



Welcome to the July 2019 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: when to appoint welfare deputies, termination and best interests, capacity in the context of sexual relations and birth arrangements, and the interaction between the MHA and the MCA in the community;

(2) In the Property and Affairs Report, fraud and vulnerability; news from the OPG, and deputyship and legal incapacitation;

(3) In the Practice and Procedure Report: Court of Protection fees changes; contingency planning, costs and s.21A applications; mediation in the Court of Protection;

(4) In the Wider Context Report: the Chair of the National Mental Capacity Act Forum reports, a new tool to assist those with mental health/capacity issues to know their rights, older people and the CPS/police; and books for the summer;

(5) In the Scotland Report: establishing undue influence and an update on the Scott review.

You can find all our past issues, our case summaries, and more on our dedicated sub-site [here](#). If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the [Small Places](#) website run by Lucy Series of Cardiff University.

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The picture at the top, "Colourful," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

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### What constitutes support? Update

Readers will be aware that we have been covering the case of *MM*, on what constitutes ‘support’ for purposes of receipt of Personal Independence Payments. On 18 July the Supreme Court unanimously allowed his appeal in the limited sense of interpreting the relevant legal provisions differently from the Inner House. We will return to the Supreme Court’s – significant decision – in the September issue.

### What are sufficient averments of undue influence?

Mrs Wilson lived in a house that she owned in Kirriemuir. In 2012 her son-in-law Mr Watkins lost his job. Mrs Wilson invited Mr Watkins and his wife (her daughter) to live with her in her house. Mr and Mrs Watkins sold their own house and moved in. In 2013 Mrs Wilson executed a Disposition of the house in favour of Mr and Mrs Watkins, reserving a liferent to herself. After an incident in 2015 Mrs Wilson left the house and went to reside with her other daughter. Mr and Mrs Watkins continued to reside in the house. Mrs Wilson raised proceedings in the Court of Session against Mr and Mrs Watkins seeking *inter alia* production

and reduction of the Disposition on grounds that the Disposition had been impetrated by Mr and Mrs Watkins exercising undue influence upon Mrs Wilson to their own benefit. In *Adeline Margaret Wilson against Peter Watkins and Another* [2019] CSOH 44, Lord Brodie considered whether the averments for Mrs Wilson were sufficient to entitle her to proof of her case of reduction on the ground of undue influence. In his decision dated 12<sup>th</sup> June 2019, he held that they were not. It was argued for Mr and Mrs Watkins that Mrs Wilson had not given fair notice of what her case against them was. Her pleadings lacked specification. Lord Brodie observed that this was not such a case as sometimes occurs where the person said to have been unduly influenced is deceased, nor was she “in some way facile or less than fully competent”. When granting the Disposition she had received legal advice. The averments suggested that she was quite capable of understanding a legal document (and capable of independent living). It was averred for Mrs Wilson that she “did not understand what she was signing”, but Lord Brodie observed that there was “little by way of context in the pursuer’s pleadings to explain just what the pursuer means by it. It stands with the pursuer’s bare denial of quite detailed averments

by the defenders as to the giving of instructions to solicitors and the preparation and execution of the Minute of Agreement and Disposition. The pursuer does not explain what she thought she was doing when she signed such documents as she accepts that she did sign.". There were sufficient averments of a relationship of confidence and trust as between Mrs Wilson on the one hand and Mr and Mrs Watkins on the other, but Lord Brodie agreed with counsel for Mr and Mrs Watkins that "it requires the one party to be dominant or ascendant and the other party to be in some way subordinate or amenable. I simply cannot find the averments to instruct such a relationship.". Likewise, there were no specific averments of Mrs Wilson having been misled or pressurised.

Lord Brodie accepted that "there may be cases where the nature of the gratuitous benefit is so substantial and so unexpected as to raise an inference of an abuse of trust", but that was not the case here. Lord Brodie concluded that "In my opinion, in the present case the pursuer has failed to make averments which, if proved in their entirety, entitle her to the remedy that she seeks.".

*Adrian D Ward*

## World Congress

Five World Congresses on Adult Guardianship have taken place at two-yearly intervals from 2010 to 2018, in Japan, Australia, United States of America, Germany and Korea. The scope of these World Congresses has expanded substantially beyond the topic of guardianship, and the concept of guardianship has come under increasing criticism in some quarters (the United Nations Committee on the Rights of

Persons with Disabilities having called for the abolition of all guardianship regimes, though there is dispute as to whether that position is justified by a proper interpretation of the UN Convention on the Rights of Persons with Disabilities). The International Advisory Board, which among other functions allocates World Congresses, agreed that successive organisers might propose amended titles (and sub-titles) for the event. The 6<sup>th</sup> World Congress will be held in Buenos Aires, Argentina, in 2020, and at the request of the organisers the agreed title and sub-title will be (in English-language version):

*6<sup>th</sup> World Congress on Adult Support and Care  
From Adult Guardianship to Personal  
Autonomy*

A further amended title has now been agreed for the 7<sup>th</sup> World Congress to be held at the Edinburgh International Conference Centre from 6<sup>th</sup> – 9<sup>th</sup> June 2022. The title and sub-title will be:

*7<sup>th</sup> World Congress on Adult Capacity  
Enhancing Autonomy, Support and  
Protection*

Preparations for the event in Edinburgh continue.

*Adrian D Ward*

## Book notice

"La voluntad de la persona protegida: Oportunidades, riesgos y salvaguardias" ("The Will of the protected person: Opportunities, risks and safeguards") is the name of a major project led by Professor Montserrat Perena Vicente of Rey Juan Carlos University, Madrid, and now the name of a book published by that University, all

of the chapters being based on presentations at a conference at that University on 20<sup>th</sup> and 21<sup>st</sup> September 2018. Five chapters are in English, four in French, and the remainder all in Spanish. Even for those whose language skills are limited to English, the book is worth reading. Under the title “The right to make choices: supported decision-making activities in the United States”, Peter Blanck and Jonathan G Martinis describe the background and work of the National Resource Center for Supported Decision-making, established by Quality Trust for Individuals with Disabilities, the Burton Blatt Institute at Syracuse University, and Kansas University Center on Developmental Disabilities. Pietro Franzina of the University of Ferrara (Italy), well known for his leading role in the European Law Institute Project on the International Protection of Adults, writes (in English) on: “The relevance of private international law to the effective realization of the fundamental rights of vulnerable adults in cross-border situations”. Among other things, the chapter analyses the advantages of a widespread ratification of Hague Convention 35 on the International Protection of Adults. Christopher Schnieders and Elyn Saks present a “Conversation about the Saks Institute for Mental Health Law, Policy and Ethics and our focus on the mental health consumer”, perhaps of particular Scottish relevance in the context of the Scott review. Our own Adrian Ward writes on; “Rights, empowerment and medical consent: the impact of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities”, arguing that it is a fiction to address issues of medical consent, and indeed issues generally of capability to act and decide with legal effect, in terms of the absolutes of complete capacity and complete incapacity. He

demonstrates the danger that the space between these extremes can in practice be filled with a presumption of incapacity, and describes techniques, including new techniques, supportive of the exercise of legal capacity, to fill that space.

### Scott review

We are pleased to report that it has now been confirmed that Kirsty McGrath, who until now has led the Scottish Government review of adult incapacity legislation, will lead the secretariat. She will be joined in the secretariat by Ruth Wilson, who has been working in Scottish Government’s Mental Health Law team for the last three years. Further staff to support the review are likely to be recruited in due course.

*Adrian D Ward*

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Alex is recommended as a 'star junior' in Chambers & Partners 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, including as Wellcome Research Fellow at King's College London, and created the website [www.mentalcapacitylawandpolicy.org.uk](http://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. 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), 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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Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click [here](#).

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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 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; 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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Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. 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](#).

## Conferences

### Conferences at which editors/contributors are speaking

#### Liberty Protection Safeguards: Implementation of the Mental Capacity (Amendment) Act 2019

Alex is chairing and speaking at a conference about the LPS on Monday 23 September in London, alongside speakers including Tim Spencer-Lane. The conference is also held on 5 December in Manchester. For more information and to book, see [here](#).

#### Clinically Assisted Nutrition and Hydration Supporting Decision Making: Ensuring Best Practice

Alex speaking at a conference about this, focusing on the application of the BMA/RCP guidance, in London on 14 October. For more information and to book, see [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.

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We are taking a break over summer, and 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](mailto:marketing@39essex.com).

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