

Scotland

Introduction

Welcome to the March 2016 Newsletters. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Newsletter: what we don't know about the MCA and further observations on 'using and weighing';
- (2) In the Property and Affairs Newsletter: calibrating testamentary capacity to the nature of the estate and updates from the Office of the Public Guardian;
- (3) In the Practice and Procedure Newsletter: the draft Case Management Pilot, the s.49 Pilot and an update on the transparency pilot;
- (4) In the Capacity outside the COP Newsletter: further follow-up from Winterbourne View, the Mental Health Taskforce report's 'fusion' recommendation, and immigration detention and the MCA;
- (5) In the Scotland Newsletter: the shortage of Mental Health Officers (again), total or complete incapacity in the context of homelessness, the Carers (Scotland) Act 2016 and an update on the consultation on the AWI.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site [here](#). 'One-pagers' of the cases in these Newsletters of most relevance to social work professionals will also shortly appear on the SCIE [website](#).

Editors

Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Anna Bicarregui
Simon Edwards (P&A)

Guest contributor

Beverley Taylor

Scottish contributors

Adrian Ward
Jill Stavert

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For all our mental capacity resources, click [here](#).

Shortage of mental health officers (again!)

[Last month](#) we reported the decision of Sheriff D A Brown at Hamilton Sheriff Court in the case SS and MM, Applicants, addressing a situation on which we have repeatedly reported, namely the widespread failure of local authorities to comply with section 57(4) of the Adults with Incapacity (Scotland) Act 2000. The section requires that a Mental Health Officer's Report (where one is required) for an application under part 6 of the 2000 Act be produced within 21 days of notice of intention to bring the application. In SS and MM notice of intention had been given on 29th May 2015, but by the time of the hearing before Sheriff Brown on 25th September 2015 no Report had been prepared. He ordered North Lanarkshire Council, the relevant local authority, to prepare the Report within 14 days. The local authority appealed to the Sheriff Principal. We reported the decision at first instance upon being advised that the local authority had abandoned our appeal.

On 19th February 2016 Sheriff Brown refused to make a similar order, upon substantially similar facts. The difference on that occasion would appear to be that the local authority provided to the Sheriff figures for the number of Mental Health Officers employed by the Council, the number of requests for Reports received year on year, how such Reports are allocated and what are the various competing demands for the services of Mental Health Officers. It was submitted that as the problem was one of resources the court should only exercise its discretion to make such an order in the clearest and most exceptional circumstances, such as where an adult was in danger of abuse or neglect., or likely to lose an offer of accommodation, if no powers were put in place.

The Sheriff took the view that there was nothing about the case before him which warranted it being given any special priority. Surprisingly, no assurances appear to have been given to the court as to the steps being taken by that particular Council – or for that matter nationally – to resolve the shortage of Mental Health Officers and thus allow Councils to perform their statutory obligations in the matter.

In the case of *Stork*, pursuer 2004 SCLR 513, a Mental Health Officer's Report had not been prepared within the 21 day period and in consequence the medical reports were, by the time that the application was lodged in court, older than the 30 days required in terms of section 57 (3) of the 2000 Act. Sheriff Vanett rejected a submission that he had discretion under section 3(1) to allow the application to be received notwithstanding these deficiencies. Instead, he interpreted "shall" in section 57 (3) as being "directory rather than mandatory". He suggested that his interpretation was "in harmony with the purpose and principles of the [2000] Act". He referred to the benefit principle and commented that if the provisions of section 57(3) and (4) were strictly enforced, then the pursuers would have to go to the trouble and expense of instructing fresh examinations and assessments, and would have to raise a new application. That decision was prior to the amendments to section 57 made by the Adult Support and Protection (Scotland) Act 2007, introducing (in sub sections (3)A and (3)B) discretion to allow the medical reports where they are more than 30 days old. The amendments in effect gave statutory authority to the course followed by Sheriff Vanett in *Stork*.

It would appear that the question, now, is whether on the one hand Sheriff Vanett's view that "shall" in section 57(4) is still "directory rather than mandatory"; or alternatively whether

the Parliament, having chosen to legislate expressly to create a discretion where medical reports are late, would have created similar express discretion if it had intended that there be similar flexibility regarding Mental Health Officer's report and, having not done so, clearly intended the 21 day limit to be mandatory and not within the discretion of Sheriffs to extend. These arguments do not appear to have been explored in the latest case. On the other hand, as we have previously asserted, the only effective solution – under the legislation as it stands – is for urgent steps to be taken to improve the recruitment, training and retention of Mental Health Officers so that Part 6 applications may be processed as intended by the Parliament.

It is worth recalling that the 21 day limit did not appear in the draft Bill annexed to the Scottish Law Commission "Report on incapable adults" (report number 151, September 1995). In subsequent consideration, there was significant concern that Part 6 applications should not be delayed through delays in producing required reports. The options canvassed were either to impose a statutory time limit, or alternatively to "open up" the requirements to other sources of reports. For as long as there are too few Mental Health Officers to meet requirements, any intervention by the courts will only cause individual applications to be processed ahead of others. An alternative solution would be to remove the Mental Health Officer's "monopoly" and open up to other sources of reports.

Adrian D Ward

"Total or complete incapacity?"

W v Stirling Council [2015] CSOH162; 2016 SLT 35, was a petition for judicial review brought by a lady identified as LW, and heard (confusingly) by

Lady Wolffe. On 4th February 2015 Stirling Council decided that LW was intentionally homeless. LW sought judicial review of that decision. On 1st August 2103 she had become a tenant of private rental property in Stirling under a Short Assured Tenancy. It continued by tacit relocation on 31st January 2014, but on 17th February 2014 the landlord served a Notice to Quit. Following upon that, Decree of Recovery of Possession was granted in September 2014. She thereupon become homeless. The question was whether her homelessness was intentional.

Prior to taking the tenancy, LW had been advised that there would be a shortfall of about £10.80 per week between her housing benefit and the rent due. The Notice to Quit resulted from failure to pay that difference.

LW had a history of mental health issues. She had been known to psychiatric services since 2006, after referral by her GP for depression, anxiety and agoraphobia. She was assessed as also experiencing psychotic symptoms.

In about March or April 2014 (that is to say, very shortly after the events giving rise to the Notice to Quit) she was admitted to hospital and detained under the Mental Health (Care and Treatment)(Scotland) Act 2003. She was discharged, then detained again. In November 2014 she was still subject to a Community Treatment Order. A letter from a community psychiatrist nurse (wrongly identified in the decision as "community practice nurse") on 19th December 2014 concluded that the nature of her illnesses "significantly affected her ability to function and reduced her level of being responsible" and that, at that time, LW "had no apparent insight to how unwell she was and unaware of her day-to-day responsibilities".

LW's three grounds for seeking reduction of the decision were all unsuccessful. They were, firstly, "that there was no proper basis in fact to support the determination that the petitioner had made herself intentionally homeless without having secured alternative accommodation"; (secondly) "that the decision letter failed to take into account properly and reasonably the significant psychiatric history and ongoing treatment of the petitioner" and (thirdly) "that the decision was *Wednesbury* unreasonable". The first ground was rejected on the basis that "the petitioner's case was not one of total or complete incapacity". It is remarkable that such black and white concepts of capacity should still be current, and should influence decisions. It is also notable that the decision makes no reference to the United Nations Convention on the Rights of Persons with Disabilities, and in particular the obligation upon states parties under article 12.3 of the Convention to "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity". There are references in the decision to LW having been assessed for support, but it is difficult to identify that there was any clear evidence as to any disabling effects of her psychiatric troubles in this specific matter of fulfilling her responsibilities under her tenancy; and although it is narrated that in August 2013 the Council had assessed her as requiring support in "understanding of tenancy and tenancy management", and also in relation to housing benefit, council tax and rent, the decision does not record whether she received support, and if so what support, in relation to those matters.

Carers (Scotland) Act 2016

The Carers (Scotland) Act was passed by the Scottish Parliament on 5th February 2016. Royal assent is awaited. We have frequently reported

on issues of ordinary residence, differences in the approach to ordinary residence as between England and Wales on the one hand and Scotland on the other, and differences between ordinary residences and other concepts, such as habitual residence. See most recently our commentary on *Milton Keynes Council v Scottish Ministers* in the [December 2015](#) newsletter.

It was a matter of criticism of the Carers (Scotland) Bill as introduced that it was proposed that assessments of carer's needs should be carried out by the local authority of the carer's ordinary residence, even when that was different from the ordinary residence of the person cared for. We are pleased to report that under the Act as passed the "responsible local authority", that is to say the authority responsible for preparing and Adult Carer Support Plan, means "the local authority for the area in which the cared for person resides."

Adrian D Ward

Scottish Government Consultation of the Adults with Incapacity (Scotland) 2000

We reported [last month](#) on the current Scottish Government consultation. We remind readers that the consultation period will end on 31st March 2016. Key players and interest groups are evidently taking a wide view of the extent to which the 2000 Act, and also the Mental Care and treatment (Scotland) Act 2003 and the Adults Support and Protection Act 2007, should be subject to review. We have previously recorded disappointment that even since the Courts Reform (Scotland) Act 2014 the adult incapacity jurisdiction has not seen implementation of the recommendation by the Scottish Law Commission (in its Report on Incapable Adults, 1995) that adult incapacity cases should be dealt

with by specialist designated Sheriffs. The debate now appears to be moving towards examination of the merits of transferring that jurisdiction to the tribunal system, envisaging the possibility even that the same tribunals might handle matters under all three Acts, with the objective of bringing specialist competence to all three, and also bridging perceived lack of coordination between the three jurisdictions.

Adrian D Ward

Mental Welfare Commission – Advance statements campaign launch

The Mental Welfare Commission for Scotland (the Commission) will be holding an advance statements campaign launch event on 17th March 2016 at the Royal College of Surgeons of Edinburgh¹.

Advance statements, or advance directives as they are alternatively known, are widely acknowledged as a means of enhancing respect for individual patient autonomy and choice. Studies have reportedly found that the making of advance statements/directives has numerous therapeutic benefits including empowering the individual, enhancing capacity, improving the patient/clinician relationship and, most significantly, reducing the need for involuntary detention.

The Mental Health (Care and Treatment)(Scotland) Act 2003 (the 2003 Act)² requires that medical staff and the Mental Health Tribunal for Scotland must have regard to a

¹ See also Mental Welfare Commission for Scotland (2014), [Advance Statements: Good Practice Guide](#)

² Ss 275-276.

patient's wishes expressed in a psychiatric advance statement or, alternatively, record the reasons for overriding such wishes and inform a number of people and bodies (including the Mental Welfare Commission for Scotland (the Commission)). Indeed, unwarranted overriding of such wishes may constitute human rights violations³. Moreover, it is also hoped that confidence in psychiatric advance statements will be increased when amendments to the 2003 Act (made by the Mental Health (Scotland) Act 2015) come into force. These will require health boards to ensure that psychiatric advance statements are placed in patient records and notified to the Commission (which will maintain a central register) and require health boards to account for steps, monitored by the Commission, that they take to promote advance statements.

The UN Committee on the Rights of Persons with Disabilities in its General Comment No 1 on Article 12 UN Convention on the Rights of Persons with Disabilities (the right to equal recognition before the law)⁴ refers to advance planning – which includes advance statements – as an important form of support in the exercise of legal capacity. Whilst psychiatric advance statements as recognised by the 2003 Act may not pass muster with the committee, in that they become relevant when the patient lacks mental capacity and relate to those with mental disorder only, their ability to keep the will and preferences of a patient at the centre of care and treatment decisions should not be underestimated.

³ J Stavert, “Added value: using human rights to support psychiatric advance statements” (2013) 17(2) *Edinburgh Law Review* 210.

⁴ UN Committee on the Rights of Persons with Disabilities, General Comment No 1 (2014) [Article 12: Equal Recognition before the Law](#), CRPD/C/GC/1, adopted 11 April 2014, para 17

The Commission launch campaign therefore comes at an opportune time.

Advance statements concerning physical health cannot be used to force certain treatment to be provided and aside from psychiatric advance statements there is no case law or legislation that recognises advance refusals relating to physical health. However, it is likely that the Scottish courts will follow the English courts and uphold wishes expressed in such advance refusals⁵. The English and Welsh Mental Capacity Act 2005⁶ also recognises advance refusals. It is suggested that a similar provision be legislatively adopted in Scotland.

Jill Stavert

Mental Welfare Commission for Scotland: No through Road: People with Learning Disabilities in Hospital

The Mental Welfare Commission for Scotland has [published](#) a visit and monitoring report on people on people with learning disabilities in hospital in Scotland. It notes some improvements since its last report in 2011 such as, for example, fewer people with learning disabilities being in hospital units. It does, however, highlight with concern the fact that almost 32%⁷ of patients in hospital units for persons with learning disabilities who have been identified as being ready for discharge face delays of months, or even years, for such discharge. The reasons for this may be complex but the fact remains that it raises questions of compatibility with ECHR, notably Article 5 (the right to liberty) and 8 (the right to respect for private and family life), and UNCRPD rights as well as whether the principles of the Adults with

⁵ Scottish Law Commission, *Report on Incapable Adults 1995*(No 151), para 5.46.

⁶ Ss 24-26.

⁷ 58 out of a total of 180 patients with learning disabilities.

Incapacity (Scotland) Act 2000 and/or Mental Health (Care and Treatment)(Scotland) Act 2003 are being implemented.

It should also be noted that during the passage of what became the Mental Health (Scotland) Act 2015 through the Scottish Parliament the Scottish Government confirmed that it will conduct a review – originally recommended in the Millan Report⁸ and reiterated in the McManus Review Report⁹ - of whether or not persons with learning disabilities should continue to be included within the definition of ‘mental disorder’ in the Mental Health (Care and Treatment)(Scotland) Act 2003.

Jill Stavert

Mental Welfare Commission for Scotland local visit reports

From March 2016, the Commission has started [publishing](#) its local visit reports on its website. At the time of writing eight such reports have been posted.

Jill Stavert

⁸ Scottish Government (2001), [New Directions: Review of the Mental Health \(Scotland\) Act 1984](#), paras 30-62 and Recommendation 4.6

⁹ Scottish Government (2009), [Limited Review of the Mental Health \(Care and Treatment\)\(Scotland\) Act 2003](#), pp 74-75

Conferences at which editors/contributors are speaking

Palliative Care Conference

Alex will be speaking on the practicalities and realities of DOLS within palliative care practice at the 11th Palliative Care Congress in Glasgow on 11 March. For details, and to book see [here](#).

Safeguarding Adults in Residential Settings

Tor will be speaking about why capacity matters at this conference at the ORT House Conference Centre London on Tuesday 15 March 2016. For further details, see [here](#).

Edge DOLS Assessors conference

Alex will be speaking at Edge Training's annual DOLS Assessors conference in London on 18 March. Other speakers include Mr Justice Peter Jackson. For details, and to book, see [here](#).

Centre for Mental Health and Incapacity Law, Rights and Policy: Deprivation of Liberty seminar

Jill's Centre is holding a seminar to consider deprivation of liberty and achieving ECHR compatibility from a UK-wide perspective on 23 March, the speakers being Laura Dunlop QC, Colin McKay and Michelle Pratley. For details, and to book, [contact](#) Rebecca McGregor of the Centre.

Operationalising Article 12.4 Safeguards: Lessons from Three Jurisdictions of the UK

Adrian and Jill will be speaking at the Essex Autonomy Project's (free) side event to the 15th Session of the meeting of the UN Committee on the Rights of Persons with Disabilities in Geneva on 31 March 2016. For more details and to book, see [here](#).

CoPPA London seminar

Alex will be speaking at the CoPPA London seminar on 20 April on the recent (and prospective) changes to the COP rules. The seminar will also

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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.

cover the transparency pilot. The seminar will take place at 39 Essex Chambers at 5pm and will be followed by drinks. Free to COPPA members, or £10 to non-members. To book a place or to join COPPA, or the COPPA London mailing list, please email jackie.vanhinsbergh@nqpltd.com.

ESCRC seminar series on safeguarding

Alex is a member of the core research team for an-ESRC funded seminar series entitled 'Safeguarding Adults and Legal Literacy,' investigating the impact of the Care Act. The theme for the seminars in the first year of this three years series is 'Making Law'. The second and third seminars in the series will be on "New" categories of abuse and neglect' (20 May) and 'Safeguarding and devolution – UK perspectives' (22 September). For more details, see [here](#).

Adults with Incapacity

Adults will be speaking on Adults with Incapacity at the Royal Faculty of Procurators in Glasgow private client half day conference on 18 May 2016. For more details, and to book, see [here](#).

Other events of interest

Jordan Publishing's Court of Protection Practice and Procedure Evening Seminars 2016

District Judge Marc Marin will update practitioners on the new rules within the Court of Protection and help them to understand how this will affect their day-to-day practice. For further information and to book your place (London – 7 April/Manchester – 19 April) click [here](#).

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

David Barnes

Chief Executive and Director of Clerking
david.barnes@39essex.com

Alastair Davidson

Senior Clerk
alastair.davidson@39essex.com

Sheraton Doyle

Practice Manager
sheraton.doyle@39essex.com

Peter Campbell

Practice Manager
peter.campbell@39essex.com

London 81 Chancery Lane, London, WC1A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

Manchester 82 King Street, Manchester M2 4WQ
Tel: +44 (0)161 870 0333
Fax: +44 (0)20 7353 3978

Singapore Maxwell Chambers, 32 Maxwell Road, #02-16,
Singapore 069115
Tel: +(65) 6634 1336

For all our services: visit www.39essex.com

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Editors

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Jill Stavert

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Alex Ruck Keene: alex.ruckkeene@39essex.com

Alex is recommended as a 'star junior' in Chambers & Partners 2016 for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations and is the creator of the website www.mentalcapacitylawandpolicy.org.uk. He is on secondment for 2016 to the Law Commission working on the replacement for DOLS. **To view full CV click here.**



Victoria Butler-Cole: vb@39essex.com

Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. 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.**



Neil Allen: neil.allen@39essex.com

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.**



Annabel Lee: annabel.lee@39essex.com

Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. **To view full CV click here.**



Anna Bicarregui: anna.bicarregui@39essex.com

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: simon.edwards@39essex.com

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.**



Adrian Ward adw@tcyoung.co.uk

Adrian is a practising Scottish solicitor, a consultant at 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.**



Jill Stavert: J.Stavert@napier.ac.uk

Professor 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 2015 updated guidance on Deprivation of Liberty). **To view full CV click here.**