CASE COMMENTARY

Darlington BC, Applicants

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This decision by Sheriff A M Mackie at Glasgow, issued on 19 January 2018, is a significant and helpful step in an ongoing process in which Scotland's judiciary has addressed unexpected difficulties which arise when adults with impairments of cognitive functioning, for whom measures have been established in England, move to Scotland. Such moves are a frequent occurrence. One cannot reasonably attribute the difficulties to the legislature, the Public Guardian, or the courts.

In *C, Applicant*, Airdrie Sheriff Court, 2 April 2013, unreported, Sheriff M Shankland provided clarification as to the status of English powers of attorney in Scotland. A Scottish council had refused to recognise the authority of an attorney under an English enduring power of attorney to manage self-directed support on behalf of the granter, who had moved to Scotland. The Scottish council faced the difficulty that in terms of the Community Care (Direct Payments) (Scotland) Regulations 2003 (SSI 2003/243), made under s.12B(1B) of the Social Work (Scotland) Act 1968 ("the 1968 Act"), an attorney may consent on behalf of a granter to receipt of direct payments for the purposes of s.12B(1) of the 1968 Act (reg.3(1)); but the definition of "attorney" is limited to a continuing attorney in terms of s.15(1) of the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act"), or the transitional provisions of para.4 of Sch.4 to the 2000 Act. An application for directions under s.3(3) of the 2000 Act was made. That section allows the sheriff to give directions to any person exercising "(a) functions conferred by [the 2000 Act]; or (b) functions of a like nature conferred by the law of any country". The sheriff held that an English enduring power of attorney had automatic recognition in Scotland and had the same effect as a Scottish continuing power of attorney, and directed the council to proceed on the basis that the attorney was a continuing attorney. The Public Guardian still found it necessary to provide on her website a certificate, that may be downloaded and attached to non-Scottish powers of attorney, in the following terms: "I, Sandra McDonald, Public Guardian for Scotland, hereby advise that interpretation of Scottish legislation suggests a non-Scottish Power of Attorney is automatically valid in Scotland. There is no provision for having a non-Scottish Power of Attorney endorsed for use in Scotland; this action being unnecessary."

It is relevant to note in passing that para.146 of the explanatory memorandum to the Hague Convention on the International Protection of Adults ("Hague 35") was amended in 2017 to accept — as the author had previously contended, but contrary to the previous terms of the explanatory memorandum — that a power of attorney approved by a court or administrative authority may, as between contracting states, be a "measure of protection" qualifying for automatic recognition.

There is a procedure to have non-Scottish court orders recognised, and to become enforceable in Scotland, by an application to the sheriff to have them registered with the Public Guardian. The relevant provisions are contained in Sch.3, paras 7 and 8 to the 2000 Act. Where there is a possibility that it might be necessary to enforce in Scotland an order made in England or Wales by the Court of Protection, it is prudent to have such order registered under that procedure, against such eventuality. What can be done in an urgent situation when such an order has not been registered? Orkney Islands Council made an emergency application to Kirkwall Sheriff Court on 10 August 2016, in a case in which an adult had been taken from England in violation of an order of the Court of Protection, and was within the territory of the Kirkwall court. The application was made not under the 2000 Act, but under the provisions for removal contained in ss.14-16 of the Adult Support and Protection (Scotland) Act 2007. The sheriff was satisfied that it was appropriate to grant a removal order, and did so. Carers from the adult's place of residence in England arrived that same day and were able to take the adult back with them.

Difficulties have however arisen when local authorities in England or Wales do seek to register in Scotland an order of the Court of Protection in terms of which an adult is to be moved to Scotland. That was the situation in *Darlington BC,*

Applicants, 2018 S.L.T. XX. Any practitioner consulted or instructed in such a matter will find Sheriff Mackie's clear exposition of procedure helpful. The remainder of this commentary concentrates on Sheriff Mackie's removal of a hurdle which has been causing real difficulty in such cases, raised by the Scottish Central Authority ("the Authority"). As Sheriff Mackie narrates, para.7(3) of Sch.3 to the 2000 Act lists circumstances in which recognition of "[a]ny measure taken under the law of a country other than Scotland for the personal welfare or the protection of property of an adult with incapacity" may be refused. If, as in the present case, the measure would have the effect of placing the adult in an establishment in Scotland, under para.7(3)(e) recognition may be refused if "(i) the Scottish Central Authority has not previously been provided with a report on the adult and a statement of the reasons for the proposed placement and has not been consulted on the proposed placement; or (ii) where the Authority has been provided with such a report and statement and so consulted, it has, within a reasonable time thereafter, declared that it disapproves of the proposed placement". Scottish Central Authority had adopted a practice of responding to such reports and statements of reasons by declining to approve or disapprove the proposed placement. Each time, it pointed out that Hague 35 has not been ratified in respect of England, and expressed the view that the relevant provisions of Sch.3 to the 2000 Act relate only to transfers between countries in respect of which Hague 35 has been ratified. This seemed to fly in the face of the clear terms of Sch.3 para.7(1), to the effect that a non-Scottish measure "shall, if one of the conditions specified in sub-paragraph (2) is met, be recognised by the law of Scotland". Only the second of those alternatives applies where the UK and the other country were party to Hague 35. The first is that jurisdiction in the other country was based on the adult's habitual residence there. That was the ground of jurisdiction in all of the applications frustrated by the Authority.

In *Darlington BC, Applicants*, Darlington had — as narrated by Sheriff Mackie — faxed and sent the required report and statement of reasons to the Authority on 18 January 2017. The usual reply was issued. Darlington explicitly sought warrant to intimate their application to the Authority. That warrant was granted and duly implemented. The Authority had the opportunity to enter the process and seek to justify its view, but did not do so. Sheriff Mackie granted the application. He held that the first alternative in para.7(2) applied, and noted with reference to para.7(3)(e) that the Authority had been provided with the required report and statement, and had not disapproved the proposed placement. While technically his decision falls short of the status of a decision where a contradictor has been heard, in the circumstances it falls short by the narrowest of margins.

As to converse situations where people with cognitive impairments, and with measures in place in Scotland, move to England, it is appropriate to adopt, as the last words of this commentary, the last words (in para.24.45) of the recent 8th edn (2017) of Cretney & Lush on *Lasting and Enduring Powers of Attorney*. As to the position of Scottish powers of attorney in England and Wales, the authors refer to "This unsatisfactory state of affairs" and quoted the relevant FAQs pages on the website of the Office of the Public Guardian (Scotland). "Q. Can a Scottish Power of Attorney be used in England?" The answer describes the current difficulties and concludes "It is recognised that this is an unacceptable position and perhaps not what was intended. The matter rests with England to agree and make any changes that are required."