Mental Capacity Law Newsletter December 2014: Issue 52

Scotland

Introduction

Welcome to the December Mental Capacity Law Newsletters. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: Mostyn J takes on the Supreme Court over Article 5; the vexed OFSTED Guidance; the *Re X* process; guardianship and *Cheshire West*;

(2) In the Property and Affairs Newsletter: decisions on planning for survivorship of attorneys, inheritance tax planning, retainers and the survival of the common law tests for testamentary and gift-making capacity;

(3) In the Practice and Procedure Newsletter: an important case on habitual residence; a *cri de coeur* about case management; and what to do where a litigation friend is no longer in funds;

(4) In the Capacity outside the COP Newsletter: prosecutions under s.44 MCA 2005; the battle of the UN Committees as to deprivation of liberty; the Law Commission's report on kidnapping and false imprisonment and legislative change post-Winterbourne View

(5) In the Scotland Newsletter: an update on the position relating to powers of attorney, an important case on whether a local authority complaints procedure excludes the possibility of judicial view and Lady Hale in Glasgow.

As matters stand, our commitments mean that it is unlikely we will be able to bring you a Newsletter in January. If no Newsletter appears, a 'watching brief' on important developments will be maintained by Alex on his website. In the meantime, happy holidays to all!

Editors
Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Anna Bicarregui
Simon Edwards

Scottish contributors
Adrian Ward
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Hyperlinks are included to judgments; if inactive, the judgment is likely to appear soon at www.mentalhealthlaw.co.uk.

Powers of Attorney: Inner House to decide

In our May Newsletter we first reported information provided to us by Alison Hempsey of TC Young regarding a hearing on 29th April 2014 before Sheriff Baird in Glasgow Sheriff Court in which clients for whom she acted were appointed joint financial guardians to *NW*. Their application was contested by a bank which held a purported continuing power of attorney by *NW* in its favour. Sheriff Baird held that he would have appointed the applicants even if the purported continuing power of attorney was valid, but held that it was not, because it failed to comply with the essential requirements of section 15(3)(b) and (ba) of the Adults with Incapacity (Scotland) Act 2000 ("2000 Act"). In order for a power of attorney to qualify as a continuing power of attorney, and thus be operable following any impairment of capacity, section 15(3)(b) requires that it must incorporate "a statement which clearly expresses the granter's intention that the power be a continuing power". Under section 15(3)(ba): "Where the continuing power of attorney is exerciseable only if the granter is determined to be incapable in relation to decisions about the matter to which the power relates" it must state: "that the granter has considered how such a determination may be made". Under section 18 of the 2000 Act, a power of attorney granted after commencement of the Act which does not comply with section 15 (or, if a welfare power of attorney, section 16) has no effect during relevant incapacity.

It rapidly became apparent that Sheriff Baird's decision in *NW* affected not only other continuing powers of attorney in the standard style of the bank in that case, but a very large number of continuing and welfare powers of attorney, including those based on "samples" then appearing on the website of the Office of the Public Guardian.

We have followed the development of this matter through ensuing editions of this Newsletter. See the June, August and October issues for more detail. Briefly, the bank in *NW* lodged and then withdrew an appeal. An application was made by the Public Guardian for certain directions: Sheriff Baird refused to warrant it, and that refusal was not appealed. The question of validity was raised in various subsequent proceedings, including in at least one criminal prosecution. It was raised in *B and G v F* (Forfar Sheriff Court, 7th August 2014, decision on scotcourts website) where Sheriff Murray came to the opposite conclusion to Sheriff Baird in *NW*, upon a document (and in the circumstances) before Sheriff Murray in that case, the document being substantially similar to the document in *NW* and Sheriff Murray explicitly disagreeing with Sheriff Baird on some points. We have reproduced relevant parts, anonymised, of the power of attorney documents in both *NW* and *B and G v F* (which we originally described as *B and F v B*) in our October Newsletter. *NW* has now been reported at 2014 SLT (Sh Ct) 83.

In the course of our coverage we have expressed views on some relevant considerations. We have pointed out that it is open to sheriffs to come to different conclusions upon similar facts, and to take different views of the law. In terms of section 14 of the 2000 Act, decisions of the sheriff are appealable to the Sheriff Principal, and thence, with leave of the Sheriff Principal, to the Court of Session. Under present arrangements, which may shortly be altered, it is open to Sheriffs Principal to come to different conclusions, their decisions being binding only upon sheriffs in their own sheriffdoms (and a Sheriff Principal may overrule a precedent by one of his own predecessors – as once occurred in a

case in which Adrian was acting). An appeal decision by the Court of Session, which would be taken by a division of the Inner House, is binding upon all Sheriffs Principal and all sheriffs. However, though we stand to be corrected by any reader who advises us otherwise, we believe that there has not yet been any appeal to the Court of Session under the 2000 Act.

The 2000 Act confers jurisdiction upon the Court of Session in certain matters under Part 5, but not under other Parts of that Act. That does not mean, however, that the jurisdiction of the Court of Session cannot be accessed in any circumstances in relation to matters arising under other Parts of the 2000 Act, including Part 2 which deals with powers of attorney.

Section 27 of the Court of Session Act 1988 ("1988 Act") allows a Special Case to be presented to the Inner House of the Court of Session "where any parties interested, whether personally or in some fiduciary or official capacity, in the decision of a question of law are agreed upon the facts, and are in dispute only on the law applicable to those facts". The Public Guardian has found herself, in her official capacity, in dispute with another party (presumed to be an attorney acting in that attorney's fiduciary capacity) regarding the validity as a continuing power of attorney of a document understood to be not dissimilar to those considered by Sheriff Baird and Sheriff Murray in the cases mentioned above. The parties are agreed upon the facts, and are in dispute only on the question of validity. It is understood that they have presented, or are about to present, a Special Case to the Inner House in accordance with section 27 of the 1988 Act. Section 27 requires respective Counsel to sign a case setting out the facts upon which they are agreed and the question of law arising from those facts. Parties may ask the court either for its Opinion, or for its Judgment, on that question of law. Subsidiary provisions are to be found in section 27 and in Court of Session Rule of Court 78. From such information as is available to us, it would appear that the Special Case regarding the purported continuing power of attorney in that case is likely to meet requirements and to proceed. Court of Session practitioners inform us that in the normal course of events one could expect the Special Case to be heard before the summer recess in 2015. It may be that upon representations by the parties, and in respect that the Public Guardian is an officer of court, the court administration may – if able – be willing to fix a hearing earlier than might otherwise have been the case. Of course, it will be necessary to await the conclusion of such hearing for any indication from the court as to the likely timescale thereafter before the Opinion or Judgment of the court becomes available.

It has to be remembered that even in *B and G v F*, Sheriff Murray was critical of the drafting of the document before him. However, even with great care over drafting, practitioners may nevertheless face a dilemma – even taking full account of the views of Sheriff Baird – where an intending granter of a continuing or welfare power of attorney has, for whatever reason, only limited powers of comprehension such that he or she could validly grant such a document if couched in simple language and accompanied by explanations in simple language, but not a document of greater complexity. This could engage the fundamental obligation to facilitate autonomy and self-determination, in conflict with any strict construction of sections 15 and 16 of the 2000 Act. It is notable that Ministerial Recommendation (2009)11 of the Council of Europe on "Principles concerning Powers of Attorney and Advance Directives for Incapacity" strongly emphasises the relevance and importance of principles of autonomy and self-

determination. It is thus to be anticipated that the decision of the Court of Session upon the anticipated Special Case will be helpful not only in relation to the validity of large numbers of historical and thus existing power of attorney documents, but as a guide to future practice. It is perhaps not unreasonable to hope that the opportunity will be taken to obtain clarification of related matters concerning powers of attorney upon which the law seems to some degree to be uncertain.

The text of the recent statement by the Public Guardian is as follows: "The Public Guardian is aware that the recent opinions expressed by Sheriff Baird and Sheriff Murray raise conflicting views on the validity of certain continuing powers of attorney. A Special Case is due to be lodged shortly in the Inner House of the Court of Session in relation to another power of attorney where similar issues have arisen. The Public Guardian, who will be a party to that action, does not expect to comment further while that case is pending." We shall of course continue to follow and report upon developments relevant to this issue.

Adrian D Ward

Judicial review or complaints procedure?

In *McCue v Glasgow City Council*, 2014 SLT 891, Lord Jones held that Glasgow City Council's Social Work Services complaints procedure (set out as an appendix to his Judgment) is an alternative remedy which excludes the court's statutory jurisdiction, and therefore renders an application for judicial review incompetent. That applies whether or not the complaints procedure is a statutory remedy, though in fact in the opinion of Lord Jones the Council's complaints procedure is a statutory remedy.

Andrew McCue has Downs Syndrome. His capacity is impaired. Mrs McCue, his mother, is his guardian. He is in need of community care services. The Council, the relevant local authority under the Social Work (Scotland) Act 1968, assessed his needs in accordance with section 12A of that Act. Mrs McCue was dissatisfied with the outcome of the assessment, and sought to have the Council's decisions following upon that assessment judicially reviewed.

The report helpfully lists all relevant authorities, including those relevant to the question of when the supervisory jurisdiction of the Court of Session is excluded through availability of an alternative remedy, and also the provisions and guidance under which complaints procedures, such as those of Glasgow Council, were established. Having held that such procedures, whether statutory or not, excluded the supervisory jurisdiction, it was not necessary for Lord Jones to address the question of whether Glasgow City Council's complaints procedure is a statutory remedy, but he nevertheless did so in deference to the arguments advanced by Counsel on that point, and held that it was. It would appear from a reading of his decision as a whole that even if he had been wrong on that point, and that any alternative remedy required to be derived from statute, it is unnecessary for the relevant statute expressly to exclude the supervisory jurisdiction of the court.

Because section 7(10) of the Scottish Public Services Ombudsman Act 2002 provides that the Ombudsman must not investigate matters in respect of which a complaint can be made to a local authority, unless the Ombudsman is satisfied that such procedure has been invoked and exhausted or that (in the particular circumstances) it is not reasonable to expect it to be invoked or exhausted, resort to the Ombudsman was not – as matters stood before

the court – an alternative remedy barring judicial review.

The Council had submitted that the Petition should be dismissed because it was academic. Lord Jones held that if it had been necessary to determine that question, he would have held that it was not academic. On the pleadings as adjusted, the Council's decision was a "final decision" which, though subject to ongoing review, was operative and determined the provision to be made for Mr McCue until such time as the review is carried out.

While this decision is of general relevance on the point of competency of judicial review where a complaints procedure has not been exhausted, it will be of particular relevance where – as here – a person who may be in need of community care services under the 1968 Act has an intellectual disability resulting in impairment of capacity.

Adrian D Ward

Lady Hale in Glasgow

The Royal Faculty of Procurators in Glasgow has recently been enhancing its reputation for developing a useful, and at times adventurous and challenging, programme of events. The Faculty's links with the late Lord Rodger go back to when he won the Faculty's prize while a student at Glasgow University. Following his untimely death the Faculty established the annual "Lord Rodger Memorial Lecture", and it is impressive but not really surprising that Lady Hale, Deputy President of the Supreme Court, accepted an invitation to deliver the first lecture in the Tron Church Building, immediately opposite the Faculty's premises, on 31st October 2014. She entitled her lecture "Psychiatry and the law: an enduring interest for Lord Rodger". She traced their respective interests in mental health law, in the case of Lord Rodger right back to the fact that his father was an eminent psychiatrist, and continuing through the membership of Lord Rodger himself as a member of the Mental Welfare Commission. In Lady Hale's own case, she narrated how "as a baby law lecturer" she found herself teaching mental health law to social workers at a time when there was no suitable textbook: "*So I wrote one. And that got me my first judicial appointment as a legal member of Mental Health Review Tribunals*".

Lady Hale followed Lord Rodger's contribution to mental health law through case histories in which he was involved and then speculated as to how he might have stood on some cases recently before the Supreme Court. She also commented that it would be intriguing to wonder what he would have thought of the United Nations Convention on the Rights of Persons with Disabilities. That gave her the opportunity to hint at her own views: "*The United Kingdom ratified this Convention without reservation in 2009, despite the obvious difficulty of reconciling some of its provisions with much of our mental health law both north and south of the border*". Having referred in particular to Articles 4.4 and 12.2 of the Convention, she observed that: "*Taken at face value, it is difficult to see how these provisions can be reconciled with any of the case histories I am about to describe*".

She proceeded with a review of cases, both enlightening and entertaining, commencing with *Galbraith v HM Advocate*, 2002 JC 1, through to recent decisions of the Supreme Court following Lord Rodger's death, notably *Cheshire West*. On one point her lecture, both as delivered and as now available here, interestingly differed from what she actually said in *Cheshire West*. In *Cheshire West* she defined the "acid test" as "whether the individual in question is subject to continuous supervision and control and is not

free to leave." In Glasgow she said: "The acid test was whether they were under the complete control and supervision of the staff and not free to leave." The latter is perhaps closer to the reference in *HL v UK* (2004) 40 EHRR 761 to staff exercising "complete and effective control over care and movement for a significant period". However, viewing her decision in *Cheshire West* as a whole (and, in particular paragraph 54, where she also used the term "complete" rather than "continuous") she may not have considered these differences to be material.

By way of footnote, there may be some Scottish interest in a lecture given by Lady Hale a fortnight earlier, on 17th October 2014, to the (English) Mental Health Tribunal Members' Association, to be found here. She gave a helpful account of *Cheshire* West and its impact. She described the "acid test" in precisely the same terms as in Glasgow. She narrated how – as is proposed in Scotland – Mental Health Act procedures are in England and Wales kept separate from operation of their deprivation of liberty safeguards regime but commented – addressing Tribunals -: "*It is difficult to see why your Chamber is not the obvious place. You have the expertise in dealing with mental health and disability issues, you know something about health and social care, you are much cheaper and more accessible than the courts, you could learn how to deal with all the issues or leave those which were unsuitable (in practice, probably only property issues) to the courts ….*" and other reasons including that specialist judges could be recruited to their ranks

Adrian D Ward

Scottish Law Commission Report on Adults with Incapacity

In last month's Newsletter, we carried an article on the Scottish Law Commission's Report on Adults with Incapacity. The Scottish Law Commission has been in contact with us to highlight two points that the Commission wishes to emphasise in relation to the commentary upon the Report. We are very grateful to the Law Commission for taking the time to comment, and we are happy to reproduce their comments thus:

> *"Firstly, it is said in the article that we have justified the involvement of welfare guardians and attorneys in the suggested community process on the basis of a particular passage in Stanev v Bulgaria. In fact, in the Report at paragraphs 3.56 to 60, we discuss this passage and the responses we received to questions we posed about it. We say 'we do not think it would be sensible to base recommendations on this isolated passage from the European Court'. The reference used in the article is paragraph 6.42, where we observe that, were 'valid replacement' to develop as a doctrine, it would presumably prevent the subjective element of DoL being satisfied. But we go on to say in 6.43 that the reasoning is 'not sufficiently developed' to obviate the need to satisfy Article 5(4), and we proceed to explain how we have tried to do that in our scheme.*
>
> *Secondly, the article suggests that we have created the potential 'to renew restriction arrangements indefinitely'. In fact, the Bill provides that any authorisation, whether by the Sheriff or an attorney or guardian, lasts for a period of one year, which duration also applies after any renewal (sections 52E(13) and 52(G)). This is explained at paragraphs 6.44 and 45 of the Report."*

We are aware that the Report has – rightly – generated considerable amount of debate and discussion both in Scotland and south of the Border. We welcome views upon the approach adopted by the Commission to solving these difficult questions (to which we understand that

the Scottish Government will be responding, as normally expected, by 1 January) and will undoubtedly be publishing more on this topic in future issues of the Newsletter.

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Conferences at which editors/contributors are speaking

Intensive Care Society State of the Art Meeting

Alex will be speaking on deprivation of liberty safeguarding at the Intensive Care Society's State of the Art Meeting on 10 December 2014. Details are available here.

Talk to local faculties of solicitors

Adrian will be addressing local faculties of solicitors on matters relating (inter alia) to adult incapacity law in Wigtown on 10 December.

Capacity and consent: complex issues

Jill will be speaking at the next workshop of the Centre for Mental Health and Incapacity Law, Rights and Policy on 11th February, which will be addressing complex issues in capacity and consent. For further details, see here.

Royal Faculty of Procurators

Adrian will be speaking at a half-day private conference for the Royal Faculty of Procurators in Glasgow on 11th February, at a one-hour lunchtime adult incapacity session on 25th February and with Alex on 13th May 2015.

IBC Planning for the International Older Client Event

Adrian will be speaking at the IBC Planning for the International Older Client event in London on 12th March 2015.

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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 Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Chambers Details

Our next Newsletter will be out in early February. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Newsletter in the future please contact marketing@39essex.com.

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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Alex been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, works to which he has contributed including 'The Court of Protection Handbook' (2014, LAG); 'The International Protection of Adults' (forthcoming, 2014, Oxford University Press), Jordan's 'Court of Protection Practice' and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). He is an Honorary Research Lecturer at the University of Manchester, and the creator of the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click here.

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Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. To view full CV click here.

Simon Edwards
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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

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Adrian is a practising Scottish solicitor, a partner of T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: "*the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law*," he is author of *Adult Incapacity*, *Adults with Incapacity Legislation* and several other books on the subject. To view full CV click here.

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Dr Jill Stavert is Reader in Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2013 updated guidance on Deprivation of Liberty) and is a voluntary legal officer for the Scottish Association for Mental Health. To view full CV click here.