



Welcome to the July 2026 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: Permission to appeal granted in *Townsend*; post-AGNI guidance; and a new Guidance Note on Capacity for Care Providers
- (2) In the Property and Affairs Report: Statutory wills; charging for being an appointee; and guidance on assessing financial capacity
- (3) In the Practice and Procedure Report: Court of Protection and child deprivation of liberty statistics; court fees rising; reasons challenges in the Court of Protection; medical treatment cases – whether to issue, and the consequences of waiting too long
- (4) In the Mental Health Matters Report: EU Recommendation of the Committee of Ministers to member States on respect for autonomy in mental healthcare
- (5) In the Children’s Capacity Report: A CAMHS psychiatrist’s view on child deprivation of liberty cases – and what interventions can help to break the ‘vicious cycle’ of restrictions and institutionalisation
- (6) In the Wider Context Report: Adult social care reform; the Muckamore Abbey Inquiry Report is published; and what becomes of solicitors whose clients lacked capacity
- (7) In the Scotland Report: Circumvention and undue influence

A reminder that that whilst Chambers have launched a new and zippy version of our [website](#) which may look unfamiliar, all the content that you might need – our Reports, our case-law summaries, and our guidance notes – can still be found via [here](#).

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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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Circumvention and undue influence

A helpful re-statement of the requirements to establish facility and circumvention, and to establish undue influence, has been provided by Sheriff A F Deutsch in the case *Allan Scott v Lorna Reeves and others*, [2026] SC GLA 57.

Mrs Ruby Scott, a widow, died on 14th March 2021, aged 77, survived by five adult children. She had subscribed an “original Will” on 14th October 2011. It left her estate equally among her son Allan, her daughter Lorna, and her daughter Jacqueline. It is narrated that she was diagnosed with vascular dementia in September 2018. On 21st February 2019 she subscribed a power of attorney conferring welfare and continuing powers upon her daughter Lorna Reeves. Following Mrs Scott’s death, Allan commenced his action seeking production and reduction of a second Will. As the sheriff put it: *“The second Will bears to have been signed on 25 April 2019. It could not have been attested any earlier than November 2019.”* The significance of that difference would appear to be that Mrs Scott’s capabilities were declining markedly and rapidly. Having heard and considered evidence, Sheriff Deutsch concluded that: *“The second Will was obtained from the deceased [Mrs Scott] by the first defender [Lorna] through circumvention and undue influence for the first defender’s own benefit”*. He ordered production and reduction of the Will.

Beyond the specific facts of the case, Sheriff Deutsch’s judgment is interesting for the passage on pages 6 – 8 (paragraphs [3] – [9] of the note to the judgment). That passage does not develop the law. It is however a helpful statement of the current law on facility and

circumvention, and on undue influence. The deceased’s capacity was not put in issue. One might surmise that the advice to Allan as pursuer may have taken account of the adage that it is easier to prove a positive than to prove a negative – in this case, to prove the positives that there was facility and circumvention, and also undue influence, such as to warrant reducing the second Will; than to prove the negative that Mrs Scott lacked adequate capacity to grant it. Such categorisations can however overlap: for example, the Mental Welfare Commission pointed out that a person may lack capacity to recognise and/or resist exercise of undue influence, in its report on “An investigation into the response by statutory services and professionals to concerns raised in respect of Mr and Mrs D” (published 13th February 2012). Where lack of adequate capacity can be, and is, established, the outcome is clearcut: in Scots law, the purported act or transaction in question is void. Potentially vitiating factors such as facility and circumvention, or undue influence, render the act or transaction voidable, necessitating careful enquiry not only into whether such factors existed, but as to their consequences: in the present case, the question was whether Mrs Scott subscribed a second Will which she would not otherwise have subscribed.

Facility and circumvention

Sheriff Deutsch summarised the requirements at [5]:

“To succeed with his plea of facility and circumvention the pursuer must establish three elements. Firstly, that the deceased was facile, secondly that she was pressurised to make the new will by circumvention and thirdly lesion, which

simply means harm or loss. These elements are to be looked at together, not compartmentalised. The strength of the evidence in relation to one matter may compensate for the weakness of proof upon other matters. (Mackay v Campbell 1967 SC 53 at 61). In a case such as the present, there is no requirement for any separate proof of harm having been caused, the very fact that a new will was granted would be sufficient (Pascoe-Watson v Brock's Executor 1998 SLT 40 at 47; Smyth v Romanes's Executors 2014 CSOH 150)."

Sheriff Deutsch quoted from *Smyth* that improper pressure and undue circumvention could be *"direct, forceful and overpowering"* or *"more subtle and insidious, working by solicitation or importuning"*. Possible, but not individually necessary, elements in circumvention could be fraud, bullying or browbeating. Facility is a spectrum. *"If a person with a weak and pliable mind ... is pushed or led by fraud, force or solicitation to do what he would, or might, otherwise have resisted doing had his mind been stronger, then his act can be reduced by the court."*

Where "facility or weakness of mind" is proven at the time when a person acts or transacts in favour of the alleged perpetrator, fraud or circumvention may be assumed *"without the need to prove any specific types of circumvention"*.

The sheriff addressed the requirement for lesion (harm) later in the judgment, at [40]: *"In the present case there is no requirement for proof of lesion; the very fact that a new will was granted is sufficient evidence of harm."*

Undue influence

Sheriff Deutsch quotes selectively from authorities as to the essential nature of undue influence, though this commentator would tend to favour the dictum of Lord Guthrie in *Forbes v Forbes' Trustees*, 1957 SC 325 at 333, that there

must be proof of "a fiduciary or quasi-fiduciary relationship" between the parties, enabling one to exert a dominant influence over the other. In assessing alleged undue influence, Sheriff Deutsch made two significant points. Firstly, in the present case, Mrs Scott had not received independent advice:

"Independent advice is important because, if independent advice was not made available, undue influence will be inferred unless the defender can show that the position of the granter was as good as if he had received independent advice Smyth v Romanes's Executors." [8]

Secondly:

"Once it has been proven that there existed a relationship in which one party had the dominant or ascendant influence, the pursuer must go on to prove that the party in the position of trust and influence has abused his position or the power that the position gives him (Broadway v Clydesdale Bank plc (No 2) 2003 SLT [26])." [9]

Certification of the power of attorney

There appears to be an unexplained gap in the narrative provided by the sheriff's Findings in Fact. In Finding (21), on page 4 of the judgment, the sheriff found that:

"In the period from the beginning of 2018 until the death of the deceased [Mrs Scott] the first defender [Lorna] was in a position of dominance over her both in relation to her finances and her physical and medical care."

That was therefore the position when the power of attorney in favour of Lorna was subscribed on 21st February 2019. In terms of Finding (15):

"Annexed to the power of attorney is a certificate given by the deceased's consultant psychiatrist to the effect that he

was satisfied that the deceased understood the nature and effect of the power of attorney."

It seems reasonable to conclude that the certificate referred to must have been the "single certificate" incorporated in the power of attorney document in accordance with section 16A of the Adults with Incapacity (Scotland) Act 2000 certifying the matters set out in sections 15(3)(c) and 16(3)(c) of that Act. As well as certifying capacity, as narrated in Finding (15), the consultant psychiatrist must also have certified that he had no reason to believe that Mrs Scott was "acting under undue influence or that any other factor vitiated the granting of the power". Given that no party called the consultant psychiatrist to give evidence, and that no written record was produced as to the basis on which the consultant psychiatrist considered that he could properly certify absence of undue influence or any other vitiating factor (which would encompass *inter alia* facility and circumvention), it is surprising that the judgment does not explain why the court neither enquired about the existence of such a record, and required it to be produced, nor sought attendance of the consultant psychiatrist so that the consultant psychiatrist could be examined (or cross-examined) as to the basis on which the consultant psychiatrist considered that the certificate could properly be granted.

UN CRPD

The UN Convention on the Rights of Persons with Disabilities ("CRPD") is not mentioned or discussed in the judgment. Article 12.4 could be said to accommodate circumstances such as arose in this case, in the generalised wording appropriate for international instruments, in that Article 12.4 requires respect for "the rights, will and preferences of the person" but protection from "conflict of interest and undue influence".

In a future similar case, a court might consider it appropriate to explain its conclusions not only by reference to the long-established criteria

explained by Sheriff Deutsch, but also in relation to the intersection of the CRPD requirements for respect and protection. In the case of Mrs Scott, was her subscription of the second Will not an exercise of her will at all? If so, was the second Will void rather than voidable? Did the outcome equate to a finding of incapacity? If subscription was an exercise of her will, is the outcome to be explained on the basis that where principles are in conflict, it is for the court to strike a balance in the light of the circumstances of each individual case, as they might be found by the court to be proven; so that no one principle can be allowed to prevail in any absolute way?

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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 also does 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](#).

Neil's training dates are available 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 September. 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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