MENTAL CAPACITY REPORT:
SCOTLAND
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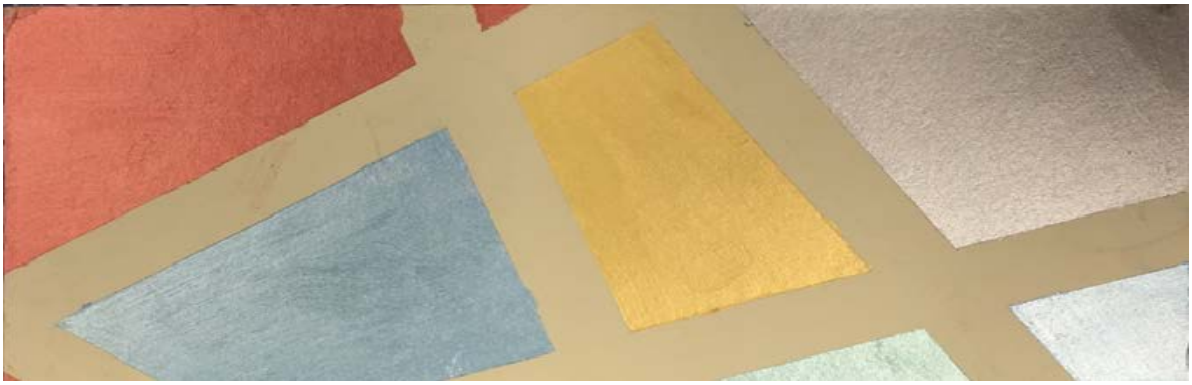

Welcome to the June 2024 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: when no option is a good one, snapshots from the frontline, and are we listening closely enough to the person in the context of deprivation of liberty;

(2) In the Property and Affairs Report: the Powers of Attorney Act 2023 on election hold, contesting costs in probate cases and guidance on viewing LPAs online;

(3) In the Practice and Procedure Report: post-death costs, what does it mean to be an expert in the person, and procedure in brain stem death cases;

(4) In the Mental Health Matters Report: the MHA 1983 under strain in police cells and the hospital setting;

(5) In the Wider Context Report: the inherent jurisdiction – a case, guidance, and a challenge from Ireland; the older child and medical treatment decisions – mental capacity or competence, and Capacity and contempt proceedings – what is the test?

(6) In the Scotland Report: guardianship under examination before the Sheriff Appeal Court and Scottish Government's Mental Health and Capacity Reform Programme.

There are two plugs this month:

(1) For a free digital trial of the newly relaunched Court of Protection Law Reports (now published by Butterworths. For a walkthrough of one of the reports, see here.

(2) For Lucy Series' blog post about mental capacity and voting.

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.

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

Contested guardianship: helpful clarification but fundamental omissions from SAC

On 14th May 2024 the Sheriff Appeal Court issued a judgment in a dispute between an adult's parents about his future guardianship arrangements, which on several points provides helpful clarification to be taken into account by sheriffs at first instance and practitioners throughout Scotland, but which at a fundamental level appears to be flawed. The case is identified as *Colin Boyle (AP)*, Second Applicant and Appellant (the adult's father) *v Molly Denton (AP)*, First Applicant and Respondent (the adult's mother) [2024] SAC (Civ) 20. As the quoted names are stated to be pseudonyms, I refer to the three relevant parties as "the adult", "father", and "mother". At this stage, the case is identified only by its Court Reference GLW-AW247-17. It was decided by Appeal Sheriff B A Mohan, who delivered the opinion of the court; Sheriff Principal A Y Anwar; and Appeal Sherif F Tait.

The only information provided about the adult is that he was 24 years old, and "has autism and a learning disability". We are not given the adult's date of birth, but the judgment narrates that his parents were appointed joint guardians on 4th September 2017, indicating that the order took effect upon[1], or soon after, his sixteenth birthday.

Thereafter their relationship broke down, they separated, and they "struggled to agree on matters which affect [the adult's] welfare". The joint guardianship was due to expire on 27th February 2023. Both parents lodged minutes for renewal, each seeking to be appointed sole guardian. The sheriff considered the competing minutes at a hearing on 25th April 2023, and appointed a safeguarder, whose report was issued on 2nd October 2023. In the meantime father's circumstances had changed. He required to re-locate to Ireland. The case called before the sheriff on 3rd October 2023, when the sheriff considered the statutory reports and the safeguarder's report, and heard submissions. According to the Appeal Court judgment:

> *"The parties agreed that a guardianship order was necessary as Andrew was incapable of making decisions about his welfare and no other means was sufficient to protect his interests. However, they continued to disagree about who should be Andrew's guardian and about further procedure."*

Father changed his stance. He no longer sought appointment of himself as sole guardian. He moved for re-appointment of both parents as joint guardians, or failing that for appointment of

[1] See section 79A of the Adults with Incapacity (Scotland) Act 2000 ("the Act").

himself as joint guardian with Glasgow City Council's chief social work officer.

Mother's position remained consistent. She moved for renewal of guardianship on the basis that she would be sole guardian. Father proposed that the adult "should split his time between Ireland and Scotland in order to spend time with both parties". Neither party had adjusted their minutes or answers to reflect the changes that had taken place.

On 3rd October 2023 the sheriff issued an *ex tempore* judgment. On the basis of the reports and oral submissions, he appointed mother as sole guardian, for a period (in terms of the sheriff's interlocutor) of three years, though a note provided by the sheriff indicated that the period was two years. The note was written following lodging of the appeal. It explained the sheriff's reasoning but did not contain findings in fact or findings in fact and law.

The sheriff recorded that he was sceptical of father's proposal that the adult's time should be split between Ireland and Scotland. The sheriff stated that it was not clear "*how such a proposal could be funded nor how the local authority would be able to discharge its statutory duties to Andrew if he lived abroad for half (or at least much) of the time*". Also, the sheriff considered it neither appropriate nor in the interests of natural justice that mother be appointed joint welfare guardian when she did not consent to that role. Additionally, in the interlocutor the sheriff ordered the parents to engage in mediation. The points of appeal were whether (1) the sheriff should on 3rd October 2023 have assigned a proof, and (2) should the sheriff have given his decision in writing?

Commendably, the Appeal Court considered it relevant to address some further questions "because of the volume of AWI applications considered by the sheriff courts in Scotland". Numbered sequentially for the purposes of this Report, those further points were:

> *(3) "What is the status of a safeguarder and their report in Adults with Incapacity (AWI) proceedings?"*
>
> *(4) "Can a party who has made an application to be a sole guardian be appointed by the court as a joint guardian without consenting to that specific joint position?"*
>
> *(5) "Was it appropriate for the sheriff to order the parties to undertake mediation?"*

In the event, in relation to (1) the Appeal Court held that the sheriff had fallen into error. Although that rendered it unnecessary for the Appeal Court to address (2), the Appeal Court noted that this was "a point of wider interest", and (again) having regard to the volume of AWI cases the Appeal Court considered it "appropriate for us to make some observations on the submissions".

(1) *Should a proof have been assigned?*

Appeal Sheriff Mohan quoted Rule 2.31 of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999 and Rule 3.16.6 in Part XVI of those Rules, dealing specifically with applications under the Act, and concluded that:

> *"These provisions, therefore, give wide discretion to a sheriff considering an AWI application. A party is not entitled to a proof unless the facts in dispute are clearly identified, are both relevant and material, and are likely to have a bearing upon the decision the sheriff is invited to make."*

He referred to *Samantha Young, Appellant* (Glasgow Sheriff Court, 26 July 2013, unreported), a decision by Sheriff Principal Scott QC in which a party opposing a guardianship application appealed a sheriff's refusal to appoint a proof.

> *"But nothing was advanced before the sheriff (or the sheriff principal on appeal) to confirm what matters of fact were being challenged."*

Appeal Sheriff Mohan took the view that:

> *"In the proceedings before us, however, there was plainly a live dispute between the parties about who should be appointed as guardian and on what terms (sole or joint). That was at the heart of the issue the sheriff was asked to resolve. The sheriff had two conflicting applications. It is also clear that there were identified areas of factual dispute which were relevant to his determination."*

In his note, the sheriff recorded his concerns as narrated above. Appeal Sheriff Mohan commented that these were all matters which go to the heart of the suitability test under section 59(4) of the Act, with particular reference to the elements of accessibility, ability to carry out the functions of guardian, likely conflict of interest, and possible adverse effects of the appointment of an individual on the interests of the adult. The sheriff did not hear evidence, but instead relied on the safeguarder's conclusions about factual matters which father sought to challenge. The Appeal Court concluded that in rejecting father's motion to fix a proof the sheriff fell into error. The Appeal Sheriff quoted Lady Dorrian in *Aberdeenshire Council v JM*, 2018 SC 118:

> *"Where the issue of who is to be appointed is contested, the sheriff would no doubt hear evidence, as he did in the present case, and take account of all of the circumstances known to him. The question of suitability is not determined by a report from the MHO but by the sheriff, as the sheriff in Arthur v Arthur recognised."*

The citation for *Arthur v Arthur*, not provided until several pages later in the judgment, is 2005 SCLR 350, Sh Ct.

One would comment that the Appeal Court did not specify the issues that would have required determination by proof. The Appeal Court did not dismiss the argument for the mother that by proposing that she be re-appointed, albeit as joint guardian, the question of her suitability to be guardian had been accepted by father and was not in dispute. Father no longer sought appointment of himself as sole guardian. As we shall see, forcing joint guardianship with father upon the mother was rejected. There were accordingly no issues of fact to be determined in that regard. That left as the only issues the choice between mother as sole guardian, a role for which she was suitable, or father as joint guardian with the chief social work officer, but it is not entirely clear whether (by the test in *Samantha Young*) anything had been advanced to amount to matters of fact requiring to be determined to make that choice. Under this heading, however, the Appeal Sheriff did refer to "further point" (3).

The Appeal Sheriff did not comment one way or the other on the submission for father drawing on the assertion of Sheriff Principal Kerr QC in *Ward, Appellant*, 2014 SLT (Sh Ct) 15[2] about the need for clarity as to whether the sheriff is hearing evidence or hearing submissions: it

[2] It is necessary that I disclose that I was the appellant referred to.

might have been helpful for the Appeal Court to re-state that for the benefit of sheriffs at first instance throughout Scotland.

(2) *Ex tempore decision*

The Appeal Sheriff referred to the apparent conflict between (on the one hand) Ordinary Cause Rule 12.3, making explicit provision for *ex tempore* judgments after proof in ordinary actions, and Part XVI of the 1999 Rules permitting a sheriff to regulate procedure "as he sees fit" and even "determine" an application at the hearing; and (on the other) that although section 50 of the 1907 Act confirms that an application must be dealt with "summarily", a "judgment in writing" is nevertheless required by section 50. Helpfully, I would submit, the Appeal Court held that: "*In many cases, such as unopposed applications, the court's interlocutor will provide the necessary written form of judgment. … "Where, however, evidence is heard, a written judgment incorporating findings in fact and law and setting out the reasons for the decision is necessary."* One might add that such an interlocutor would require to cover all of the otherwise "missing" points identified in *Aberdeenshire Council v SF (No.2)* [2024] EWCOP 10[3]. See the judgment for the authorities cited by the Appeal Sheriff for the view that a written judgment is required in Summary Applications where evidence has been led.

One hopes that this ruling will end the concerns, frequently expressed, that the dearth of published and accessible judgments under the adult incapacity jurisdiction hinders the development of the jurisprudence of that jurisdiction, and compares unfavourably with the volume of published decisions from the Court of Protection in England & Wales, even after allowing for the obvious difference in respective populations.

The Appeal Sheriff concluded his observations under this heading (located in the judgment after those in points (3), (4) and (5)) by reference to changes contained in the Courts Reform (Scotland) Act 2014 but not yet brought into force.

(3) *Role of safeguarder*

The court rejected father's submission that before a safeguarder's conclusions could be considered by a court, the safeguarder required to be treated or certified as an expert. A safeguarder is appointed for the purposes in section 3(4) and (5) of the Act, not as an expert:

> *[41] …, the role of a safeguarder is not merely to express the wishes and feelings of the adult (since the sheriff is specifically empowered to consider a separate individual for that purpose under section 3(5A)), and nor is it to carry out the functions of an expert witness. The role of the safeguarder is to safeguard the interests of the adult and to report to the court. This may or may not include conveying the adult's views. In practice (as in this case) a safeguarder will usually review the application, interview relevant parties, meet the applicant(s) and the adult, prepare a report, and comment on the application insofar as he or she observes its effect on the interests of the adult. The safeguarder may also appear at any hearing.*

[3] I would commend the current work by a practitioner in Edinburgh Sheriff Court to draft, and seek agreement upon, a pro-forma interlocutor which does meet those requirements. *Aberdeenshire Council v SF*, and several other recent decisions, including matters that have become relevant to this case of *Boyle v Denton*, are described and commented on in my three-part series of articles in Scots Law Times of 10th, 17th and 24th May 2024, which seek to justify the title "Scotland in 2024: a human rights blackspot".

> *"[42] In these proceedings the safeguarder prepared a detailed and thorough report. In her role of safeguarding the adult's interest she was entitled – indeed duty bound – to highlight the difficulties which she observed in the operation of his care plan were he to spend much of his life in Ireland with the appellant."*

It was however inappropriate for the sheriff to give weight to recommendations and observations by the safeguarder "which were based on disputed facts". I would add that the court cannot delegate its own role, including in matters such as compliance with the section 1 principles, to a safeguarder or to anyone else.

(3) *Consent to joint guardianship*

Relying on authorities cited, the Appeal Court helpfully confirmed that joint guardianship cannot be imposed on an individual unwilling to serve as such. The court quoted with approval from my SCLR commentary on *Cooke v Telford*, (Sh Ct) 2005 SCLR 367:

> *"As regards joint appointment, it is doubtful whether Parliament envisaged that a contest for appointment should be resolved by appointment of both contenders as joint guardians. It is difficult to see how an adult would be appropriately served by guardians forced into a joint appointment which was resisted by at least one of them."*

(4) Mediation

The Appeal Court held that although a sheriff may direct any person "exercising … functions conferred by this Act" to engage in mediation by an order under section 3(3), the sheriff having decided "that the appellant should not exercise any of the functions conferred by the 2000 Act", he could not be directed to attend mediation. However, it is not narrated that the sheriff had held that father should exercise no function under the Act, nor the basis on which that might have been competent. There does not appear to have been any order beyond the appointment of mother as sole guardian. The purported order to engage in mediation would appear to be predicated, and thought necessary, on father continuing to provide some care for the adult, and thus continuing to qualify as nearest relative, jointly with mother.

Flaws: the principles, and involvement of the adult

It is trite that the courts' jurisdiction under the Act is inquisitorial, not adversarial. It is as different from the courts' civil jurisdiction and criminal jurisdiction as they are from each other. Under section 1(1) of the Act the court is required to comply with the section 1 principles in effecting an intervention. In a matter decided by a court, in terms of section 1(2) the person responsible for authorising or effecting an intervention is the person or persons comprising the court. The court must ensure that it complies, regardless of whatever is or is not produced, submitted or pled before the court. In the present case, the Appeal Court's disposal sustained father's appeal and remitted the cause to a different sheriff to proceed as accords[4]. In deciding to remit the cause in this way, the Appeal Court was required to be satisfied that this would benefit the adult, that such benefit could not reasonably be achieved without such intervention, and that the intended purpose of that intervention would be the least restrictive option in relation to the freedom of the adult, consistent with that purpose. The court was obliged to take account of the present and past wishes and feelings of the adult, so far as they could be ascertained by any means of communication. It seems, in fact,

[4] Parties were ordered to attempt to agree the disposal of expenses of the appeal and advise the clerk of any such agreement within 14 days, failing which a hearing would be assigned.

that no attempt was made to ascertain the relevant present views, present wishes, past views, or past wishes of the adult in any way relating to the proposition that the determination of who should be the adult's guardian should be subject to significant further doubt and delay, pending a hearing of proof. If this had been an adversarial contest between father and mother, and if the purpose of the court had been to determine that dispute, there might have been good reason for such a proof. But that was not the court's function. The function of the court was to proceed in accordance with the section 1 principles and the provisions of the Act relevant to the parties' applications.

Strikingly absent from the Appeal Court's judgment is any information at all about the adult. The parents may have agreed that a guardianship order was necessary, and may have agreed that their son was incapable, but that was irrelevant. In fact, beyond that irrelevant agreement there is nothing in the decision of the Appeal Court, nor in the decision of the sheriff as described in the decision of the Appeal Court, to suggest that the adult was in any respect incapable in terms of section 1(6)[5]. There is no narration of the powers sought to be conferred, whether they were identical in each application, and the basis on which each power was determined to comply with section 1.

In modern practice, persons authorising or effecting interventions must also comply with relevant human rights requirements, and contemporary judicial determinations of the application of those principles. Article 6 of the European Convention on Human Rights must be complied with. In practice, the requirements of the European Convention should be interpreted in the light of the UN Convention on the Rights of Persons with Disabilities, and courts should further take account of both the intention of Scottish Government to have provisions of the Disability Convention incorporated into Scots law, and of Scottish Government's acceptance of the human rights basis for relevant areas of law recommended in the Report of the Scottish Mental Health Law Review ("the Scott Report"). Judges operating systems recently reformed to comply fully with those human rights requirements report the paramountcy of the requirement that adults be facilitated to participate personally in all proceedings concerning them or, where that is demonstrated to be impossible even with provision of all necessary support, that the adult be independently represented; and that once a hearing has commenced it should proceed continuously to conclusion[6].

There were two further apparent omissions. Neither court commented on the inappropriateness of the mental health officer's report. It had been prepared before father moved to Ireland. It had not been updated since that material change of circumstances, nor – it seems – did the sheriff order that it be updated (section 3(2)). Even more fundamentally, the MHO report is quoted as having made assertions as to what was in the adult's best interests. A "best interests" test was explicitly rejected by Scottish Law Commission in its 1995 Report on Incapable Adults, which led to the 2000 Act, and which included in an Appendix substantially the

[5] See, for example, the comments of the Lord Sheriff Clerk in *Chowdhury v General Medical Council* [2023] CSIH 13; 2023 S.L.T. 404; 2023 S.C.L.R. 318 (2023 S.L.T., pp.412–413; 2023 S.C.L.R., p.330), which is among the cases described in the article mentioned in footnote 3, and the other points made in Part 1 of that article.

[6] As reported by judges acting on a daily basis under such regimes at the international conference on 9th and 10th May 2024 hosted by the University of Coimbra, Portugal, principally concerned with review of the first five years' experience of Portugal's own reformed regime, but with contributions from other recently reformed regimes (particularly Germany and Spain).

text adopted for the 2000 Act. Scottish Law Commission rejected a "best interests" test in favour of the principles, now incorporated in the Act. The UN Committee on the Rights of Persons with Disabilities similarly rejected a "best interests" test in its General Comment No 1[7]. As for Scottish authority, see the decision of Sheriff John Baird in *B, Minuter*, 2014 SLT (Sh Ct) 5[8].

In addition, neither court appears to have considered issues of recognition and enforcement if the adult were to spend significant parts of his time in Ireland, possibly with a guardian resident there. Ireland is one of the states which has recently reformed its relevant regime, and for an Irish court to accept a Scottish guardianship order for recognition and enforcement, it would without doubt look for no less a standard of compliance with modern requirements than did the English court in *Aberdeenshire Council v SF*, in which case the Court of Protection refused recognition and enforcement of a Scottish guardianship order.

Adrian D Ward

Scottish Government announces Reform Programme Delivery Plan

As we went to press, Scottish Government published on 4th June 2024 its Initial Delivery Plan for the Mental Health and Capacity Reform Programme, setting out the range of actions that are either already underway, or planned, in the period up to April 2025. The Plan is available here. It follows consideration by Scottish Government of the Report of the Scottish Mental Health Law Review here and re-engagement with work that Scottish Government has itself done in the past. In accordance with the developing international human rights environment, Scottish Government states that its Reform Programme will "bring changes that give people greater control over their lives, care and treatment". In legal terms, we might reasonably interpret that as continuing to enhance rights to autonomy and self-determination with appropriate provision in law, and with support in accordance with Article 12.3 of the United Nations Convention on the Rights of Persons with Disabilities. Scottish Government's own summary is:

> *"The Programme will work to update and modernise our legislation, in line with developing thinking and international standards on human rights. It will also drive action to better implement rights in practice, ensure that we have the right mechanisms to monitor human rights and respond appropriately to rights and issues as they arise."*

In a section headed "Future Plans", the current Plan is described as a first step with future Plans to include activity "in partnership and at local level". The urgent need for law reform is summarised in a table headed "Strategic Aim 1: Law Reform", a table with target dates, with 15 specific action-points referring to existing adults with incapacity provision, all very broadly stated, and not all involving law reform. Several relate to making good the deficits in training, and in public education, and practices generally, that have increased in recent years. Some have target dates and some do not. The last addresses deprivation of liberty issues with the words "ensuring there are safeguards for the adult in the event of a deprivation of their liberty, including a standalone right of appeal". There is no target date for that.

Various points of significance to AWI law are

[7] General Comment No 1 on Article 12, paragraph 7.

[8] In one unreported case, Sheriff Baird rejected medical reports accompanying a guardianship application because they had adopted a "best interests" test.

covered under the heading "Mental Health Law Reform", including work on the definition of "mental disorder" and on "advance choices" (the title proposed by the current European Law Institute project on drafting model laws with supplementary materials for use across Europe, with more project participants from Scotland than from any other of the many European jurisdictions that are participating).

This is a quick reflection of some points picked out from this important document upon its initial publication. We envisage further coverage of this document, from both Jill and me, and of ensuing developments, in future Reports.

Adrian D Ward

Scotland: a human rights blackspot

A note in the May Report anticipated the forthcoming publication of the first instalment of Adrian's three-part article entitled "Scotland in 2024: a human rights blackspot". All three parts were published in successive issues during May. The reference is 2024 SLT (News) 59-63, 65-69, 71-75.

Capacity, habitual residence, and internet use in Scotland

The interlinked questions of capacity and habitual residence arise from time to time, often also linked to issues about particular limitations placed upon an adult, including limitations upon internet use. Another example that has arisen in Scotland more than once is a range of controls designed to limit an adult's addictive gambling. Habitual residence, including when jurisdiction on that basis moves from one court to another, also arises from time to time. In Schedule 3 to the Adults with Incapacity (Scotland) Act 2000, broadly the same rules apply to allocation of jurisdiction among sheriff court districts as they do in cross-border situations. On these points, a cross-border move by an adult has led to another case in which an English court has had to consider aspects of legal provision in Scotland, discussed in the Practice and Procedure section.

Adrian D Ward

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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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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 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.

Adrian will be speaking at the following open events:

1. The World Congress on Adult Support and Care in Buenos Aires (August 27-30, 2024, details here)
2. The European Law Institute Annual Conference in Dublin (10 October, details here).

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 July. 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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