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Mental Health and Capacity Law Newsletter

No 2 March 2015

Editorial

Welcome to this Mental Health and Capacity Law Newsletter from Arnot Manderson Advocates. In this issue we feature a range of current developments and are pleased also to be able to bring a perspective from an experienced mental health professional.

In this issue:

EHRC report Preventing Deaths of Adults with Mental Health Conditions in Detention – A Scottish Perspective

The Equality and Human Rights Commission recently issued a well–publicised report considering the issue of deaths of individuals with mental disorder who are in some form of custody or detention. Such deaths most commonly occur in prisons, police cells or psychiatric hospitals.

It has been clear for some time that the State has a positive obligation in terms of Art.2 of the Convention to take steps to prevent deaths of mentally – disordered individuals who are subject to detention (See, for example, *Renolde v France* (2009) 48 EHRR 42 and *Savage v South Essex Partnership NHS Trust* [2009] UKHL 74; [2009] AC 681), or else are in a psychiatric hospital voluntarily (See, *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; [2012] 2AC 72). Whilst the bulk of the EHRC report has considered the applicable regimes in England – where "serious flaws" are identified - the report also considers the position under the law applying in Scotland.

Thus far the EHRC have not embarked on a full inquiry into the position in Scotland, and acknowledge that new developments such as the establishment of Police Scotland and the Police Investigations and Review Commissioner – and also recently proposed changes in the FAI system – will need time to bed in before their efficacy can be determined. The closer working which is developing between SPS and NHS Scotland in relation to the health of prisoners is also acknowledged.

Statistical evidence provided by SPS, Police Scotland and NHS Scotland points to a relatively constant rate of suicides amongst this subject group. What is particularly clear – if unsurprising – is that a particular crisis point for prisoners arises during the initial period of imprisonment, with a quarter of suicides occurring during the first three days, and the majority within the first month.

The picture for hospital patients indicates that in 2012 – 13 half of suicides occurred when a patient was in hospital, with the remainder occurring when a patient was subject to compulsory treatment in the community (See 2003 Act, s.64 (4) (a)), or subject to a suspension of detention (See 2003 Act, s.127). As far as detention by police is concerned, a sample of records found a strong correlation between detainees declaring mental health and substance abuse issues – as many as 75% in the latter case – causing difficulty in identifying the level of risk to the individual and appropriate measures.

It is a matter of concern that a lack of adequate training of staff generally– as well as sheer lack of numbers in the field – is clearly identified in the EHRC report. The EHRC also points to a need to establish clear processes to ensure that individuals subject to police detention are assessed and placed appropriately. Improvements in the reporting and investigating deaths of individuals with a mental disorder – a corollary to the Art.2 right (See, for example, *Emms, Petitioner* 2011 SLT 354) – are also commended.

While the response in Scotland to the requirements of Art.2 set out in the Report is evolving, practitioners should be aware that the EHRC have identified areas where the regime applying in Scotland may not achieve the level of protection necessary for compliance with the Convention. The Report may be particularly helpful in accessing appropriate support for vulnerable individuals in order to prevent tragic outcomes in future, but it is clear that our law has some distance to travel yet.

The EHRC report can be found at :

http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Adult%20Deaths%20in%20Detention%20Inquiry%20Report.pdf

David W Cobb, advocate

Call the MHO

MHOs require to work closely with solicitors in preparing Schedule 2 reports where a guardianship application is being contemplated. Sometimes the zones of responsibility need to be explained, and this piece reflects experience when I received an e-mail from a solicitor seeking advice on how an MHO goes about completing as Schedule 2 report towards a guardianship order. His words were: “I have a client who emailed me as below. Is there anything I can say to him to allay his concerns and to make me sound knowledgeable in the MHO assessment area? I have no idea what you chaps talk about! Is an Edinburgh one!”

His terms of reference amused me but I still managed to send him a decent enough reply. I thought this would be a good article to set the scene for this and future contributions. Here is my reply:

“This is fairly easy to answer. Solicitors should be able to issue a guidance note. Often proposed guardians are not prepared and some think that being a guardian is an extension of their duties as relatives to the Adult. This is not the case. What I usually do is send or give a list of the legal tests in Section 59 (3) & (4) as basis for discussion in my assessment. You should be well able to write a brief comment on each power for your clients to read over.

You could explain to your client the role of an MHO is as follows:-

a) To prepare the statutory Schedule 2 report called a “suitability of guardian report”

b) This report is based on an interview with the proposed guardian(s) and also taking into account the views of Nearest Relative; primary carer; relevant persons -e.g. allocated social worker.

c) To interview the Adult and ascertain their past and present wishes and feelings.

d) To have sight of the medical reports to comment on capacity.

e) To amend the application - details in the Statement of Facts; the welfare powers.

f) Assess the proposed substitute guardians as if they are actual proposed guardians.”

(This point is often not emphasised by solicitors who seem to think the substitutes are simply "spares". The solicitor should make it clear in their application why a substitute is being proposed. This then allows the MHO to comment on this regardless of their assessment.)

Solicitors should also make it clear to their client that being appointed guardians does not trigger an automatic right to having social service resources. The guardian is appointed by the court to act as if they were the Adult. In other words, the social services do not give a guardian undue consideration over other service users in terms of allocation for resources.

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Validity of pro forma continuing powers of attorney - Inner House decision

As we noted in the previous Newsletter, the decision was imminent in a Special Case before the Inner House to resolve conflicting sheriff court decisions about validity of commonly used pro forma continuing powers of attorney was imminent. As practitioners will know, that the decision was issued just before Christmas, and it has recently been reported: *Great Stuart Trustees Ltd v Public Guardian* 2015 SLT 115 ([2014] CSIH 114).

A Special Case under section 27 of the Court of Session Act 1988 is a procedure for determination by the Inner House of specific agreed questions of law on the basis of agreed facts. Strictly, the decision in the Special Case is directed only to the parties, however as the Court itself noted, the decision may well have practical effects beyond its immediate confines (see para 14). This is undoubtedly one such instance.

In *Great Stuart Trustees*, the terms of the power of attorney were:

> "I, [name & address] appoint [spouse's name] whom failing... Great Stuart Trustees Ltd to be my continuing attorney in terms of section 15 of the Adults with Incapacity (Scotland) Act 2000...
>
> My Attorney may manage my whole affairs as he/she thinks fit with full power for me and in my name or his/her own name as my Attorney to do everything regarding my estate which I could do myself and that without limitation by reason of anything contained in this power of attorney or otherwise."

There followed a list of 19 specific powers.

The attorney had been acting for some time, but had taken legal advice in light of the decision in *Application for guardianship in respect of W* 2014 SLT (Sh Ct) 83, in which Sheriff Baird had indicated doubts about whether a power of attorney in similar form to this constituted a continuing power of attorney for the purposes of section 15 of the 2000 Act. A further complication arose in the shape of the subsequent decision of Sheriff Murray in *B v H* 2014 SLT (Sh Ct) 160, disagreeing with the decision in *W*, which had been cited in argument. Early resolution was therefore required, as was indicated by the involvement of the OPG.

Taking what it described as an objective approach to construing the power of attorney, the Inner House concluded that the power of attorney was 'unquestionably' a valid continuing power of attorney (see para 22). Although the Special Case procedure does not empower the Court to overrule earlier decisions, the Inner House also made clear its preference for the reasoning in *B v H* (para 29).

In reaching its decision, the Court took particular account of mention of section 15 of the 2000 Act and more importantly to the express reference to constituting a continuing power of attorney. Those were strong indicators that the requirement of section 15(3)(b) that the granter's intention that the power be a continuing power was met (see para 22). The Court was fortified in its conclusion by the breadth of the specific listed powers, and also by the inclusion of a certificate in the terms required by section 15(3)(c) of the 2000 Act (see paras 23 & 24).

Though the power of attorney in issue pre-dated the amendment of section 15 by the Adult Support and Protection (Scotland) Act 2007, the Court also dealt, *obiter*, with section 15(3)(ba). On that issue, the Court held that had section 15(3)(ba) been applicable, the power of attorney would also have satisfied its requirements (see para 32).

Great Stuart Trustees Ltd is therefore a decision which has, as the Court anticipated, resonance beyond its own circumstances, and will come as a relief to practitioners dealing with what was understood to be a very common form of wording in continuing powers of attorney - the OPG estimated around 282,000 powers of attorney were in similar form. From a drafting point of view, also evident from the decision is the importance of clarity in describing the character of the power of attorney as a continuing power, and spelling out the scope of powers conferred with precision.

Kenneth Campbell QC

Cross-border patient transfers

The transfer of a detained patient across the Scotland-England border for treatment is relatively commonplace. What less frequently occurs is the transfer of a patient out of the United Kingdom, although the process of obtaining the necessary approval and appeal to MHTS is broadly similar.

The position was considered recently in a decision issued by Sheriff Principal Pyle at Inverness (*K against a Decision of a Mental Health Tribunal*, Scottish Courts, 30th January 2015) which considers the extent and adequacy of evidence which a Tribunal requires in determining such an appeal. David Cobb, counsel for the patient, will analyse the implications of this decision in the next issue of this Newsletter

Mental Health & Scots Law in Practice

New Edition now published

The 2nd Edition of Mental Health & Scots Law in Practice has recently been published by W. Green having first been trailed by Arnot Manderson Advocates at its Mental Health & Incapacity Conference in September.

The text was co-authored by Arnot Manderson silk Joanna Cherry QC and Professor Lindsay Thomson (Professor of Forensic Psychiatry at the University of Edinburgh and Medical Director, The State Hospital) and features a significant contribution by another Arnot Manderson silk, Kenneth Campbell QC.

This new Edition expands upon the impact of the Mental Health (Care and Treatment) Scotland Act 2003 on those involved with mental health in Scotland. Increased detail on effectiveness of tribunals is included along with a new chapter on risk. An essential description on the provisions of the Adults with Incapacity (Scotland) Act 2000, as amended, is also provided. The authors provide key guidance on psychiatric systems and services for mentally disordered offenders, including the new legislation for psychiatric defences as of 2012. The book goes further and offers practical advice on providing expert reports and giving evidence in court, ensuring you can confidently confront the challenges this raises.

More information on the book can be found here .

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