

STATUTORY PRINCIPLE ON CONTRAVENING AN ADULT'S WILL AND PREFERENCES

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ENLIGHTENED THINKING

AGENDA

- The Legal Framework and Practice in Scotland
- The Background to reform
- Proposed Legislative Reforms
- Decision making processes
- Case studies

ADULTS WITH INCAPACITY
REFORM:
THE LEGAL FRAMEWORK

UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

'UNCRPD'

- **Article 12(3)**

- Supported Decision Making

States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

- **Article 12(4)**

- Measures relating to the exercise of legal capacity must:

- Respect the rights, will and preferences of the person
 - Be free of conflict of interest and undue influence
 - Be proportional and tailored to the person's circumstances
 - Apply for the shortest time possible and
 - Be subject to review



THE ADULTS WITH INCAPACITY
(SCOTLAND) ACT 2000:
BACKGROUND TO REFORM

- *Cheshire West and Cheshire Council v P* [2014]
- SLC Report on Adults with Incapacity [2014]
- Scottish Government Consultation in response to draft Adults with Incapacity Bill within the SLC Report [2015/2016]
- UN Review of UK Position [2017]
- Mental Welfare Commission for Scotland: Good Practice Guide for Supported Decision Making

PROPOSED REFORM

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The Principles

- How does the 2000 Act work?
- Principles set out in 2000 Act:
 1. Acting for the benefit of the Adult (s1(2))
 2. Minimum intervention (s1(3))
 3. Taking account of past and present wishes of the adult (s1(4(a)))
 4. Taking account of wishes of other relevant individuals (s1(4(b)-(d)))
 5. Encouraging the adult to use whatever skills and capacity they have (s1(5))

PROPOSED REFORM

The Principles

- Proposition for change: additions to the Principles
- *“There shall be no intervention in the affairs of an adult unless it can be demonstrated that all practical help and support to help the adult make a decision about the matter requiring intervention has been given without success.”*
- Consultation asks whether:
“a further principle is required to ensure an adult’s will and preferences are not contravened unless it is necessary and proportionate to do so”

FURTHER PROPOSALS FOR REFORM

Graded Guardianship

- What is Graded Guardianship?
 - Essentially a tiered model of Guardianship
- Why is this required?
- **Grade 1** guardianship
 - Day to day welfare matters and managing simple financial affairs
 - Appointed by OPG
- **Grade 2** guardianship
 - Managing property, more complex financial affairs and more complex welfare needs,
 - Appointed by Sheriff Court, but with no hearing
- **Grade 3** guardianship
 - All financial and welfare matters
 - Used where there is some disagreement among the Parties about the nature of the Guardianship
 - Appointed by Sheriff Court following hearing

THE PROPOSED PRINCIPLES:
RESPONSES TO THE SCOTTISH
GOVERNMENT CONSULTATION

HOW WILL THIS PRINCIPLE OPERATE IN PRACTICE?

- Draft legislation not yet published.
- What is the source of the proposition?
 - Essex Autonomy Project
- Proposed principle included in the Scottish Government's consultation
 - Faculty of Advocates response
 - Law Society of Scotland response
 - Equality and Human Rights Commission response
 - Care Inspectorate response
 - Mental Welfare Commission for Scotland
 - Sandra McDonald, Office of the Public Guardian
 - Scottish Human Rights Commission

WHAT ARE RIGHTS, WILL AND
PREFERENCES AND WHAT
HAPPENS IF THEY CONFLICT?

RIGHTS, WILL AND PREFERENCES

What are they and what happens if they conflict?

- Rights
 - Rights that the Adult has which are ascertainable by law
- Will
 - No formal definition but something akin to an inherent belief or standpoint of Adult that defines and informs their decision making processes.
- Preferences
 - Opinions and preferences of Adult that would lead them to choose one alternative over another in any given situation.
- Conflicts
 - Currently no hierarchy is proposed in the Principles.
 - It remains to be seen whether the legislation will impose a hierarchy.

DECISION MAKING PROCESSES: WHAT ARE THEY?

APPROACHES TO DECISION MAKING

Informing our Case Studies

Substituted Decision Making

May be allowed where:

- a Guardian is appointed by the Sheriff, if an Adult is incapable of making decisions independently; or
- in cases of a Power of Attorney under similar circumstances.



Supported Decision Making

Encourages Adult to:

- make a decision for themselves
- express their will and preferences
- encourages use of capacity

Takes into account:

- Psychological, situational and physical factors



Combined approach: **Best Interpretation Decision Making**

How do we best interpret what the adult's decision would have been?

Indicative Factors

Presence of Support

The Adult's Behaviour

The Effect of the Decision

External Assistance

CASE STUDIES

CASE STUDY 1

- Young man with autism.
- Guardian appointed but may have been unnecessary.
- He has capacity at times and not at others.
- Transitions between substituted & supported decision-making.
- Wants to go to Amsterdam to try smoking cannabis and sleeping with sex workers.
- When are his legal rights engaged?
- Does this scenario fall into the desire/will parameter?
- What about potential risks to the responsibilities of Guardian?

CASE STUDY 2

- A young man with autism – similar to case study 1
- Recently befriended by a group of people heavily into tattooing and piercings.
- He decides he wants to follow suit, at significant cost to him.
- There will be a significant financial impact on his weekly benefits. He says he wants to go ahead regardless. He may not be able to pay his rent.
- The tattooist/piercer is one of his new friends.
- Is his right to freedom of expression engaged?
- How best to support him in this situation?
- Engage with community nurse to discuss pros and cons of tattoos/piercings?
- Discussions regarding financial impact/practical consequences

CASE STUDY 3

- Man with advanced dementia and severe arthritis. He is a wheelchair user & was recently diagnosed with lung cancer.
- Treatment options are being considered by him & his medical team. His family is also involved in the decision making process and his daughter has been appointed as his Guardian.
- How can all involved ensure he can exercise his legal capacity on an equal basis with others and that his RWP are reflected in the final decisions made?
- All staff address him directly. Do not speak about/over him as he sits in wheelchair. Explain don't patronise.
- Surgeon explains cancer treatment surgery option. Pros and cons of each option. Gave time to formulate and ask questions.
- When question was asked that was hard to understand, surgeon gave time for discussion. Daughter gave her best interpretation, understanding his gestures. Surgeon responded to him, not daughter.

Any questions?

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