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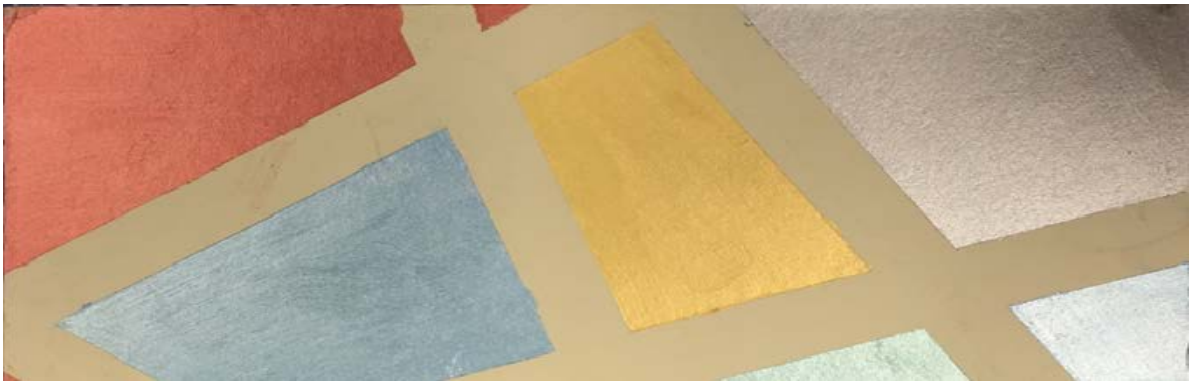

Welcome to the September 2023 Mental Capacity Report, which we think is our largest ever, thanks to judicial hyperactivity over what is usually the (relatively) quiet summer period. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the MHA/MCA interface revisited; belief, diagnosis and capacity, and questioning an independent spirit;

(2) In the Property and Affairs Report: the SRA looks at law firms providing LPA / deputyship services, OPG guidance on completing LPA forms and a shedinar on the MCA and money;

(3) In the Practice and Procedure Report: transparency in committal hearings and on death, and why belief is not the same as proof when it comes to capacity;

(4) In the Wider Context Report: the wider MHA context within which many MCA matters arise, the limits of autonomy in medical settings; litigation capacity under the spotlight in both civil and family courts; and the second of our reports from Ireland as the new Act beds in;

(5) In the Scotland Report: Articles 3 and 2 ECHR in play in the capacity context

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.

We also take this opportunity to bid farewell and thank you to Stephanie David, whose commitments mean that she has to take a step back from the editorial team.

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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

1. Scotland in violation of Article 3 ECHR?

Article 3 of the European Convention on Human Rights is succinct, and best quoted rather than described. It reads: "No-one shall be subjected to torture or to inhuman or degrading treatment or punishment". Unhelpfully for some purposes, it is headed "Prohibition of torture", which can obscure, or at least divert attention from, the four potential combinations of "inhuman or degrading" and "treatment or punishment". A further complicating factor is that the report of the relevant Council of Europe Committee to the United Kingdom in June 2021 appears to report solely in relation to England, excluding the other nations of the United Kingdom. The full title of the report is "Report to the United Kingdom Government on the periodic visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment from 8 to 21 June 2021." This leaves the uncomfortable possibility that inhuman or degrading treatment or punishment, contrary to Article 3, could be occurring "under the radar" in Scotland, in violation of Article 3.

That such is not only a theoretical possibility, lurking in some murky area, has been brought starkly to our attention by press reports of a decision of Mr Justice Paul McDermott in the High Court of Ireland on 29th June 2023. A man identified as "RS" was described as suffering from "a medley of mental health conditions". He was accused of threatening a man with a firearm (contrary to section 16A of the Firearms Act 1968) and assaulting the man by stamping on his head and hitting him with a brick, to the severe injury of that man and to the danger of his life. Scotland's Crown Office sought to extradite RS from Ireland. The court heard that RS would, if extradited, be remanded to prison in Scotland where he would be confined for 22 hours a day with less than three square metres of personal space. Mr Justice McDermott held that RS would in such circumstances have found prison "much more severe" than persons not suffering from his mental health conditions. He refused the extradition request on the basis that if sent to Scotland RS would face "a real and substantial risk of inhuman or degrading treatment".

Adrian D Ward

2. His Majesty's Advocate v Tigh-Na-Muirn Ltd [2023] HCJAC 30

This case involved an appeal by the Crown against the level of a fine imposed on a care home for breach of its statutory health and safety obligations. It is another very sad reminder

of the potential serious consequences of isolation affecting people living in residential care during the pandemic. It involved the tragic death of a 90 year old man, David Fyfe, who had underlying health conditions, including Alzheimer's disease, and who was living in a privately owned residential home that was owned and run by the respondent, Tigh-Na-Muirn Ltd (TNM).

Mr Fyfe had contracted Covid-19 in May 2020 and was therefore isolated in his room at the home to prevent the spread of infection. The home's covid resilience plan, made by THM managers, was updated regularly (in accordance with HSE, Public Health Scotland, Health Protection Scotland, Care Inspectorate, Social Work and Angus Council advice) and was based on the availability of supplies at any given time. However, despite employing health and safety consultants, TNM did not consult them about the resilience plan. Moreover, TNM staff found that the advice was changing daily and official information sometimes confusing or conflicting. Because there were pandemic associated supply issues relating to clinical wipes the resilience plan was altered to include Sterigerm (ammonia) cleaning sanitiser. The resilience plan stated that that isolated rooms would have their own cleaning kits to be kept in each room and not removed. Unfortunately, Mr Fyfe ingested some of the cleaning sanitiser and as a result he developed acute severe airway inflammation and pneumonia from which he died. This was found to be the primary cause of his death.

A local authority investigation found that 'control of substances hazardous to health risk' assessments had been carried out by TNM but these had not covered risk to residents from chemicals. This was because chemicals were not usually left in such a way that residents were exposed to them.

TNM accepted its responsibility and pled guilty to a breach of sections 3(1) and 33(1)(a) of the Health and Safety at Work etc Act 1974. The sheriff court found this to be a serious breach of obligation, and that although the breach was not deliberate and one of omission there was an aggravating factor in that Mr Fyfe was a vulnerable individual owing to his Alzheimer's disease and TNM being responsible for his care. However, the sheriff considered TNM's culpability to be low. This was because:

> *'• The management team did not have any cause to imagine that Mr Fyfe might deliberately or accidentally ingest the cleaning agent;*
>
> *• Genuine efforts were being made in extremely challenges* [sic] *circumstances to respond to and react to a rapidly changing situation and to keep residents and staff safe, although they were inadequate on this occasion; and*
>
> *• The incident was an isolated one.'*

The sheriff was therefore of the opinion that a fine at the lower end of the range of possible sentences was appropriate. She accordingly set the fine at £30,000 reduced to £20,000 because TNM had entered a guilty plea.

The Crown appealed to the High Court of Justiciary against this sentence. Finding in favour of the Crown, the Court sympathised with TNM regarding the very difficult position care homes were in during the pandemic. However, on the facts, it found that, contrary to the sheriff's view, the risk of harm not an isolated incident (as claimed by TNM) but a continuing breach and that TNM's culpability therefore was not low. For this reason, the Court increased the fine to £90,000 reduced to £60,000 because of TNM's guilty plea.

A full reading of the case for its facts and the High Court of Justiciary's reasoning is strongly recommended. It reminds us of the stark realities facing people living in care homes and those responsible for their care during the pandemic, and of the lessons to be learned. Interestingly, however, the Court did not mention or consider Article 2 ECHR (the right to life). This was perhaps because it was considering sentencing relating to statutory offences, but it nevertheless seems unusual given the circumstances and seriousness of this case.

3. AB Report

On 3rd August 2023 the Mental Welfare Commission issued its report on its "Investigation into the care and treatment of AB", available at: Investigation into the care and treatment of AB | Mental Welfare Commission for Scotland (mwcscot.org.uk). We do not seek here to summarise this most significant and important 53-page report, but rather to draw attention to its issue and to recommend that it be read, though we do pick out a few points. We do however seek to outline briefly the circumstances and some particular points, with comments. One cannot better the overview provided by Suzanne McGuinness, the Commission's Executive Director (Social Work) in the introduction to the report at the above link:

> *"This is a very distressing case, where a vulnerable person was isolated from their family by another individual over many years, to their personal detriment. It resulted in increased poor health and an early death. Despite opportunities, no effective intervention which would have changed AB's circumstances was made.*
>
> *"Our recommendations for change cover social work and health care, but they also address the issue of legal authority and power of attorney, recognising that someone who may lack capacity for decision making about their health or welfare needs may be under the undue influence of another person.*
>
> *"It is vital that this report is shared, read and discussed in detail by social work, mental health and general health services across Scotland, and by legal services. We believe there are lessons to be learned across the country and we hope this in-depth report will help raise awareness of the importance of identifying where undue influence may exist and the legislative frameworks which can be used to avoid similar situations in future."*

One would only add the explanation that the person referred to as "another individual" above is identified as CD in the report. AB granted a power of attorney in favour of CD. A solicitor prepared the power of attorney, and certified it on the basis of the solicitor's personal knowledge of AB, without reference to having consulted anyone. That solicitor had represented AB at an appeal against short-term detention five months before preparing the power of attorney document, at which hearing the solicitor would have heard the concerns of a consultant psychiatrist about AB's impaired capacity arising from AB's mild to moderate learning disability, and also concerns about CD's influence on AB. The Commission is clear that the solicitor ought to have sought a medical report on AB's capacity to grant the power of attorney.

In sections 9 and 10 of the report, the Commission makes six recommendations to "NHS A and local authority A". One national recommendation, and ten "learning points", including learning points relating to undue pressure and coercive control; and a learning point specifically in relation to solicitors acting in the granting of powers of attorney, in the following terms:

> *"Solicitors when consulting with clients seeking to grant power of attorney must fully consider their client's capacity to do so, if there is any undue influence or vulnerability and the attorney's ability to fully comprehend their role. The Commission addressed this issue in a report published in 2012 Mr and Mrs D. In response the Law Society of Scotland introduced guidance for solicitors which remains current. The guidance for Rule B1:5 of the Law Society of Scotland Rules notes that whilst the solicitor must satisfy themselves that a client has capacity, "if there is any doubt as to a client's capacity to instruct in a particular case (for example a client may have a profound learning disability), input should be sought from an appropriate professional."*

Further issues arose because the same solicitor wrote to social work, and made complaints to the Health and Social Care Partnership, in each case referring in the headings to those letters to both AB and CD, without making clear for which of them the solicitor was acting. The question "Who is my client?" featured prominently in a series of seminars that I gave for the Law Society of Scotland around the country in the 1990s, and – shortly after passing of the Adults with Incapacity (Scotland) Act 2000 – in paragraphs 2-11 to 2-17 of my book "Adult Incapacity" (W Green/Sweet & Maxwell Ltd, 2003). That question does not appear to have been addressed, nor answered, by the solicitor. It would appear that the solicitor ought to have been aware of potential conflict of interest. If acting for CD, the solicitor should have made clear whether that was CD as an individual, or CD in the role of AB's attorney. The Commission stresses the importance of relevant staff following guidance (including the Commission's own good practice guide "Common concerns with power of attorney") to refer promptly to the Public Guardian any concerns about the granting of a power of attorney.

A further issue that is evident from the report is that relevant staff repeatedly "backed off" in the face of difficulties which they ought to have addressed, and in one respect failed to take steps which it was their Council's duty to take. On my reading of the Commission's report, it seems to me that the conditions in section 57(2) of the 2000 Act for a local authority application for guardianship were met. If so, the local authority had no option about that. There is a clear statutory obligation to apply: "they [the local authority] shall apply under this section for an order". One of the difficulties said to have been encountered by the local authority in proceeding with a guardianship application appears to have been difficulty over access for medical practitioners to prepare the required reports. It is not clear why powers under the Adult Support and Protection (Scotland) Act 2007 were not utilised to overcome that difficulty.

One apparent training need, not listed in the report's recommendations or learning points, is the need for non-legal staff to understand when they should access specialist legal advice, available in-house in most if not all local authorities.

Adrian D Ward

4. Had attorneys complied with s1 principles?

On 16th May 2023 Lord Sandison, in the Court of Session, decided [[2023] CSOH 30] a challenge brought "in substance" by the three children of a Mrs Elizabeth Kaye with reference to a Deed of Variation of the Will of Mrs Kaye's late husband Peter Kaye. On 22nd June 2010 Mrs Kaye had granted a continuing and welfare power of attorney in favour of Mr Kaye and a Mr Johnstone, with a Ms Foster as substitute. On

6th May 2017 Mr Kaye made a Will which appointed Mr Johnstone and Ms Foster as his executors, and in which he bequeathed the residue of his estate to Mrs Kaye if she survived him, whom failing to a charity named "The Scar Foundation". Mr Kaye died on 22nd May 2017 leaving estate in excess of £2.5 million.

The Deed of Variation of Mr Kaye's Will was entered between Mr Johnstone and Ms Foster on the one hand as Mrs Kaye's attorneys, and on the other as Mr Kaye's executors, on 26th March 2019. It provided that instead of Mrs Kaye receiving the monetary residue of Mr Kaye's estate, it should go to Blind Veterans UK. The monetary residue amounted to approximately £2.45 million. Before entering the Deed of Variation, Mr Johnstone and Ms Foster had obtained Counsel's Opinion that they had power to carry out the variation and that it was appropriate for them to do so. For further details of all of this, see Lord Sandison's judgment. For procedural reasons explained in that judgment, Mr Johnstone brought this action as – by then – sole surviving executor nominate of Mrs Kaye, though truly as a means of having determined by the court the objections of the children, who – as described by Lord Sandison – "conceive[d] themselves to be grossly disadvantaged by the terms of the Deed". Mr Johnstone brought the action in his own name as executor nominate of Mrs Kaye against himself as former continuing and welfare attorney for Mrs Kaye, and himself as executor nominate of Mr Kaye, and Blind Veterans UK.

Lord Sandison held that entering the Deed of Variation was within the powers of Mrs Kaye's attorneys, and that they were not in breach of their fiduciary duties. On the question of "benefit" under section 1(2) of the Adults with Incapacity (Scotland) Act 2000, Lord Sandison held that Mrs Kaye's attorneys had complied with that requirement. He narrated that:

> *"It was common ground at the debate that the benefit referred to in the subsection need not be financial, and that a benefit in the sense of having one's apparent wishes while capax fulfilled might well suffice."*

He likewise held with reference to section 1(3) of the 2000 Act that the actions of the attorneys complied with the requirement that it should be the least restrictive option in relation to the freedom of the adult, consistent with its purpose. Section 1(2) is qualified: "the person responsible for authorising or effecting the intervention is satisfied …". Section 1(3) is not. Lord Sandison pointed out that the requirement of s1(3) "is an objective matter for the court and not the attorneys to determine". For reasons explained in his judgment, Lord Sandison held that the pursuers' assertion that the Deed of Variation was contrary to the requirements of section 1(3) failed.

In relation to section 1(4), Lord Sandison upheld the criticism that there should have been consultation in terms of that section by the attorneys before they decided to execute the Deed of Variation. He refers to Mrs Kaye's "eight nearest relatives" (an impossibility – see item 6 of this Report), but he nevertheless directly identifies the "real issue" here as being:

> *"whether the presumed antipathy of those relatives to the proposed Deed of Variation (given that it would, subject to the incidence of inheritance tax, deprive them of a share of £2.4 million) and the supposed conflict of interest to which that situation is said to have given rise, makes it reasonable for Mrs Kaye's attorneys not to have sought their views"*

He held that it did not. He pointed out that:

> *"Section 1(4) plainly contemplates that the views of the relatives may be of some moment in coming to the decisions to be made, and some cogent factor (such as clear estrangement or alienation from the adult, or incapacity or relevant vulnerability on the part of the relative) would require to be present to make obtaining those views unreasonable. The extent to which any views expressed may be thought to be coloured by self-interest is something that the attorneys are entitled to take into account in coming to what are their own decisions as to whether to proceed with the proposed intervention or some variant thereof; presumed self-interest in the views is not in itself an adequate reason for not seeking them."*

Nevertheless, he concluded that in the circumstances of this case, and for reasons explained in paragraphs [41] – [43] of his judgment, while there had been a failure to comply with section 1(4), that did not warrant reducing the Deed of Variation because:

> *"the equities of the situation point firmly in favour of permitting matters to remain where they stand, rather than unravelling a position that cannot be remade on account of a clear but practically inconsequential failure to comply with one of the general principles of the 2000 Act."*

Possible criticisms of the decision are that Lord Sandison narrated that "Mrs Kaye was diagnosed with dementia in 2016" but not whether there was any evidence before him as to whether she lacked relevant capacity, or the ability to express (if need be with assistance) her wishes and feelings in the matter, at the time when the attorneys decided to execute the Deed of Variation. It would in addition have been helpful to have known what was the trigger for bringing the relevant powers under the power of attorney into force, and whether the trigger provisions had been fulfilled.

Adrian D Ward

5. Mother representing adult?

A decision (*KT v Principal Reporter* [2022] CSOH 80, 2023 SLT 747) by Lord Brailsford in the Court of Session on 28th October 2022, reported in Scots Law Times on 4th August 2023, seems remarkable, all the more so that it follows previous authority.

The decision of a Children's Hearing had the effect of severing all contact between two siblings, KT (aged 16 and thus an adult) and DJT (a child). The mother of KT and DJT appealed unsuccessfully to Hamilton Sheriff Court against the outcome of the Children's Hearing. KT then sought leave to bring a judicial review against decisions of sheriffs at Hamilton. Lord Brailsford refused that application.

KT's application founded on decisions of the sheriffs in Hamilton that the mother's appeal should not be intimated to KT, and that the decision at Hamilton to sever contact between KT and KT's sister DJT was made without KT's participation. It should be noted that the mother had no authority (by way of power of attorney, guardianship or intervention order, or otherwise) to represent KT in any proceedings. Scots law has no provisions for automatic representation of an adult by someone related to the adult, such as does exist – for example – in Austria, Czech Republic, Norway, Spain and Switzerland. Lord Brailsford nevertheless held:

> *"that KT's mother, also the mother of DJT the subject of the appeal, had rights to participate in the appeal to the sheriff and was therefore able to address the wider interests of her family, including the question of inter sibling contact*

> *between KT and DJT. Second it was not disputed that KT's mother's grounds of appeal did discuss the merits of sibling contact. Moreover the mother's grounds of appeal did contain material relative to KT and contact with her sibling."*

Lord Brailsford relied on *DM v Locality Reporter*, 2019 SC 196 that compliance with Article 8 of the European Convention on Human Rights "does not necessarily require personal attendance by a sibling at the hearing", and that failure to intimate to KT was within the discretion of the Children's Hearing under the Children's Hearings (Scotland) Act 2011, and under the relevant rules of court (in Part VIII of the Act of Sederunt (Child Care and Maintenance) Rules 1997).

However, the fact that something was technically competent does not mean that it was proper or lawful. The sibling excluded from personal attendance in the DM case was a child, aged 12 at the time. KT was an adult. His mother had no authority to represent his position. Article 6 of the European Convention reads (edited):

> *"1. In the determination of his civil rights … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

In Scotland, that is an absolute right from which neither legislation by the Scottish Parliament, nor rules of court, nor a judge in any court, may derogate. It can hardly be argued that all rights of contact between KT and his young sister DJT did not address KT's civil rights. The simple fact is that the ultimate determination of the matter by the court in Hamilton proceeded without intimation to him, and without his participation either personally or through anyone with authority to represent him.

(Lord Brailsford is chair of the Scottish Covid-19 Inquiry, which was formally opened on 28th August 2023.)

Adrian D Ward

6. "Nearest relative" in the 2000 Act

An application by Renfrewshire Council to have its chief social work officer appointed welfare guardian to the adult "HS" was unopposed and successful, but nevertheless resulted in an appeal to the Sheriff Appeal Court because of a dispute involving HS's three children about who, if anyone, should be nearest relative. The decision of the Appeal Court was delivered by Sheriff Principal S F Murphy KC on 2nd June 2023 [SAC/2023/PAI-AW77-21]. The identity of the other members of the court is not disclosed, and at time of writing is not available on the scotcourts website. "Headline points" likely to be of general interest include these:

a. The Appeal Court held that only one person could be nearest relative in terms of the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act"). Two or more persons cannot jointly hold that role. That issue did not feature to any major extent in this particular case. Sheriff Principal Murphy narrated that: "There was some discussion before the sheriff, less so in the appeal" on this point. He nevertheless confirmed the Appeal Court's agreement with the conclusion of the sheriff at first instance that, for reasons at paragraph [29], "the plain language of the Act indicated that it was a position to be held by one individual only". This clarification is likely to be helpful in the future. It was arrived at for the reasons given in paragraph [29], and would appear to be unobjectionable.

b. This case shares a theme also with item 4 in this Report of general interest regarding

provisions of the 2000 Act relating to consultees specified in section 1(4)(b), (c) and (d) of the 2000 Act. In relation to any intervention under the Act, being an intervention such as is described in section 1(1), account must be taken of the views of each of them "in so far as it is reasonable and practicable to do so". The present case considered provisions regarding the nearest relative [section 1(4)(b)] and "any person whom the sheriff has directed to be consulted" [section 1(4)(c)(ii)] (item 4), but did not address the equally relevant provisions concerning other persons appearing to have an interest [section 1(4)(d)].

c. This case also shares with item 5 troubling issues about whether assumptions may be made in any proceedings about the views of an adult without involvement of that adult, or of someone explicitly empowered to represent the adult.

d. The Appeal Court clarified the ways in which an application with regard to the nearest relative may be made under section 4 of the 2000 Act. Section 4(1) authorises the Court of Session or the sheriff to grant certain orders with regard to the nearest relative. If the adult to whom the application relates, or any person claiming a relevant interest, so applies (and only if such a person so applies), the court may make an order that specified matters should not be disclosed or intimated to the nearest relative [section 4(1)(a)]; that the functions of the nearest relative shall (during the continuance in force of the order) be exercised by a person other than the person defined as "nearest relative" in section 254 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act"), and instead by the person who would otherwise be the nearest relative in terms of that definition, if in the opinion of the court that other person is a proper person to act as the nearest relative, and is willing so to act [section 4(1)(b)]; or that no person shall, during the continuance in force of the order, exercise the functions of the nearest relative. These provisions apply only to exercise of the functions of the nearest relative under the 2000 Act, thus not affecting exercise of functions under the 2003 Act. Upon application by such a person, the court may subsequently vary an order granted under these provisions [section 4(3)]. Upon an application under section 4(1), the court may make the order applied for or may instead make one of the other orders permitted by section 4(1). In the present case the court considered whether making an application under section 4 always required a Summary Application in terms of section 2(2) of the 2000 Act. The court held that application could also be made by motion in existing proceedings (the application in the present case having been made by motion in the course of the guardianship proceedings). The court referred to Rules 2.30 and 2.31 of the Summary Application Rules providing that (except where the sheriff otherwise directs) any motion relating to a Summary Application should be made and regulated in accordance with Chapter 15 of the Ordinary Cause Rules (Rule 2.30), and that the sheriff should make such order as the sheriff thinks fit for the progress of the Summary Application insofar as it is not inconsistent with section 50 of the Sheriff Courts (Scotland) Act 1907 (Rule 2.31). The court thus held that the sheriff has very wide powers to consider any motion relating to a Summary Application, and to make such order as the sheriff thinks fit for the progress of the application. That is what the sheriff

had done in the present case (see below). It was correctly done.

Beyond these points of clarification, this case is more startlingly notable for what was not done by the Appeal Court (or, apparently, the court at first instance), or not insisted upon, than what it did do. But first, a brief identification of parties and narration of the facts and issues in this particular case is appropriate.

As to the parties, HS was described as an adult aged 95, suffering from dementia, and resident in a care home. Surprisingly, it is not narrated in the decision, though presumably established in evidence before the court, that HS lacked capacity relevant to the matters before the court. The applicant for the guardianship order was Renfrewshire Council ("the Council"). The adult had three children, all daughters: JM the eldest, and the nearest relative of HS in terms of the definition imported into the 2000 Act from the 2003 Act; LM, described in the decision as the first interested party and appellant; and KG, described as second interested party and respondent. Potentially confusingly, the decision refers in paragraph [2] to "the interested party", without distinction, but it is clear that this must have been a reference to LM, the first interested party. The Council, LM as first interested party and appellant, and KG as second interested party and respondent, were all represented before the court. HS and JM neither appeared nor were represented.

Issues arose among the three daughters over who should exercise the functions of the nearest relative (the court, inaccurately, referred to "nomination of one of them as HS's 'nearest relative'"). LM moved the court either to nominate her to be nearest relative jointly with JM, or else to be appointed as a consultee in terms of section 1(4)(c) of the 2000 Act. KG made a counter motion that no-one be appointed to exercise the role of nearest relative. The sheriff, having considered that there was a history of conflict among the sisters with regard to HS's welfare to an extent which had sometimes compromised her day-to-day care, refused both motions, and (again in the words of the Appeal Court) "declined to appoint anyone as the nearest relative" or as consultee, meaning, one must presume, that the sheriff applied the option of ordering that during the continuation of that order no person should exercise the functions of the nearest relative.

The Appeal Court summarised LM's grounds of appeal as being (i) the sheriff erred in law by allowing KG's oral motion "to remove JM as nearest relative without intimating the motion to JM, which was iniquitous"; (ii) the sheriff erred in law "in removing the nearest relative by failing to consider the benefit to the adult and failing to apply proper weight to the protective benefit to the adult"; and (iii) the sheriff erred in law "by failing to appoint the appellant either as nearest relative or consultee, for the protection of the adult's rights".

The arguments before the Appeal Court are narrated in paragraphs [3] to [11], confused by grouping "argued for the respondent" and "argued for the second interested party" under separate headings when KG was both second interested party and respondent. Regarding (i), the challenge to the procedure by oral motion was dealt with as above, but it is difficult to see how the argument concerning failure to intimate that motion to JM was competently dismissed. That concern also applies to (ii).

It is relevant to read in full the Appeal Court's narration of the sheriff's reasoning, and of the Appeal Court's own reasoning and conclusions, but for the purposes of the concerns expressed below one might focus upon paragraph [28] of the Appeal Court's decision, which is in the following terms:

"The sheriff has set out his reasoning in the note attached to his interlocutor. He was provided with reports from two medical practitioners and a mental health officer ("MHO") in connection with the guardianship application. All three reported that disagreements between the adult's daughters had contributed to her decline and that they had been obstructive in her care at times. The MHO had concluded that she was unable to support the appointment of any of the siblings as their mother's guardian on the basis that their ongoing conflict 'would continue to impact on the care and support of the Adult' (Sheriff's note, paragraphs 27 – 30). The sheriff further traced the history of the dispute and its detrimental effect upon the care of the adult as noted by the social workers who had been involved in the case {Sheriff's note, paragraphs 32-35). He concluded that this information was relevant to his decision in respect of the issue of nearest relative as well as to the issue of guardianship {Sheriff's report, paragraph [36]). He was correct to do so as the information was clearly relevant to both. At paragraph [37] of his report he noted three recent instances in which the issues among the siblings had led to disputes over everyday decisions over arrangements within their mother's care home. The sheriff concluded, at paragraph [38]:

> *'This sorry state of affairs has left me to conclude that to have any of the sisters in the role of nearest relative presents risks to the wellbeing of the Adult'.*

"In the light of the difficulties reported by the medical and care professionals that conclusion is a reasonable one. The sheriff can only make an order where he is satisfied that it will benefit the adult. He could not be so satisfied in relation to the specification of any of the adult's daughters as the nearest relative on account of the material which had been placed before him and to avoid any further difficulties of the kind identified it was reasonable for him to conclude that an order under section 4(1)(c) that no person should exercise the functions of the nearest relative was appropriate in this case as it would benefit the adult by ending the prospect of further disruption."

In addition, the Appeal Court held that JM "was aware that her younger sister LM was seeking to take over the role of nearest relative from her" by reference to the email quoted later. The inferences that the Appeal Court drew from that email are also as described below.

All of the foregoing is predicated upon a proper understanding of the role of nearest relative, and the roles of consultees generally, under the 2000 Act. The views of the nearest relative must be taken into account in relation to any intervention under the Act "in so far as it is reasonable and practicable to do so". The same applies to all the other consultees under section 1(4)(b), (c) and (d). Beyond such consultation, the role of the nearest relative includes the following. An application for authority to intromit under Part 3 must give particulars of the nearest relative, to whom the application must be intimated by the Public Guardian [s27(1)(b)]. Managers of establishments must intimate to the nearest relative their intention to have a resident medically examined with a view to managing that resident's affairs under Part 4 [s37(3)]. In relation to procedure under Part 4, the nearest relative is entitled to require production of relevant records [s41(f)]. The nearest relative may consent to research for the purposes of s51(3)(f) and (3A) (in the case of s51(3)(f) where there is no guardian or welfare attorney with relevant powers). The Public Guardian must intimate to the nearest relative an application for discharge of a financial guardian, and the nearest

relative is entitled to object and to be heard [s72(2)]. Likewise, applications to the Public Guardian, Mental Welfare Commission or local authority for recall of a guardian's powers, or the intention of one of those authorities at its own instance to recall such powers, must be intimated to the nearest relative, who is entitled to object and to be heard [s73(5)]. An application to the Public Guardian for consent to dispose of accommodation must be intimated by the Public Guardian to the nearest relative [Sch. 2, para 6(2)]. Insofar as relating to HS's property and financial affairs, all of these functions could be relevant. Some, but only some, would not be relevant in matters concerning her personal welfare insofar as within the powers of the welfare guardian appointed, for so long as that appointment endured. It is reasonable to see the nearest relative as a conduit by which information may be given to an adult's family and representations may be made. If an adult has no nearest relative, the benefit of all of these provisions would be lost. Nowhere do either the sheriff at first instance or the Appeal Court appear to have determined that there was no potential benefit to the adult in having a nearest relative, in relation to these provisions. Nowhere is it narrated that either court sought to ascertain whether, faced with the prospect of no-one having these roles for the benefit of their mother and themselves, they might have been motivated to resolve the squabbles among themselves. That is a course to my knowledge taken by some sheriffs, expert in this essentially inquisitorial jurisdiction, where it seemed necessary to clarify the possible results of parties continuing their squabbles.

As regards the obligation to consult in terms of section 1(4)(b), (c) and (d), the nearest relative's status is precisely the same as other consultees. They include, under section 1(4)(d), any person appearing "to have an interest in the welfare of the adult or in the proposed intervention". The distinction between persons claiming an interest and persons having an interest is relevant. The term "person having an interest" is not defined in the 2000 Act, nor in regulations made under the Act. For the reasons given in paragraph 14-59 of "Adult Incapacity" (Ward, W Green, 2003), it could mean "any relative" (on the basis of old authority there cited), or a person "close to an adult", and which might be "a close relation of the adult, or the person who has lived with, or cared for or about them, over a significant period" (again, see sources quoted in paragraph 14-59). In any event, in the present case HS's three children clearly were and are, in terms of section 1(4)(d), all persons having an interest, and known to those responsible for "authorising or effecting" any interventions in relation to HS as having an interest. In practical terms, in relation to all consultation obligations under section 1(4), whether any one of them, or none of them, should have the functions of nearest relative is irrelevant. There is no provision in the Act explicitly allowing close relatives to be deprived of that function. It is arguable that this could be done in relation to a particular, specified person who would otherwise require to be consulted, in specified matters, by an order under section 3(3) of the 2000 Act, but that would have to comply with the section 1 principles, and was not something that was sought in the present case.

Paragraph [28] of the Appeal Court's judgment is quoted in full above. It fails to relate to the status of the daughters as consultees in terms of s1(4)(d), or how the difficulties might be ameliorated if any one of them, or more of them, should in addition have the status of consultee under s1(4)(b) or s1(4)(c). In particular, it is difficult to see how any of the orders sought by any of the parties, or the order made by the sheriff, could have had any impact upon the reported difficulties: certainly, that is not answered by the judgment of the Appeal Court. A direction to those required to consult under

s3(3), setting out thresholds for when it would not be reasonable to consult at all, could perhaps have achieved what the proceedings as conducted were destined not to.

Paragraph [28] of the Appeal Court decision appears to conflate the functions of a nearest relative, and of consultees generally, with the quite different functions of a guardian, to which they bear no similarity, and to fail to consider the distinctive roles of a nearest relative only, and the roles of all consultees.

What is certainly essential is that if conflicting views exist among members of an adult's family, the person effecting or authorising a proposed intervention needs to know about them. Misunderstanding of the role of the nearest relative however extends further.

The Appeal Court asserts in paragraph [1] that the function of nearest relative "had previously been exercised by the adult's eldest daughter, JM". It is not identified what functions were previously so exercised, or whether any of them were previously exercised at all. It also appears that JM, and possibly the other daughters of HS, had no understanding of what were the functions of a nearest relative. Much was made of an email dated 12th August 2021 from JM to LM, in the following terms:

> *"To whom it may concern,*
>
> *"I believe that my mother (named above) would have wanted me, her eldest daughter, to look after her affairs. I justify this by pointing out that she entrusted me with her finances by adding my name to her bank account to act on her behalf.*
>
> *"Unfortunately due to my ill health I am not in a position to look after my mother as well as I would like to and believe that my mother would want my sister [LM] to take care of her affairs as she is her second daughter and next in line as next of kin."*

What is clear from this is that JM evidently thought that the role involved looking after her mother, looking after her affairs, and being entrusted with her finances. None of these are relevant to the role of nearest relative. JM appears to have had no understanding that the role of nearest relative was limited to that of consultee, together with the specific additional roles explained above. She had no concept of those roles, and there is no evidence that she considered whether or not she was a suitable person to continue to have those roles. Surprisingly, that misunderstanding appears to be amplified, rather than identified, in the sentence with which the Appeal Court followed narration of the email:

> *"This message clearly indicates that JM was aware that LM was seeking to be placed in charge of their mother's affairs and that she supported that application because she felt that she herself was not capable of doing so on account of her own ill health."*

This also covers the Appeal Court's conclusion on the criticism that no indication was given to JM that she might be removed, and that to do so without intimating to her was iniquitous. Given that JM evidently had no understanding of what the role was, it is difficult to understand how the Appeal Court could assert that JM *"was aware that the question of the nearest relative was a live consideration before the court and she did not enter process when she had the opportunity to do so."*

These concerns extend all the more strongly to the proposition that HS should be deprived of the benefit of having any nearest relative at all.

In these matters it is difficult to see how either the sheriff at first instance or the Appeal Court

can be said to have complied adequately with the section 1 principles, or with Articles 6 or 8 of the European Convention, in this essentially inquisitorial rather than adversarial jurisdiction, all of these being binding upon the court regardless of submissions made to the court, and any omissions in evidence placed before the court. In terms of section 1(6) an "adult" means any person who has attained the age of 16 years, and section 1(1) requires compliance with the section 1 principles in relation to any intervention in the affairs of an adult under or in pursuance of the 2000 Act. Article 6 of the Convention requires procedural fairness in relation to, *inter alia*, a determination of JM's civil rights, and Article 8 prohibits any interference by a public authority in exercise of any person's right to respect for private and family life "except such as is in accordance with the law" or for other exceptions not relevant here. "In accordance with the law" includes compliance with the section 1 principles. For further understanding of the position, see my article "Two 'adults' in one incapacity case?: thoughts for Scotland from an English deprivation of liberty decision" (2013 SLT (News) 239-242). It is not open to any court randomly to dispense with intimation "to an adult". The Parliament provided a specific mechanism for doing so, therefore a court should not bypass that mechanism. The mechanism is provided in section 11. It was not utilised in this case.

Even more startling than the failure to ensure that section 1 and Articles 6 and 8 were adequately complied with in relation to JM, is the failure to have done so in relation to HS, undoubtedly "the adult" at the centre of these proceedings. Having regard to the huge amount of work done in recent years on the obligation of states under Article 12.3 of the UN Convention on the Rights of Persons with Disabilities, coupled with the clearly stated intention of the Scottish Parliament to incorporate the provisions of that provision into Scots law (and the presumption meantime in favour of interpretation in accordance with international obligations), it must be virtually inconceivable that HS should never have had at least any past wishes and feelings relevant to these proceedings. In terms of section 4(1)(a), the obligation to ascertain and take account of these is absolute. It is not qualified "in so far as it is reasonable and practicable to do so", in contrast to the other provisions of section 1(4). Regardless of the past, there appears to be nothing narrated in the Appeal Court decision to indicate that HS would not, even then, supported if necessary by the absolute obligation under section 1(4) to ascertain her wishes and feelings "by any means of communication", to have any views in the matter, which ought to be placed before the court. There is no narration that either the sheriff at first instance or the court complied with the obligation under section 3(4) to consider whether it was necessary to appoint a safeguarder.

We understand that an application by JM seeking leave to appeal further to the Court of Session was made but refused.

Adrian D Ward

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Conferences

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

Alex is leading a masterclass on approaching complex capacity assessment with Dr Gareth Owen in London on 1 November 2023 as part of the Maudsley Learning programme of events. For more details, and to book see here.

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 October. 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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