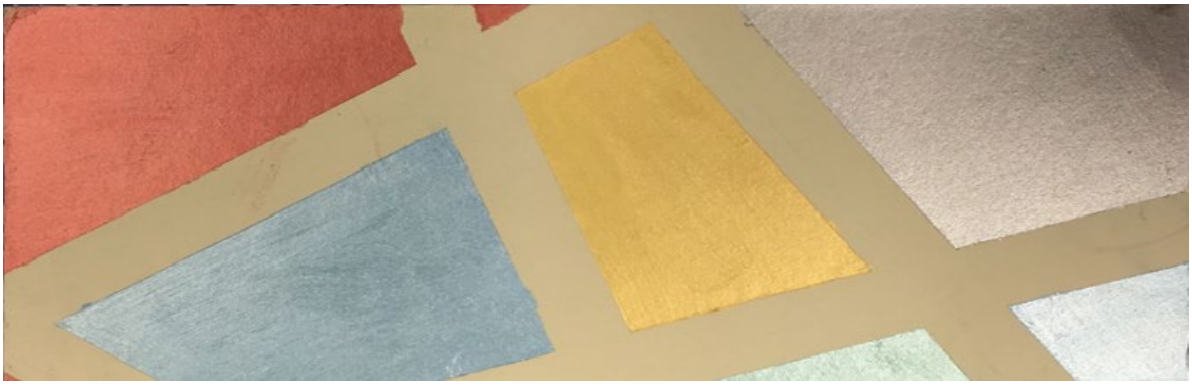

Welcome to the July 2025 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: what to do when an advance decision to refuse treatment may be in play, and the consequences of the gaps between services for those with disordered eating;

(2) In the Property and Affairs Report: capacity in the rear view mirror: how does the presumption work?;

(3) In the Practice and Procedure Report: disclosing position statements to observers; habitual residence, moving jurisdictions and 'lawful authority;' and the impact on P of being assessed;

(4) In the Mental Health Matters Report: progress of the Mental Health Bill and the tort consequences of a finding of Not Guilty by Reason of Insanity;

(5) In the Children's Capacity Report: a depressing snapshot from the national DoL court, human rights of children in the social care system and capacity and gender-affirming treatment;

(6) In the Wider Context Report: the Oliver McGowan statutory learning disability and autism training, and the pitfalls of facilitated communication

(7) In the Scotland Report: joint attorneys in dispute: appropriate remedies and; "If at first you don't succeed …": res judicata in tribunal proceedings.

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.

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: open-and-shut case – or was it?

Sheriff Robert D M Fife, sitting at Edinburgh, issued on 26th June 2025 his judgment in the contested application for a guardianship order by City of Edinburgh Council in respect of the adult "B". The case was contested by the adult's son "M" (designated "second respondent"). The sheriff issued his judgment following an evidential hearing which proceeded over six days, and concluded on 9th May 2025.

Edinburgh City Council ("the Council") sought appointment of its chief social work officer ("CSWO") as welfare guardian, and a solicitor ("R") as financial guardian. The powers sought for each are referred to by number and letter at various points in the judgment, but the terms of none of them are disclosed. The application was lodged in February 2023 and appointment of the CSWO as interim welfare guardian was made on 23rd February 2023. In pursuance of the interim welfare powers, the adult was moved on 8th May 2023 into a care home. Evidence at the hearing in May 2025 described her as being "incredibly happy and contented" there, at least by that time.

M ("the son") sought appointment of himself as welfare guardian. He also sought an intervention order authorising himself to make various decisions in relation to the property and financial affairs of the adult. The Council was successful. The CSWO was appointed welfare guardian for a period of three years with the unspecified powers sought. R was appointed as financial guardian for a period of two years with unspecified powers. The son's craves to have himself appointed welfare guardian, and for the intervention order, were dismissed. The only very limited success achieved by the son was that rather than award the Council's costs of opposing the application for an intervention order, the sheriff reserved the question of expenses for a subsequent hearing.

The judgment, correctly and helpfully, narrates the evidence that the sheriff heard, the conduct of the hearing, and the submissions made to him. That all takes a very large part of his judgment, but for the purposes of this Report that can all be condensed into two observations. Readers who are interested are recommended to read those narrations, and will no doubt reach their own conclusions as to these observations, which are (firstly) that rarely – if ever – can the evidence before the court have shown a candidate for appointment as guardian to be so unsuitable to be anyone's guardian with any powers, as was the son, subject to just one possible counter-indicator as regards welfare guardianship; and (secondly) that rarely if ever can a party litigant have subjected all of the witnesses and others involved to such a constant sustained, aggressive, and largely improper and unreasonable onslaught as did the son. The minor qualification on suitability, in relation to the welfare appointment, was assertions and evidence that the son "was proactive, with the family, in finding a suitable care home for the adult" [48] and the narration by the sheriff that he had:

> *"heard from several witnesses who spoke favourably of M [the son] trying to do the best for the adult, particularly his efforts in securing the best care home for the adult."*

In the next sentence, the sheriff recorded that:

> *"M, himself, acknowledged he could be intolerant of any delay and that his actions, at times, reflected his frustration."*

Next thereafter, however, the sheriff narrated that:

> *"Nevertheless, all the witnesses described M's repeated threats, abuse and bullying behaviour. There was no favourable suitability assessment of M to be appointed as welfare guardian or intervener."*

The forgoing three quotations comprise [104]. It would appear that the "repeated threats, abuse and bullying behaviour" were experienced by all of those who subsequently were witnesses, and others, in their previous dealings with the son. One must observe that it cannot have been other than a significantly stressful and unpleasant experience for all concerned to be subjected to such a constant bombardment throughout six days of a hearing. It is worth reading the full judgment to observe, through that medium, the sheriff's commendable handling of such a situation. By and large, it would appear that the same could be said of all those who "came under fire", though a minor exception was noted and considered by the sheriff as follows:

> *"During cross-examination, there was a brief terse exchange between R and M when R expressed some views about M's knowledge of company law. Against a background of a sustained professional and personal attack on R by M, and personal abuse directed towards R by M, throughout the proceedings, narrated in detail in R's affidavit and the written submissions for the applicant, the outburst was understandable. This has had no adverse impact on my assessment of R as a witness. The professional and personal attack on R by M was very concerning. M's conduct towards R was at times reckless, unwarranted and unacceptable." [101]*

That all said, the judgment appears to disclose some startling features.

The sheriff narrated the two "gateway" conditions upon which the sheriff must be satisfied to be able to grant a guardianship application. The Adults with Incapacity (Scotland) Act 2000, section 58(1)(a) specifies relevant incapability, and section 58(1)(b) requires the sheriff to be satisfied that no other means under the Act would be sufficient to enable the adult's relevant interests to be safeguarded or promoted. One would observe that these could be read as a development for the purposes of part 6 applications of some of the principles in section 1(1) - (4) of the Act setting out the obligations falling upon the sheriff to satisfy himself. Those are obligations upon the sheriff as the person responsible for authorising or effecting the intervention in terms of section 1 of the 2000 Act, and therefore apply regardless of whatever may have been produced, pled, submitted or otherwise been made available to the sheriff.

If there is one sentence that leaps out from the page in the whole judgment, it is – in relation to the condition in section 58(1)(a):

> *"The first precondition as to incapacity is a matter of admission." [71]*

That would appear to be a complete impossibility. The evidence all suggests total

incapability of the adult in relation to all matters in respect of which guardianship powers were sought. If so, the adult must have been completely incapable of admitting her own incapability. Equally startlingly, the judgment omits reference to anything done towards implementing the mandatory requirement in section 1(4)(a) to take account of the present and past wishes and feelings of the adult. All possible combinations of those four elements must be taken into account, without exception. The more impaired is the adult's relevant capacity, the more important are these. There is a mild indication that the adult had a favourable view of her son, but no indication of any rigorous investigation into that. One must also mention that the medical evidence seems to focus largely upon diagnosis, and drawing conclusions from that diagnosis, rather than clearly assessing capacity as a separate matter.

There appears to be no narration of the issue of capacity as an essential element in its own right. That rather appears to take us back to the generally, and firm, rejection of any remaining vestiges of the former view of capacity being the binary extremes of complete capacity or total incapacity. One could say that in Scots law the rejection of that binary approach could be dated back to the 1980s, and the introduction and development of partial guardianship, as an alternative to plenary guardianship, in the form of appointments of tutors-dative to adults, beginning with *Morris, Petitioner*, in 1986. That is reinforced every time a guardianship order under the 2000 Act is granted with specific, targeted powers. The section 1 requirements, with the generally accepted requirement that they be interpreted in the light of human rights requirements and obligations, could be said to represent clear rejection of the old binary approach. Coupled with that, one has to observe that the judgment does not narrate the necessary rigorous assessment of each of the powers granted in order to comply with section 1(3). Indeed, as noted above, the powers are not narrated.

It is notable that whatever were the powers granted in the interim order, the following May the adult was placed in a care home. There appears to have been no narration as to whether her placement and retention there was a deprivation of liberty by reference to the well-known "*Cheshire West*" criteria (see here the *RF* case). It is not possible from the judgment to determine whether her transfer there, and remaining there, was lawful. One cannot assert that it was unlawful, but one would have thought that the point ought to have been addressed.

If there is another "leaping out from the page" point, it is that a previous safeguarder had to withdraw, so badly had her relationship with M deteriorated, but for the remainder of the proceedings R became safeguarder as well as (it appears) being existing interim financial guardian and the candidate, who became the successful candidate, for appointment as financial guardian. It would seem from the narration that R in the course of a single continuous session of giving evidence intermingled evidence as safeguarder, on the one hand, and as interim financial guardian and candidate for appointment as guardian, on the other. There appears to have been no consideration as to whether in the circumstances this was a conflict of interest, and whether as such it disqualified him from appointment as safeguarder. This commentator is unaware of anything in the relevant jurisprudence to suggest that the position in Scots law does not reflect the requirement of Article 12.4 of the UN Convention on the Rights of Persons with Disabilities that "all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards …" and in particular are "free of conflict of

interest". One must record regret that these issues were not subject to debate leading to clear expression of the sheriff's views in relation to them.

It is a feature of this case that there appears to have been no reliance upon, nor reference to, any decided cases. One must accept the sheriff's conclusions that the son was unsuitable for appointment as either welfare guardian or financial guardian, linked to the sheriff's finding that a welfare guardian does not have fiduciary duties, but is in a "position of trust" impliedly equated Some mention might have been made of findings such as in *Application in respect of RA*, January 17, 2008, Glasgow Sh. Ct., under which a candidate who had been guilty of embezzlement was found unsuitable for financial guardianship, but nevertheless appointed welfare guardian. There could have been some mention why the facts demonstrated otherwise in relation to the son, indeed on a reading of the judgment one would expect that, but it might have been helpful for that to have been mentioned. Likewise, it is implied that the son did not make a separate application for an intervention order, but was this done only by minute (see *Cooke v Telford*, 2005 S.C.L.R. 367, Sh. Ct.) or because the sheriff has discretion to appoint "any individual whom he considers to be suitable for appointment and who has consented" (section 59(1)(a))? There was no need, where the sheriff proposed to do that, for any requirement such as a minute (see *Arthur v Arthur*, 2005 S.C.L.R. 350, Sh. Ct.). Notably, however, these both concerned appointment as guardian of someone not proposed in the guardianship application for the role. Is that transferable to an appointment under an intervention order? Just as the sheriff may appoint a different guardian, likewise under section 58(3) the sheriff may treat a guardianship application as being an application for an intervention order, and presumably that would include the option under section 53(5)(b) to "authorise the person nominated in the application" to act. It is not clear, however, that anyone other than the person nominated in "the application", meaning the nominee in the guardianship application, might be appointed: this commentator would suggest not.

Finally, one of the son's apparent misdemeanours was successfully to register in England a purported power of attorney granted by the adult. It was subsequently removed from the English register upon evidence that the adult was not capable of granting it. One wonders how the OPG for England & Wales accepted it for registration in the first place, in the absence of any apparent connection with England & Wales on the part of the granter ("donee") sufficient to justify the granting of an English power of attorney. One would suspect that in the converse situation such an application would be rejected by the (Scottish) OPG.

Adrian D Ward

AWI reform: progressing, but imperilled by SLAB

AWI reform is proceeding in accordance with the Ministerial Statement reproduced in the June Mental Capacity Report. The AWI Expert Working Group and the Ministerial-led Oversight Group, as described in the Ministerial Statement, have both been established, as has been a monthly programme of meetings of the Expert Working Group, from this month through to May 2026. Tom Arthur MSP, Minister for Social Care, Mental Well-Being and Sport, has not yet personally had a visible involvement in AWI reform externally to government, but has remained closely involved in the internal process, and from now on will be engaging externally. He will personally chair the Oversight Group. Relevant to this Report, his officials have arranged for me to meet him personally, one-to-

one, shortly after issue of this Report. To the extent that may be appropriate and permitted, I shall include the outcome in the October Report.

In the meantime, the following ongoing matters will be (or are likely to become) relevant to proposed amending legislation, and to require to be taken into account before it is finalised and submitted to the Parliament. I give them separate headings.

Anti-disability discrimination by Scottish Legal Aid Board

The policies and established conduct of SLAB are already having a substantial and discriminatory adverse impact upon the rights of access to justice of people with relevant disabilities, their families, and others who are dependent upon Legal Aid to access the services of a solicitor, whether to make or oppose applications, or more generally to be advised and assisted about adult incapacity law more generally. The impact is likely to be severe by the time that legislation is enacted, seriously imperilling the implementation of the legislation.

For some years now legal aid funding for AWI services by solicitors has generally been less than the cost of provision of those services, which practising solicitors have generally had to subsidise from other work. This has arisen from several factors: failure to acknowledge the time that often needs to be spent with clients in order to provide an adequate service; refusal to fund at all much of the time necessarily spent by solicitors to address and comply with the demands arising from SLAB's own policies and conduct; and unreasonably low rates paid even for work that is remunerated. Some solicitors have reported that total time necessarily spent in AWI work can be remunerated by SLAB at a rate less than the national minimum wage. The sad consequence has been that progressively over recent years solicitors – generally the most committed to serving people with relevant disabilities and motivated to develop all necessary expertise to do so – are finding the cost to them of doing legally-aided AWI work have become prohibitive, and they have been forced to cease doing so. Solicitors continue to report this. Even more worryingly are predictions that those still providing such services will not be able to continue to do so indefinitely, unless this situation is ended. We hear predictions, the effect of which is that within a timescale of some two years the availability of suitable legal expertise to meet the needs of those dependent upon legally-aided services will have been further drastically reduced, if not substantially eliminated altogether.

In addition to its impact upon fundamental rights of access to justice, the current situation appears to have a significant adverse effect upon public finances, for which of course government is responsible. In present circumstances, one must hope that this factor, coupled with the fundamental human rights issue, will be sufficient to impel Scottish Government promptly to rectify this situation. The impact on resources and finances arises in this way. Many expert solicitors are continuing to offer their expertise as safeguarders. Although appointment of safeguarders currently appears to be variable from court to court, and from sheriff to sheriff, needs for compliance with legislation and human rights requirements may well lead to such appointments being mandatory in all cases where "the adult", or those attempting to support the adult, do not have the benefit of legal advice or representation. Lack of adequate legal advice and assistance means that attempts by adults and unqualified representatives tend to lack the focus and efficiency that result from professional advice and professional preparation. That is likely to result not only in more appointments of safeguarders, but in safeguarders having to spend more time upon

appointments than would otherwise be necessary. That will all have impacts upon the public purse.

Even more serious in impact upon the public purse and public resources will be the similar impact upon the time required from mental health officers to discharge their duties. Even as matters stand, a reasonable estimate would be that Scotland's total time-allocation to services statutorily provided by mental health officers will require to be at least doubled in order adequately and efficiently to meet current needs. That does not take account of predictable increased demands.

At the end of the chain, so to speak, there is a further existing impact upon the public purse, again likely to increase, of substantially increased demands upon the courts as part of the chain reaction resulting from the policies and conduct of SLAB. Appropriately competent involvement of solicitors from the outset of applications, and weeding out of applications that would be inappropriate, can result in issues being identified and addressed at the outset, so that – for example – the need to appoint a safeguarder can be identified before a first formal hearing. Otherwise there is likely to be delay while that is addressed, and further court time required for a next hearing. Even with a safeguarder in place, inexpert presentation and conduct by unrepresented parties can give rise to further extensions and continuation of hearings, with avoidable demands on court time and resources, as well as being to the disadvantage of vulnerable adults who remain "in limbo" until their needs can actually be met. That can often have substantial impact upon services, notably – for example – all the consequences of delayed discharges from hospital.

Also "in the mix" are the existing and predictable further impacts upon local authorities. A principal example arises under sections 53(3) and 57(2) of the 2000 Act. If it appears to the local authority that an application for a guardianship or intervention order is necessary, that the conditions for doing so apply, and that no application has been made or is likely to be made by anyone else, then the local authority must apply. We understand that at least some local authorities are already experiencing substantial increases in workloads in consequence, with obvious impact on resources and funding.

Current cases

A hearing of the application to the Supreme Court by the Attorney General for Northern Ireland is due to commence on 20th October. It cannot be predicted when a decision might be issued. That decision, however, is likely to be significant for Scottish law reform, particularly as regards provisions to render lawful what would otherwise be unlawful deprivations of liberty. Put simply, Northern Ireland proposes that in addition to "capacity", an adult's wishes and feelings should be taken into account in determining whether there is sufficient consent to actual or proposed arrangements such as to take them out of the scope of Article 5 deprivation of liberty. The brief summary about the case on the website of the Supreme Court could be read as suggesting that this is applied to "young persons" (in Scottish terminology) only, not adults, in the context that adulthood commences only at 18 in Northern Ireland (and in England & Wales) but at 16 in Scotland. That impression would be incorrect. We understand that relevant court papers make it clear that the "wishes and feelings" approach should apply – in our terminology – to adults of all ages.

There is the major practical implication regarding the difficulty of avoiding unachievable demands upon services, if the definition of what constitutes a deprivation of liberty in *Cheshire West* is not mitigated. In Scotland, such

mitigation could still be achieved if, for example, a situation was known to the relevant local authority which could identify no reason for referral under adult support and protection legislation (which has no equivalent in the rest of the UK). There is also the question of the Scottish approach – acknowledged in relevant discussions, including in response to initiatives by the Mental Welfare Commission for Scotland, since shortly after the 2000 Act was passed – to the distinctive concept of assent in Scots law. Nevertheless, the UK Supreme Court will no doubt determine the consequences of the current Europe-wide position and jurisprudence. It might be possible, but would be difficult, to argue that "it can be accepted that that is the position, but its impact for Scotland and the practical results would be different".

However, also to be taken into account is the current French case before the European Court of Human Rights in which I understand that interveners are requesting that court to provide an updated ruling on the definition of an Article 5 deprivation of liberty, taking an overview of Strasbourg jurisprudence to date. That jurisprudence includes suggestions that a prerequisite is some element of suffering or other adverse impact experienced by "the adult". That review could have the effect of narrowing the definition in *Cheshire West*.

Cross-border aspects

In drafting legislation for Scotland in relation to cross-border aspects, it would be appropriate to take account of developments in legislation and recommendations by the European Union. These would certainly require to be taken into account in cross-border situations with member states of the European Union. That would be likely to add an "additional layer" to the provisions of Hague Convention 35 of 2000 on the International Protection of Adults, in particular in relation to the treatment of powers of attorney, advance directives/advance choices, and official certificates to be used in cross-border situations. Also relevant is the possibility of European provisions for inter-connectivity of registers: it is not yet known whether suggestions by European Law Institute that non-EU states could "opt in" to such arrangements are likely to be progressed. It is notable that EU legislation and recommendations tend to have wider influence across Europe, just as provisions of Hague 35 can have impact beyond the states that have ratified Hague 35, an example being that although the UK has not ratified in respect of England & Wales, Schedule 3 to the Mental Capacity Act 2005 to a significant degree replicates the wording and effect of Hague 35.

"The 2026 election"

The progress of AWI reform may be impacted by how the Scottish Government is made up, and the attitude to AWI reform of all parties whether in government or in opposition. The Scottish Government officials are there to serve government, however constituted, and cannot be involved beyond that. However, it will obviously be helpful to the cause of AWI reform if everyone who is able to do so takes or makes opportunities to encourage all parties to support AWI reform, preferably in their manifestos, with a view to making the overall drive for long-outstanding reform a matter that is in principle one of cross-party consensus, rather than undue political contention, notwithstanding that there will no doubt be matters which may be contentious, and which will require to be addressed, towards achieving best achievable legislation through the Parliamentary process. Such consensus was achieved in relation to the 2000 Act through the support of all parties prior to the first elections to the Scottish Parliament.

Adrian D Ward

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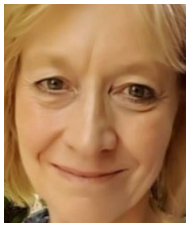

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Conferences

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 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.

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