MENTAL CAPACITY REPORT:
SCOTLAND
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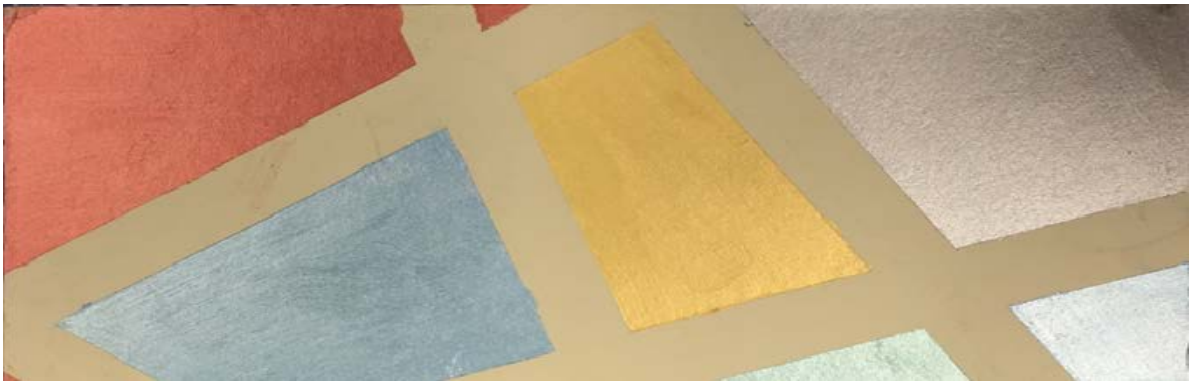

Welcome to the December 2023 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the least worst option as regards compulsory feeding, putting values properly into the mix and the need for a decision actually to be in contemplation before capacity is considered;

(2) In the Property and Affairs Report: relief from forfeiture in a very sad case;

(3) In the Practice and Procedure Report: counting the costs of delay, guidance on termination cases, and a consultation on increasing Court of Protection feeds;

(4) In the Wider Context Report: forgetting to think and paying the price, the cost of getting it wrong as litigation friend, Wales potentially striking out alone on mental health reform, and a review of Arianna's book on social care charging;

(5) In the Scotland Report: reduction of a Will: incapacity and various vitiating factors, and an update on law reform progress.

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.

We will be taking a break in January, so our next Report will be out in February 2024. For those who are able to take a break in December, we hope that you get the chance to rest and recuperate. For those of you who are keeping the systems going in different ways over that period, we are very grateful.

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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

Reduction of a Will: incapacity and various vitiating factors

On 25th September 2023 Sheriff Christopher Dickson, sitting at Edinburgh Sheriff Court, addressed issues of retrospective assessment of alleged incapacity, facility and circumvention, and undue influence, in relation to a Will by Josephine Margaret Allan ("the deceased"), in *Graham Bruce Somerville v Alasdair Roderick Allan qua Executor-Nominate of the late Josephine Margaret Allan, and as an individual*, [2023] SC EDIN 38. The deceased was maternal aunt of the pursuer and sister of the defender. She had executed a Will on 27th November 2018 ("the 2018 Will") (which was not subject to challenge), followed by another Will on 11th August 2019 ("the 2019 Will") in radically different terms, which was the subject of challenge. She died on 28th September 2019, aged 74. Few readers will wish to read all 162 pages of Sheriff Dickson's Judgment and Note [66 paragraphs of the Judgment, followed by findings in fact and law, and findings in law, and 275 paragraphs of the Note] , so after (1) a brief outline of the factual background, I have picked out from the great wealth of content in the Judgment, some points of significant relevance to adult capacity law and practice, namely (2) the sheriff's findings in fact and law (in terms of his Judgment), (3) some interesting material narrating the task of medical practitioners, and their assessments, (4) the sheriff's method of assessment of evidence, that he applied to each witness, (5) the sheriff's views on the grounds of facility and circumvention, and undue influence, (6) the sheriff's findings on the effectiveness of a witness seeing a party sign but not seeing the content of the document; and two points of interest which it was not necessary for the sheriff to address, namely (7) error as a vitiating factor, and (8) comments on major current examination of "will" and conflicting expressions of "will".

(1) Summary

The 2018 Will was prepared on the deceased's instructions by solicitors ("the deceased's solicitors"). It appointed the pursuer as sole executor and bequeathed to him the residue, including the deceased's house, subject to the following legacies:

1. Two signet rings to Jennifer and Laura;
2. Car and Bose music centre to the defender;
3. Two horses, Dale and Missy, to Ian Butt;
4. Cat, Tiger, to Patricia; and
5. Any items within her property that Patricia, Jennifer and Laura wish to have.

Patricia was the sister of the defender and the mother of the pursuer, and of Jennifer and Laura. The deceased loved animals and owned two horses: Ian Butt was her favourite veterinarian.

The full terms of the 2019 Will are quoted at [41] of the Judgment. The 2019 Will was typed by the defender on his typewriter and witnessed by a friend of the defender. Under it the deceased appointed the defender to be sole executor, and provided that:

> *"I do solemly declare that in the event of my death, it is my express wish that all my worldly goods, house, possessions, property, animals & live-stock fall into the ownership & care of [the defender], with the provision that he oversees the safe transport of my horses, Dale and Missy, into the trusted care of Mr. Iain Butt, [address]."*

On 13th August 2019 the deceased saw Ms Lawrie of the deceased's solicitors and gave Ms Lawrie the new Will, with instructions that it superseded the 2018 Will. Ms Lawrie enquired why the deceased had changed her Will. The deceased gave an explanation which, as narrated below, was held by the sheriff to be factually incorrect. The deceased also instructed a power of attorney in favour of the defender.

The deceased died unmarried and without issue on 28th September 2019.

(2) The sheriff's findings in fact and law (in terms of his Judgment)

The following were the sheriff's findings in fact and law:

1. *That the terms of the 2019 will were unheralded.*

2. *That the deceased did not receive any independent advice or assistance before making the 2019 will.*

3. *That when making the 2019 will on 11 August 2019 the deceased: (i) understood that she was changing her will and making the defender her sole beneficiary; (ii) understood that all her belongings, including her house, would be going to the defender; and (iii) comprehended and appreciated that the pursuer and the rest of the Somerville family would have had an expectation of being beneficiaries under any will made by her.*

4. *That the deceased made the 2019 will on 11 August 2019 because of the following two reasons: (i) since the pursuer had found out that he was to benefit from everything in the 2018 will she had not seen him in over a year – he had not been at her house or anywhere near her; and (ii) the defender was now the person who was helping her out with everything due to her being very ill. Those two reasons were incorrect. Those two reasons influenced the deceased's will in disposing of her property and brought about a disposal in the 2019 will, which, if the deceased had been of sound mind, she would not have made.* [This is the finding on which I comment under heading 7 below.]

5. *That the deceased lacked testamentary capacity when she made the 2019 will and therefore the 2019 will should be reduced.*

6. *That upon the 2019 will being reduced the defender will have no title to intromit with the deceased's estate. The defender continues to have access to the deceased's house. In the circumstances when decree of reduction is granted, decree of interdict should also be granted to prevent the defender from intromitting with the estate of the deceased.*

(3) Some interesting material narrating the task of medical practitioners, and their assessments

The relevant medical history, including the history of assessments of capacity, is narrated in paragraphs [16] through to [25] of the Judgment. That passage reproduces several relevant medical notes. Further medical history, with

reproduction of further medical notes, appears in paragraphs [51] to [64] of the Judgment. All of this material is valuable in demonstrating the amount of care and skilled medical time devoted to the task of attempting to assess on an ongoing basis whether the deceased had capacity to make decisions in medical matters, or whether it would be appropriate to apply non-consensual procedures, in a case where the deceased for most of the time was hovering at the limits of competence for such matters. In these practical situations, notable is the extent to which efforts were made to afford maximum feasible respect to the deceased's expressed will and preferences by identifying and offering arrangements that could be followed with her consent, rather than applied under appropriate procedures without her consent. This approach was well encapsulated by Dr Lee, consultant geriatrician based in London. He had not seen the deceased. He expressed opinions drawn from the medical records and statements provided to him. As narrated at [76] in the Note:

> *"Dr Lee explained in practice medical professionals try and take the least restrictive option. The tendency is to try and facilitate the patient going home, particularly if the family agree with that decision. If going home then fails the medical professionals would try and negotiate another path and attempt to get the family on board with that. However, it would sometimes be necessary to use powers under the Mental Health Act to detain the patient if it was felt the patient did not have capacity."*

For clarity, it is worth repeating Dr Lee's explanation narrated at paragraph [71] of the Note:

> *"Dr Lee explained that it was possible for a person to have capacity for one thing and not another. It was also possible for a person to lack capacity but subsequently regain capacity, however, this depended on the cause of the lack of capacity. Where the patient suffered from a progressive condition, such as dementia, once capacity was lost the patient would not be expected to regain capacity."*

He emphasised more than once that capacity to decide to go home was not necessarily the same as testamentary capacity, testamentary capacity generally requiring a higher level of capability. Dr Lee also pointed out that the medical team treating the deceased were focused on questions of capacity to decide medical matters, and whether to return home.

At [260] of his Note, Sheriff Dickson agreed with the opinion expressed by Dr Lee that:

> *"The two reasons why the deceased changed her will [from the 2018 Will to the 2019 Will] could properly be described, for the purposes of stage 4 of the 4 stage test in the case of Banks [v Goodfellow (1870) LR 5 QB 549, [1861-73] All ER Rep 47], as delusions which influenced the disposing of the deceased's property and brought about a disposal of it which, if she had been of sound mind would not have been made. The two reasons were, in my opinion, to use the words of Viscount Haldane in Sivewright [v Sivewright's Trustees, 1920 SC (HL) 63] an actual and impelling influence on the deceased making the 2019 will. They resulted in the deceased making the 2019 will with terms that were contrary to the 2018 will and contrary to the testamentary intention the deceased: …"*

The 4 stage test in the English case of *Banks* was quoted with approval by Lord Atkinson in *Sivewright*. Sheriff Dickson held that the first three stages of the test had been met: the deceased understood the nature of the act and

its effects; she understood the extent of the property of which she was disposing; and she was able to comprehend and appreciate the claims to which she ought to give effect. However, he held that she failed the fourth test, that for the purpose of comprehending and appreciating the claims to which she ought to give effect, it was necessary –

> *"That no disorder of the mind shall poison [his] affections, pervert [his] sense of right, or prevent the exercise of [his] natural faculties – that no insane delusion shall influence [his] will in disposing of [his] property and bring about a disposal of it which, if the mind had been sound, would not have been made."*

(4) The sheriff's method of assessment of evidence, that he applied to each witness

The pursuer led evidence from several family members. Sheriff Dickson pointed out that they clearly supported the pursuer's case and could not be described as independent. There was also much evidence about events and conversations that could not be independently verified. At paragraph [226] of his Note he explained that:

> *"I sought to test the evidence of each witness by considering whether their evidence was internally consistent and by comparing and contrasting their evidence with other evidence I accepted, including the contemporaneous records that were available."*

Applying these tests, witness by witness, he concluded that each of the pursuer's family witnesses was credible.

(5) The sheriff's views on the grounds of facility and circumvention, and undue influence

As Sheriff Dickson had held that the deceased lacked testamentary capacity when she made the 2019 Will, it was not necessary for him to address the questions of facility and circumvention, and undue influence; but against the eventuality that he was wrong on the question of capacity he did comment on those.

On facility and circumvention, Sheriff Dickson concluded [264] that the deceased was generally strong-willed, but not when it came to the defender. She was scared of the defender and wanted the defender to move out of her house, but she did not like confrontation and, as a result, put up with him living there. If she did not lack testamentary capacity when making the 2019 Will, nevertheless "*her mind was so weak and pliable that she was unlikely to be able to resist pressure applied by the defender*". Lesion was clear from the fact that the defender was sole beneficiary under the 2019 Will, and the circumvention could be inferred from the whole circumstances, including in particular "*the problematic relationship that the deceased had with the defender*", and her recent expressions of her testamentary intentions which were contradicted by the terms of the 2019 Will. He concluded that if the deceased had had testamentary capacity on 11th August 2019, the sheriff would have found that the 2019 Will was voidable and ought to be reduced on the basis of facility and circumvention.

On undue influence, Sheriff Dickson considered [265] that the defender had a dominant or ascendant influence over the deceased. He himself prepared the 2019 Will, and arranged for the witness. Among other factors narrated by the sheriff were that the deceased "*allowed herself to be driven to Peebles for the appointment with Ms Lawrie on 13 August 2019 and wanted the defender to be appointed as her attorney*". At the time, the deceased placed confidence and trust in the defender. The 2019 Will benefited him.

The deceased did not obtain independent advice or assistance before the 2019 Will was made. Again, the sheriff referred to the problematic relationship between the deceased and the defender, and her recent expressions of testamentary intention. He considered that, if the deceased had had testamentary capacity, the whole circumstances of the case justified the inference being drawn that the defender had abused his relationship of trust with the deceased, and that the 2019 Will would have been voidable and ought to be reduced on the basis of undue influence on the part of the defender.

(6) The sheriff's findings on the effectiveness of a witness seeing a party sign but not seeing the content of the document

The content of the 2019 Will was not visible to Mr White when he witnessed the Will, because the content was covered by a sheet of paper. Sheriff Dickson dismissed that argument on the basis of the authorities that he cited in [272].

(7) Error as a vitiating factor?

"Error in substantials, whether in fact or in law, invalidates consent, or rather excludes real consent, where reliance is placed on the thing mistaken" (Bell, *Principles*, s11, 10th edition; Stair, I, 10, 13; Opinion of Lord Watson in *Stewart v Kennedy* (1890) 17 R. (HL) 25 at 26). That is the settled law in relation to contract. It is an exception to the general rule that a plea that a party to a contract would not have entered it if he had known all the relevant facts has been described as "so utterly preposterous as to be undeserving of any attention" (*Forth Marine Insurance Co. v Burnes* (1848) 10 D. 689, per Lord Fullerton). The exception, whether shared or unilateral, and whether induced or uninduced, renders a contract void, rather than voidable, but it must be an error as to the substantials of the contract.

But what about fundamental error, uninduced, in a unilateral document such as a Will or a power of attorney? Under heading (2) above, I have already indicated that item 4 of the sheriff's findings, quoted there, is potentially relevant to that question. It is not clear whether the deceased's erroneous belief described there was induced or uninduced, but let us assume that it was uninduced. Her error does seem to have been fundamental (an "error in substantials") because those are the reasons that she gave when asked why she had changed her Will. Again, let us here assume that if the point had been raised, that it could reasonably have been held that this error was substantial, and that but for that the deceased would not have changed her Will.

Sheriff Dickson dealt first with the assertion that the deceased lacked capacity to grant the Will because, if she did, that would render the Will void, and rendered it not only unnecessary but irrelevant to consider the grounds of possible voidability, namely facility and circumvention, and undue influence. If however a fundamental uninduced error had also rendered her Will void, then I would suggest that the sheriff could have decided the case on that basis alone, without several days of evidence addressing the question of her capacity. The Will would have been void, a nullity, of the same status as if it had never existed, likewise displacing the potential grounds of voidability.

I invite any reader to let me know if that reader has been able to identify any clear authority on whether fundamental error, whether induced or uninduced, renders void a unilateral document such as a Will or power of attorney, in the same way that it renders void a bilateral obligation such as a contract. I would venture to suggest that on grounds of basic principle and logic, it must. A lack of any valid exercise of will in order to commit to a juridical act, whether in bilateral

or unilateral context, must in both cases render the apparent act a nullity[1]. I suggest that it cannot do so in one of those situations, but not in the other.

During my practising career, I did advise another solicitor in a situation where that point could have been determined. An elderly lady had changed her Will to disinherit a relative who had been her main helper, guide and supporter for years. She depended upon him. She had to be admitted to a nursing home. She was unsettled and upset. She telephoned him. Her reason for changing her Will was that she was so appalled that in her time of greatest need, the person upon whom she so greatly depended, and in whom she had so often placed her trust, had hung up on her. In reality, she was unused to using a payphone, and her money had run out. Sensibly, though unhelpfully for the development of Scots law, the various parties having an interest agreed a solution, once it had been explained to those benefiting from the change that I was prepared to run an argument that in the circumstances the Will was void (with prospects of "winner takes all", but deduction from "all" of substantial costs, potentially including those of an appeal and even a further appeal).

(8) Comments on major current examination of "will" and conflicting expressions of "will"

The concept of "will" is fundamental to interpretation and application of the UN Convention on the Rights of Persons with Disabilities ("CRPD"). It is focused upon the requirement of Article 12.4 of that Convention that any measure relating to the exercise of legal capacity ensures safeguards to respect "rights, will and preferences". Indeed, "will" was described as "the bedrock of all law" by Wayne Martin, Professor of Philosophy at the University of Essex, and leader of the Essex Autonomy Project, when he described that Project's work on "'Recognition' of the 'will'" at the Project's Summer School on 9th – 11th August 2023. Several participants in the European Law Institute's ("ELI's") current project on "Advance choices" were present, and Professor Martin's comments led to an immediate debate, thereafter continued (and continuing) by email, on relevant questions such as whether an explicit instruction by the granter of an advance choice to override a subsequent vociferous expression of will to the contrary, should be applied so as to do so. Professor Martin quoted Justinian's proposition that "*furiosi nulla voluntas est*". Relevant to both the Essex Autonomy Project and the ELI project is the question whether an expression of will in the absence of adequate capacity to do so renders that expression not evidence of the person's will at all. We add to the deliberations of the two projects this unaddressed question, in the case of Ms Allan's Will, as to whether fundamental error, induced or uninduced, rendered her unilateral expression of "will" contained in her 2019 Will a nullity, and thus in terms of CRPD not an expression of will at all.

Adrian D Ward

Law reform progress report

In this last edition of the Mental Capacity Report forthis year, this is an update on Scottish Government's progress in work following upon its response in June 2023 to the Scottish Mental Health Law Review ("the Scott Review"). Jill Stavert described that response here.

Scottish Government continues major work towards substantially implementing the

[1] A point on which the law of England & Wales is fundamentally different, the difference being an example of one of the basic differences between civil law and common law systems.

recommendations of the Scott Review, and has already consulted extensively with stakeholders on its proposed draft Delivery Plan, and on scoping various key areas of work towards achieving delivery. Consultations continue. Consultees, who include both Jill and me, have been asked to keep these discussions, and particularly the associated papers, as confidential, for the obvious reason that discussions are deliberative and papers are drafts which could be changed (perhaps radically). The following is however authorised for dissemination to "wider organisations or other colleagues". I treat all readers of the Report as colleagues!

Scottish Government confirm that work is now underway to establish a new Mental Health and Capacity Reform Programme "to drive changes in legislation, improve support and strengthen accountability for human rights". Scottish Government intends to publish an initial Delivery Plan in early 2024. It will include information about priority work that will be taken forward during the first 18 months of Government's work (from October 2023 to April 2025) to help Government to achieve the Programme's vision and aims. Government also plans to publish a response to the individual recommendations from the Scott Review. Activity is already underway to set up new workstreams to deliver on the initial priorities. Further work will continue in 2024 to develop Government's approach to implementation, its leadership and governance structures, and how it will monitor and report on progress. All of this outlines the law reform agenda for 2024 insofar as relevant to the scope of the Mental Capacity Report.

I would add my own comment that "delivery" is not defined.

Adrian D Ward

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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; 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 World Congress of Adult Support and Care. This event will be held at the Faculty of Law of the University of Buenos Aires from August 27-30, 2024. For more details, 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.

Our next edition will be out in 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 Report in the future please contact: marketing@39essex.com.

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