

An introduction to Scottish adult incapacity law (1)

Introduction

Welcome to Scots law! Please leave behind at the border that cheap phrasebook which suggests that if you master the different terminology, everything will be much the same as in England and Wales. It isn't. Yes, "mental capacity law" can be translated to "adult incapacity law", but the significant differences become apparent as soon as you learn that a "best interests" test was explicitly rejected for Scotland's principal statute, the Adults with Incapacity (Scotland) Act 2000 ("2000 Act") – the first major statute enacted by the (then) brand new Scottish Parliament, following many years of careful preparation and a major co-ordinated public campaign to bring the need for such law reform at long last to the top of the political agenda.

Scots law is not part of the common law family. It is a civil law system, meaning that Roman law is not a source, rather a basis; a position reinforced by major influence from French, then Dutch, law. Only in the last three centuries has English law taken over as the dominant outside influence, to the extent that Scots law is sometimes described as a hybrid system. However, the fundamental differences persist most strongly in the areas of law already well developed prior to the Union of the Parliaments in 1707, including the areas of private law relevant to adults with impairments of capacity.

What do these differences mean? An example is that in Scots law a purported contract by a person lacking sufficient capacity is void, regardless of whether the other party was aware of the incapacity, not voidable. That is indicative not merely of a technical difference in outcome, but a more basic difference in approach to the consequences of incapacity.

The differences were also exemplified when in the 1980's both countries addressed the

apparent lack of provision for making healthcare and other welfare decisions for people lacking capacity to do so for themselves. The English approach, for example in *In re F (mental patient: sterilisation)* [1990] 2 AC 1, was to stretch the principle of necessity further than would be likely to be accepted in Scotland, and to entangle it (inappropriately, from a Scottish viewpoint) with criteria for medical negligence and considerations of best interests – which, even if adopted in Scotland, would have been a guide to how someone should act if empowered to do so, as opposed to conferring such powers in the first place. To deal with the same difficulty, Scotland went back to Roman law, reviving tutors to adults (firstly in *Morris*, 1986) but doing so in a manner adapted to modern perceptions – so that the *Morris* appointment would have been compliant with Article 12.4 of the UN Convention on the Rights of Persons with Disabilities (which appeared more than 20 years later). This is an example not only of reversion to Roman law as a source when necessary, but of the civil law emphasis upon principle rather than precedent, the role of precedents often being to exemplify and develop principles.

The Scottish courts continued to develop the principles first applied in the *Morris* decision through the ensuing 16 years until – carrying those principles forward and encapsulating them in statute – the 2000 Act replaced tutors with guardians to adults, the approximate equivalent of deputies, with the alternative of intervention orders to cover a specific matter, or interlinked matters of self-limiting duration, also successors to some developed applications of procedure for appointment of tutors to adults. (As explained in the next article in this series, guardianship and intervention orders can also confer powers in relation to property and financial affairs, rather than or as well as matters of personal welfare.)

The above difference in approach to the principle of necessity (and associated considerations) still has potential relevance in questions of when habitual residence does or does not change. Habitual residence is the principal ground of jurisdiction in adult incapacity (mental capacity) matters. In the recent case of *JO v GO & Ors* [2013] EWHC 3932 (COP) (discussed in the January and February issues of the newsletter) an English court relied heavily on *In re F* in concluding that an adult's habitual residence had transferred from England to Scotland even though the move was sanctioned by neither the competent consent of the adult, nor by anyone holding an appointment with relevant powers to do so on behalf of the adult. So far, a Scottish court has exercised jurisdiction in respect of the same adult only on the subsidiary grounds of presence and urgency, not on grounds of habitual residence. There is at least potential for a situation in which habitual residence is no longer in England so far as the English courts are concerned, but has not been acquired in Scotland so as to found jurisdiction there so far as the Scottish courts are concerned. In the absence of a decision to move to Scotland with the settled intention to stay there made either competently by the adult or on behalf of the adult by an attorney, guardian or similar holding express powers to do so.

If it is disconcerting that there should be such doubts about cross-border cases between two neighbouring jurisdictions within (still) the same country, even more unacceptable is the lack of complete clarity that properly constituted and registered Powers of Attorney in one country should be fully operable in the other. Fortunately, as regards operation in Scotland of Powers of Attorney granted and registered in England, reassurance can now be derived from the decision in *Application by C re R*, Airdrie Sh. Ct., April 02, 2013 (unreported), that an English Enduring Power of Attorney "has like effect to a continuing Power of Attorney granted under section 15(1)" of the 2000 Act. No such

assurance is, as yet, available in the converse situation – though a decision in a precisely converse situation to the *Airdrie* case is awaited.

Yet another example of the differences described above can be seen upon comparison of section 5 of the Mental Capacity Act 2005 ("2005 Act") with section 82 of the 2000 Act. The counterpart of the broad exclusion of liability in section 5 is an implied authority for anyone to do "an act in connection with the care or treatment of another person" if the person doing so has first taken reasonable steps to establish relevant incapacity, and then reasonably believes that there is a relevant impairment of capacity and that the best interests test is satisfied. Any such general authority, albeit in the form of an exemption from liability, was rejected in Scotland. The limitation of liability in section 82 applies only to those holding appointments under the 2000 Act. It provides that such persons shall not be liable for breach of duty of care or fiduciary duty if they acted (or did not act) reasonably, in good faith and in accordance with the section 1 principles of the 2000 Act. The principle of necessity does apply in Scotland, but probably not to such an extent as in England and Wales. Whereas section 5 of the 2005 Act could be seen as sanctioning a broad application of the principle of necessity, that principle is not mentioned expressly anywhere in the 2000 Act, and is only effectively referred to in section 47 (2A)(a) of the 2000 Act, which provides that the procedure for authorising medical treatment under that section "does not affect any authority conferred by any other enactment or rule of law". Behind this can be seen a basic concern not to authorise, in relation to adults – however impaired their capacity – anything amounting to a "self-appointed guardianship", which would be seen as contrary to principle and contrary, for example, to Article 6 of the European Convention on Human Rights.

The various forms of authority in relation to people with impairments of capacity which the

2000 Act does provide for and regulate, and the other main characteristics of the 2000 Act, will be described in the next part of this article, next month.

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