



Welcome to the April 2025 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: a masterclass in determining a particularly complex set of capacity questions;

(2) In the Property and Affairs Report: statutory will applications and publicity; OPG guidance on family care payments, and the bond provider saga continues;

(3) In the Practice and Procedure Report: a helpful reminder of elephant traps for the unwary as regards when time runs for purposes of appealing decisions;

(4) In the Mental Health Matters Report: the Mental Health Bill progresses, and the CQC reports on the MHA 1983 in 2023-24;

(5) In the Children's Capacity Report: a new BMA toolkit to help with capacity and other issues in relation to those aged 16 and 17, and back to the vexed question of parental consent to confinement;

(6) In the Wider Context Report: the inherent jurisdiction rebuffed in a personal injury case, recent research of relevance, and strong views from the CRPD Committee on medical assistance in dying and the 2000 Hague Convention.

(7) In the Scotland Report: what is appealable in the AWI context, and the complexities of the position of those aged 16 and 17 in Scotland.

The progress of the Terminally Ill Adults (End of Life) Bill can be followed on Alex's resources page [here](#).

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](#).

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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.

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What is appealable? And the elusive litigant

Can procedural interlocutors during the course of an application under the Adults with Incapacity (Scotland) Act 2000 be appealed to the Sheriff Appeal Court under section 2(3) of that Act? What are the obligations of a court, and other parties, towards a litigant who acts elusively? These two questions were both addressed by Sheriff Principal N A Ross, sitting alone in the Sheriff Appeal Court, in an appeal by MF (Respondent and Appellant) in a summary application by City of Edinburgh Council (Applicant and Respondent) in respect of VF (“Mr F”), [2025] SAC (Civ) 5, also now reported at 2025 SLT (SAC) 17.

On the first question, the relevant provisions of section 2 are as follows:

“Applications and other proceedings and appeals

- (1) *This section shall apply for the purposes of any application which may be made to and any other proceedings before the sheriff under this Act.*
- (2) *An application to the sheriff under this Act shall be made by summary application.*
- (3) *Unless otherwise expressly provided for, any decision of the sheriff at first instance in any application to, or in any other proceedings before, him under this Act may be appealed to the sheriff principal, and the*

decision upon such appeal of the sheriff principal may be appealed, with the leave of the sheriff principal, to the Court of Session.”

Without amending section 2(3) of the 2000 Act, section 109(3) of the Courts Reform (Scotland) Act 2014 provided that appeals to the sheriff principal are to be read as appeals to the Sheriff Appeal Court.

“VF” appealed against two interlocutors of the sheriff at first instance. By interlocutor dated 9 January 2025, the sheriff *“refused various motions by Mr F directed at removing or regulating the safeguarder, and making provision for lodging documents and ancillary procedural matters.”* By interlocutor dated 15 January 2025, the sheriff *“ordained Mr F to disclose his email address and a true postal address in the UK, for the purposes of service of documents.”*

The Council challenged the competency of the appeal. The Council argued that the wording of section 2 of the 2000 Act should be read as applying only to the merits of the summary application, and not to every incidental or procedural decision in the court process. VF argued that the Parliament had deliberately left the category of appeals wide, because (as SP Ross narrated): *“These were important proceedings for the Adult’s benefit, and that the Parliament ‘had not restricted the nature of appeals because it was reasonable to assume, in such procedure, that everybody would act reasonably to resolve any issues.’”*

SP Ross considered that the first issue was the inter-relationship between section 2(3) of the 2000 Act and section 110 of the Courts Reform (Scotland) Act 2014. *"The terms of section 110 resolve the matter – it expressly does not affect the right of appeal to this court under any other enactment (section 110(4))."*

SP Ross had been addressed on rules of statutory interpretation, but held that there was no requirement to resort to those rules, because *"The question of how section 2(3) should be read is plain, in my view, from the whole wording of section 2."* Rather than concentrating solely on section 2(3), due weight should be given to the earlier provisions of section 2. *"Section 2(1) restricts the section to 'the purposes of any application which may be made to and any other proceedings before the sheriff under this Act'. Section 2(2) states that 'An application to the sheriff under this Act shall be made by summary application'."*

SP Ross held that *"the application which may be made"* referred to the summary application itself, and not to every interlocutor within the court process. The summary application identifies the orders sought, and why they should be granted, and the terms of the summary application *"do not regulate or limit the incidental directions which a court may issue in furtherance of the application, such as appointment of a safeguarder or directions about amending pleadings, providing information, lodging documents, or any other orders which contribute to the preparation and hearing of an action. These matters are within the control of the court, and are not the subject of the 2000 Act. They are regulated instead by procedural rules and the inherent powers of the court. The 2000 Act does not purport to regulate all incidental and procedural decisions to be made by the court."* The appeal that will become available, subject to the usual rules about when appeals are statable, will (in this case) be in

relation to the appointment of a welfare guardian, the financial guardian, and in relation to such incidental orders as were sought. SP Ross held that neither interlocutor was appealable under section 2(3) of the 2000 Act; and that the appeal was not competent. He dismissed it.

One would question one aspect of this part of the decision. SP Ross held that appeal under section 2(3) *"is not available against the decision to appoint a safeguarder, which is a common law power inherent to the court, and not regulated by the 2000 Act."* That is not easily reconcilable with the provisions of subsections (4) and (5) of section 3 of the 2000 Act empowering the court to appoint a safeguarder and containing provisions on procedure for, and effects of, making such appointment.

On the second question, VF submitted that documents had not been properly served upon him, as his address of choice was in France, and if that was not acceptable to the court, it meant that all foreign litigants would be prejudiced. He submitted that he had provided an email address to the court, but from SP Ross' judgment that does not appear to have been established. SP Ross gave short shrift to all of that. As to the obligations on the court and on other parties, one can do no better than quote SP Ross:

"Mr F appears to wish to participate in the court procedure while refusing to provide an address within the jurisdiction, or an email address, at which service can be made. That is not a position open to any litigant, and appears to misunderstand the onus on the court. The court is concerned only that each litigant receives fair notice. The court does not require to guarantee service in the face of obfuscation, refusal to engage or frustration of service. If a litigant does not wish to participate, the court and the other parties are under no obligation to force

him to accept service. The litigant is at liberty to avoid service, allow envelopes to pile up on the doormat, or leave messages unopened in an Inbox. The penalty is, however, that the court will not listen to any protest that service was not made, or information not given, if it is shown to have been sent to the correct address. In the present action, it will be enough if the court or the applicant make electronic service at any of the email addresses used by Mr F in submitting his own documents. Effective service will be assumed. If that address is to be changed, the onus is on him to provide an alternative, effective address."

Adrian D Ward

“16 going on 17” – again

The position of “young persons” between the ages of 16 and 18 in Scotland remains troublesome. On the one hand, they are governed by provisions of legislation that are complex and difficult to follow, to an extent that can reasonably be characterised as absurd. On the other hand, away from complexities that keep lawyers busy in the courts, they are all too likely to encounter difficulties, and fall into gaps, in transitions between child and adult services, both under-resourced.

At the heart of the legal difficulties is Scotland’s ambivalence about whether a “child” becomes an “adult” at 16 or at 18. Adult incapacity practitioners will be aware of the conundrum that Schedule 3 to the Adults with Incapacity (Scotland) Act 2000 substantially incorporates the Hague Convention of 13 January 2000 on the International Protection of Adults, and that the Convention defines adulthood as beginning at 18; yet Schedule 3 applies without adjustment the definition in section 1(6) of that Act that “adult” means a person who has attained the age of 16 years. We previously quoted “16 going on

17” in the title to an item commencing on page 4 of the March 2021 Scotland Report [here](#) in a case on whether a 17 year-old was a looked-after “child”. See that Report for the tangles through which the Inner House had to navigate to conclude that in that case, and for the relevant purposes, she was a child.

Substantially similar complications have now led our highest criminal court into an error which has had to be corrected in a Supplementary Opinion of the Appeal Court, High Court of Justiciary, in the case of *The Procurator Fiscal, Dundee against (First) JH; and (Second) LL*, Minuters, in which The Commissioner for Children and Young People in Scotland intervened, reported at [2025] HCJAC 12. See that report for the tangles through which that court required to navigate, in order to conclude that two paragraphs of the original judgment were in error. The original judgment had concluded that, for the purpose of relevant provisions under which both accused were prosecuted, they were both children, because they were under the age of 18 years. They had in fact ceased to be children at the age of 16.

Through a complexity of amendments, the core question related to the definition of a “child” in section 307 of the Criminal Procedure (Scotland) Act 1995, which was amended with effect from 24 June 2013 to provide that “child” generally meant a person under the age of 16, subject to exceptions. When section 12 of the Children (Care and Justice) (Scotland) Act 2024 is fully in force, the definition of “child” will for most purposes alter from a person under 16 to a person under 18. However, that amendment is only partially in force. Until the outstanding amendments in the 2024 Act come into force, a “child” for the purposes of the 1995 Act will continue to be a person under 16 years of age, save for exceptions in the transitional provisions, which exceptions did not apply in this case. The

relevant provision of the original Opinion was thus narrated to read as follows:

"[11] UNCRC Article 1 defines a child as meaning 'every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier'. However, unless and until further provisions are commenced, for the purposes of the 1995 Act section 142, the age of a "child" remains a person who is under 16 years of age."

Lord Beckett was a member of the court which arrived at the original Opinion issued on 17 January 2025, and delivered by Lord Carloway as then Lord Justice General. The Supplementary Opinion was delivered by Lord Beckett, following his appointment as Lord Justice Clerk. His Supplementary Opinion included this comment:

"We were surprised and troubled to hear that in neither case is a new trial diet fixed. Given the already protracted history of proceedings, we expect early trials to be fixed for both cases, involving child complainers, against JH and LL each of whom is a child under UNCRC Article 1."

The complaint that justice delayed is justice denied applies particularly where those involved in criminal or civil litigation have vulnerabilities, such as those arising from childhood or disabilities.

Those who delight in complexity will no doubt note the reference in the Supplementary Opinion to provisions relevant to certain offences against "children under 17 years of age to which special provisions apply".

Viewed more broadly, there could be said to be three dimensions in play here. There is a vertical dimension of different ages for different purposes within any one jurisdiction, with related questions of how they are arrived at and the

coherence (or lack of it) with which they stack up together. Horizontally, there are the differences between different systems, or between systems and international instruments. Thirdly, there are the differences within each system over time, as laws are created, then reformed. Do at least some of these differences provide potential, at least within the United Kingdom, for discrimination challenges? What evidential basis is there for the setting by legislators of different ages for relating capacity and responsibility to different ages for different purposes? Do evidential bases exist, and if so to what extent? Are they used, and if so why are they not referred to?

Though acknowledging that the science has developed, there seems to be little evidence of it being accessed by legislators and used as an evidential basis. How far have we moved beyond the following, that I wrote in "The Power to Act" (SSMH, 1990)?

"So far as I can ascertain, there has been little or no adequate research into one question which is of considerable significance in relation to any reform of mental disability law. What are the skills and abilities which are needed to have full legal capacity? What is the nature of the impairment of those skills which impairs legal capacity? How can we best assess such impairment, and relate the results to specific modifications in legal capacity?"

"It is interesting to note that it has been considered possible to review child law without such information in relation to children. Discussion of the age at which children should have full legal capacity, or the ages at which they should have lesser degrees of legal capacity, has proceeded without any data as to how and when children develop the skills and abilities needed for such levels of legal capacity. Even if we knew that the

“average” or “normal” child of a given age has a particular level of such skills and abilities, we would also need to know the degree of divergence from that norm.”

Could the Parliament, and Government when exercising delegated powers, contrive to make it rather easier to find a straightforward answer to the simple question: “Is this person, for these purposes, a child or an adult?”

Adrian D Ward

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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 also does 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](#).

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 May. 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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