses an adult's funds in breach of their fiduciary duty, or outwith their authority or power, or after having received intimation of the termination or suspension of their authority or power, they shall be liable to repay the funds so used to the adult's account, with interest. Also widely accepted is the view that this does not help dissatisfied beneficiaries in the situation addressed above. There does appear to be wide support for the view that section 81 should be amended to allow a dissatisfied beneficiary in such a situation to pursue the matter against the former attorney following the death of the adult. That, of course, does not help unless and until amended provisions were to be enacted and to come into force.

The apparently gloomy situation for dissatisfied beneficiaries appeared to have been made gloomier by the decision in *Anderson v Wilson*, [2019] CSIH 4; 2019 SC 271, a case involving such dissatisfied beneficiaries in which it was held that the beneficiaries of a deceased's estate had no title to sue for a debt alleged to be owed to the estate. That view was shared by the Lord Ordinary at first instance in the case of *Lesley Currie against Susan Jane Blair, as Executor Nominate of the late John Currie*, a decision reversed on appeal by the Second Division, Inner House, Court of Session on 20th December 2022, [2022] CSIH 58; 2023 SLT 113).

The difference between *Anderson v Wilson* and *Currie* was a simple one. In the former, the dissatisfied beneficiaries had taken proceedings against the attorney/executor as attorney. It was held that the beneficiaries of a deceased's estate had no title to sue for a debt alleged to be owed to the estate. In *Currie*, it was argued that

accordingly the dissatisfied beneficiary had no right or interest in the composition of the estate: that was for the executor, as executor, to determine. That the attorney, as such, was not required to account for her intromissions to beneficiaries was not only a necessary implication of *Anderson v Wilson*, but also followed from the express terms of the power of attorney, which provided that the attorneys were only bound to account for their intromissions to the granter of the power of attorney. In such a situation, attorneys were only bound to account for their intromissions to the executor(s). That of course created the circularity which has tripped up many dissatisfied beneficiaries.

The difference in *Currie*, however, was that the dissatisfied beneficiary sued the executor as such. It was argued for her that an action calling on an executor to realise and account for an unrealised asset of the estate was not only competent, but the "usual remedy". The executor owed a fiduciary duty, as executor, to the beneficiary as beneficiary in the estate, and could not lawfully become *auctor in rem suam* by refusing to seek an accounting in respect of the actings of himself as former attorney. It was irrelevant that the same individual was both former attorney and executor. That argument persuaded the Inner House, whose opinion was delivered by Lord Tyre.

The facts largely followed the well-known pattern of such cases. John Currie appointed as his joint continuing and welfare attorneys his daughter Lesley Currie, and his stepdaughter Susan Jane Blair. Susan acted as Mr Currie's carer until he entered a nursing home in July 2014. Only Susan acted as attorney. Mr Currie died on 16th January 2015. In his Will, he appointed as executor his stepdaughter Susan, and bequeathed his estate to Lesley and Susan equally. Lesley became suspicious about the apparently low value of her father's estate. She obtained statements which showed payments amounting in total to £72,835.86 during the time from when he entered the nursing home until his death. Lesley averred that her father was a generous but fair man. It was highly unlikely that he would authorise Susan as attorney to spend so much on gifts for herself and her family. It would deplete his own resources in his final years, and would favour Susan and her family over Lesley and her family, to the financial detriment of the latter. In the action, Lesley had sought production of her father's Will. It had been produced by the time of the appeal hearing. She sought decree ordaining Susan, in her capacity as executor, to seek a full account of her intromissions as attorney, or failing that decree for payment of the sum of £72,835.86. Lesley also sought decree ordaining Susan to produce a full account of her intromissions as executor with the deceased's assets and property, and payment of the sum of £69,545.85.

Lord Tyre stated that the court was satisfied that the authorities cited (see his judgment for them): "*adequately vouch the proposition that a beneficiary who claims that the executor has not realised an asset of the estate may competently raise an action calling on the executor to realise and account for that asset*".

He further held that: "*She [Lesley] avers that a debt consisting of intromissions by the attorney [Susan] in breach of her fiduciary duty was owed to Mr Currie prior to death and is now owed to the estate. As a matter of competency and relevancy, she is entitled to seek an accounting from the respondent, in her capacity as executor, in relation to the ingathering and realisation of such an asset. In this context it is irrelevant that the executor is the same individual as the attorney alleged to be the debtor; the executor is sued in the capacity of being the same person in law as the deceased, and not as the former attorney as an individual*".

He later emphasised that: "*In the present case the reclaimer is not attempting to sue the alleged debtor, ie the respondent as an individual in her capacity as the former attorney; she is exercising her right to receive an accounting from the executor. We do not agree with the Lord Ordinary's characterisation of this as permitting an otherwise incompetent action to succeed through the back door. A competent action has been raised against the correct defender*".

The court was not convinced that Lesley was at that stage entitled to insist upon payment by the former attorney to the deceased's estate of the sum specified in the action, or such other sum as the court might determine. Accordingly, the court did not dismiss that second part of the conclusion at that stage. Possibilities included that no account was produced, or that monies which the executor did not intend to ingather were owed by the attorney to the estate. Further action might be competent. Accordingly, in the meantime the court left standing Susan's plea to relevancy in case it might require to be argued on a future occasion.

In my article "Powers of attorney: two essential practice points" in the October 2018 Journal of the Law Society of Scotland, I recommended advising granters against appointing the same individual as both attorney and executor. The document in the *Currie* case is not to be faulted in that respect, as Mr Currie appointed both Susan and Lesley to be attorneys. An argument in favour of appointing joint attorneys is that the risk of malfeasance is reduced, because one can monitor the actings of the other. One imagines that neither Mr Currie nor his adviser anticipated that only one would actually act as attorney, despite the joint appointment, and that the other would only review the actings of her stepsister after the death of Mr Currie.

Adrian D Ward

Powers of Attorney Bill

The Powers of Attorney Bill is a Westminster Private Member's Bill, supported by UK Government, which recently completed its Public Committee stage in the House of Commons. It has yet to reach the House of Lords. For primary coverage of it, see the Property and Affairs section of the Report. It is not referred to in this Scotland section because it takes the opportunity to address major and long-standing difficulties affecting the operability of Scottish powers of attorney elsewhere in the UK, including when presented at branches in Scotland of financial institutions headquartered elsewhere in the UK. We report on it here because of its startling and inappropriate failure to address that situation. Such UK-wide operability is still addressed in section 4, the only section still in force, of the Evidence and Powers of Attorney Act 1940, which is in the following terms:

> *4 Proof of instruments creating powers of attorney.*
> *(1)A document purporting to be—*
>
> *(a). . . . . .*
>
> *(b)an extract of an instrument creating a power of attorney registered in Scotland in the books of council and session; or*
>
> *(c)an office copy of an instrument deposited in the proper office of the Court of Judicature under section forty-eight of the Conveyancing Act, 1881, as it applies to Northern Ireland;*
>
> *shall, in any part of the United Kingdom, without further proof be sufficient evidence of the contents of the instrument and of the fact that it has been so deposited or registered.*

In current practice, generally speaking continuing and welfare powers of attorney under the Adults with Incapacity (Scotland) Act 2000 are

registered with the Public Guardian in accordance with the provisions of that Act. Registration in the Books of Council and Session was in practical terms superseded by the registration provisions of the 2000 Act (which came into force on 2nd April 2001). Registration in the Books of Council and Session is generally only resorted to in the event of particular difficulty, or anticipated difficulty, over operability elsewhere in the UK, or upon presentation to institutions headquartered elsewhere in the UK. To do so leads to additional costs.

As regards operability in Scotland of lasting powers of attorney issued and registered in England & Wales, the position was updated in paragraph 16 of Schedule 1 to the Mental Capacity Act 2005, which reads as follows:

> *Evidence of registration*
>
> *16*
>
> *(1) A document purporting to be an office copy of an instrument registered under this Schedule is, in any part of the United Kingdom, evidence of –*
>
> *(a) the contents of the instrument, and*
> *(b) the fact that it has been registered.*
>
> *(2) Sub-paragraph (1) is without prejudice to –*
>
> *(a) section 3 of the Powers of Attorney Act 1971 (proof by certified copy), and*
>
> *(b) any other method of proof authorised by law.*

The present Bill seeks to do two things affecting Scotland, or of significant interest in Scotland. They raise a question as to whether they would amend Scots law in a devolved area, and engage the Sewell Convention. That question is briefly addressed below.

Firstly, section 2 of the Bill would amend section 3 of the Powers of Attorney Act 1971 to add "chartered legal executives" to those who may certify copies of powers of attorney under section 3 of that Act, which applies to Scotland. "Chartered legal executives" would be added to those authorised to certify copies under section 3 of the 1971 Act. In practice, Scotland's electronic registration systems depend upon certification of copy powers of attorney, following electronic registration by OPG, under section 3 of the 1971 Act. There may be views whether or not it is a good idea to add English "chartered legal executives" to those who may certify copies of Scottish powers of attorney.

Secondly, the Bill would add in paragraph 16 (reproduced above) a new sub-paragraph (1A) covering electronic registration in E & W. It provides that the record in the E & W register will be sufficient proof of the contents of the electronic power or attorney "in any part of the United Kingdom", and that regulations may be made to provide that a document provided by the E & W Public Guardian in a prescribed manner will be evidence of the contents of the instrument and of the fact of registration "in any part of the United Kingdom". In other words, the Bill, and regulations made under it, would provide automatic recognition and enforcement (and thus "operability") of English electronic powers of attorney in Scotland.

According to section 126(4) of the Scotland Act, the devolution of legislative competence in relation to "Scots private law" explicitly includes Scots private international law. Does the Bill engage the Sewell Convention? An argument that it does not can be derived from Devolution Guidance Note 10. It provides that "provisions applying to Scotland and which are for devolved purposes, or which alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers" are the

only Bills that are subject to the Sewell Convention, requiring the consent of the Scottish Parliament. The issue, and the argument that the Sewell Convention is not engaged, depends upon whether any of the provisions of the Bill fall within the requirements of Devolution Guidance Note 10.

Whether or not it does, it is disappointing to note that the Explanatory Notes to the Bill simply assert that: "*No legislative consent motion is required in relation to any provision of the Bill*". There is no mention of the representations from Scotland that equal reciprocal provisions should apply across the UK, and that they should extend to measures such as Scottish guardianship orders (and deputyships in England & Wales). That is the crucial point. It waits to be seen whether Westminster will give priority to its responsibilities as the UK Parliament to the whole UK, or continue to proceed as if it were the legislature for England & Wales only.

The issue was raised in rather vague and general terms by Patrick Grady (MP for Glasgow North) in committee proceedings on Wednesday 1st March 2023. We must wait to see whether in consequence Westminster takes up and addresses its UK-wide responsibilities in this respect.

Adrian D Ward

Implementation of Scott Report

This, in tentative terms, is the first of what may well become a long series of items in this Scotland section tracking the progress towards implementation of the Scott Report. This item is tentative because it does not report any concrete, reportable, action, but rather what appear to be significant trends. It can now be asserted that reasonably promptly following upon completion of the Scott Report, Scottish Government has taken up the massive challenge of moving towards implementation of it. As regards the wide-ranging and fundamental reforms proposed by the Report, the process to legislation and implementation is bound to be lengthy. The Scott Report did not include any suggested draft legislation (compare the draft Incapable Adults Bill annexed to Scottish Law Commission Report No 151 in 1995). The relevant question is that of the anxious motorist who has joined the back of a long traffic queue: "Are we moving forward or are we stationary?". At this stage, one can reasonably assert that we are moving forward.

The Scott Report identified matters for priority. It appears that Scottish Government do recognise the need for legislation, particularly on matters which have for too long languished in a stationary traffic queue, and which have become urgent; the most urgent of them being the need at long last for legislation to regulate deprivations of liberty in terms of Article 5 of the European Convention on Human Rights. Here, early indications are that Scottish Government has its foot firmly upon the throttle and is moving forward as rapidly as is practicable. There have been widespread interactions with various stakeholders. These have become fine-tuned, it would seem, on the question whether there could be initial provision to meet the needs of those whose continued detention in hospital is inappropriate, where there is urgent need for a procedure to authorise lawful prompt transfer to more suitable accommodation. As we have narrated previously in the Report, there appears to be evidence of widespread unlawful discharges from hospital before and during the impact of the pandemic (and still continuing) to care homes without regard to the need for legality, and what appear to be widespread violations of human rights, motivated upon an inappropriate emphasis on "unblocking beds" and demonstrably treating the occupants of

those beds as blockages rather than people with the same rights as others. The question is whether initial legislation would address that situation only, or would aspire in the near future to address the whole need for a full deprivation of liberty scheme. One would observe that it is now longer since Scottish Law Commission reported on the topic in 2014, than it was from the 1995 Scottish Law Commission Report (mentioned above) to the first tranche of commencement of the Adults with Incapacity (Scotland) Act 2000; and likewise that England & Wales have had a deprivation of liberty scheme in force since 2009.

There are worrying aspects still evident in relation to the inappropriate "unblocking beds" pressure. One still sees references to section 13ZA of the Social Work (Scotland) Act 1968 to transfer human "blockages in beds" from hospital to other settings. Section 13ZA is concerned with an adult who lacks relevant capacity. Section 13ZA(2) provides that: "*Without prejudice to the generality of subsection (1) above, steps that may be taken by the local authority include moving the adult to residential accommodation provided in pursuance of this Part*". That provision is not ECHR-compliant. It is generally accepted that it is invalid because it would sanction the violation of ECHR, and thus was not within the competence of the Scottish Parliament. In any event, its use is effectively forbidden by "Guidance for Local Authorities: Provision of Community Care Services to Adults with Incapacity" dated 30th March 2007, because that guidance confirms that: "*Local authorities as public authorities must act compatibly with [ECHR] and the power [under section 13ZA] does not allow steps to be taken which would be incompatible with those rights, including depriving an adult of their liberty in terms of Article 5, ECHR*". The sting in the tail is that this provision lurks in the 1968 Act, not in the 2000 Act, therefore anyone acting unlawfully is not included in the exemption from liability in section 82 of the 2000 Act of appointees acting under Parts 2, 3, 4 and 6 of the 2000 Act if they have acted reasonably and in good faith, and in accordance with the general principles set out in section 1 of the 2000 Act.

Notwithstanding the persistence of some "hangover issues" from the past, such as that question of inappropriate use of section 13ZA, perhaps the most positive news so far is that a consensus among stakeholders seems to be in the early stages of emerging that instead of focusing on past deficiencies, and each acting defensively in relation to its own role, stakeholders need to come together in a broadly cooperative "we are where we are" manner to share issues and solutions, and to support Scottish Government in progressing urgently required solutions (including needs for legislation) as rapidly as can properly be achieved.

Adrian D Ward

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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.

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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