

## WITH AND WITHOUT 'BEST INTERESTS': THE MENTAL CAPACITY ACT 2005, THE ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000 AND CONSTRUCTING DECISIONS

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### I. INTRODUCTION

This article compares the bases upon which actions are taken or decisions are made in relation to those considered to lack the material capacity in the Mental Capacity Act 2005 ('MCA') and the Adults with Incapacity (Scotland) Act 2000 ('AWI'). Through a study of (1) the statutory provisions; and (2) the case-law decided under the two statutes, it addresses the question of whether the use of the term 'best interests' in the MCA and its – deliberate – absence from the AWI makes a material difference when comparing the two Acts. This question is of considerable importance when examining the compatibility of these legislative regimes in the United Kingdom with the Convention on the Rights of Persons with Disabilities ('CRPD').

The article is written by two practising lawyers, one a Scottish solicitor, and one an English barrister. Each has sought to cast a critical eye over the legislative framework on the other side of the border between their two jurisdictions as well as over the framework (and jurisprudence) in their own jurisdiction. Its comparative analysis is not one that has previously been attempted; it shows that both jurisdictions are on their own journeys, although not ones with quite the direction that might be anticipated from a plain reading of the respective statutes.

The article is divided as follows:

Part 1 considers the meaning and significance of 'best interests' in the General Comment No 1 (2014) issued by the Committee on the Rights of Persons with Disabilities ('the Committee') entitled 'Article 12: Equal Recognition before the Law' ('the General Comment');<sup>1</sup>

Part 2 compares the statutory provisions;

Part 3 examines the MCA in more detail, and the cases decided thereunder;  
Part 4 examines the AWI in more detail, and the cases decided thereunder;

Part 5 offers some observations upon the results of the analysis in Parts 1-4.

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<sup>1</sup> Available online at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en)

## II. PART 1: THE MEANING AND SIGNIFICANCE OF 'BEST INTERESTS'

By ratifying CRPD and its Optional Protocol, the UK committed itself to be bound by CRPD. 'Best interests' does not appear in CRPD, nor do two terms relevant to the discussion in this paper, namely 'substitute decision-making' and 'supported decision-making.' However, the terms appear in the General Comment, an interpretation of Article 12 of CRPD offered by the UN Committee. The interpretation of CRPD by the UN Committee is not binding on the UK. That interpretation should nevertheless receive careful consideration in assessing compliance of the UK jurisdictions with CRPD.

Article 12 reaffirms that persons with disabilities have the right to recognition everywhere as persons before the law (Article 12.1). It requires States Parties to recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life (Article 12.2); to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity (Article 12.3); and to ensure that 'all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law' (Article 12.4, which proceeds to specify safeguards, including that such measures 'respect the rights, will and preferences of the person'). Article 12.5 requires States Parties to take all appropriate and effective measures to ensure the equal right of persons with disabilities in specified property and financial matters.

Article 12 uses 'capacity' in the broadest sense, to encompass all aspects of legal status and legal personality of an adult. 'Capacity' in MCA and 'incapacity' in AWI are used with the different meaning of factual capability. In AWI, 'incapacity' is explicitly derived from the definition of 'incapable'.

Paragraph 7 of the General Comment urges that 'substitute decision-making regimes' be abolished. According to paragraph 26, such regimes should be replaced with 'supported decision-making, which respects the person's autonomy, will and preferences'. At first sight, it would appear that this could only be applicable to people factually capable of making valid decisions, if – when such be needed – they are provided with sufficient support. That the contrast between substitute decision-making and supported decision-making is not so limited is clear from paragraph 21 of the General Comment, which reads:

Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the 'best interpretation of will and preferences' must replace the 'best interests' determinations. This respects the rights, will and preferences of the individual, in accordance with article 12, paragraph 4. The 'best interests' principle is not a safeguard which complies with article 12 in relation to adults. The 'will and preferences' paradigm must replace the 'best interests' paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.

A 'best interpretation' approach is thus contrasted with a 'best interests' approach. Where an individual is factually incapable of validly acting or deciding, the core issue in relation to CRPD as interpreted in the General Comment is not that someone other than the individual will be required to consider the basis upon which to take an action or make a decision. The issue is whether the basis is a 'best interpretation'

approach within a ‘supported decision-making’ regime, or a ‘best interests’ approach in a ‘substitute decision-making’ regime.

The General Comment describes characteristics of supported decision-making regimes at length, particularly in paragraph 29, but does not provide clear guidance in situations of factual incapability to act or decide in the matter in question beyond that given in paragraph 21 (quoted above). A definition of substitute decision-making regimes is however offered in paragraph 27, as follows:

27. Substitute decision-making regimes can take many different forms, including plenary guardianship, judicial interdiction and partial guardianship. However, these regimes have certain common characteristics: they can be defined as systems where (i) legal capacity is removed from a person, even if this is in respect of a single decision; (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; [and/or]<sup>2</sup> (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective ‘best interests’ of the person concerned, as opposed to being based on the person’s own will and preferences.

If the conjunctive version of the definition is adopted then if, in terms of element (iii), the basis of deciding in situations of factual incapability is the ‘best interpretation’ approach rather than the ‘best interests’ approach, the regime is not a substitute decision-making regime.

If the partially disjunctive definition is adopted, then if the basis of decision-making is ‘best interests’, the regime is a substitute decision-making regime; if not, the characterisation of the regime as substitute or supported decision-making depends upon whether the other elements apply.

For purposes of this article, we proceed therefore on the basis that the true test for compatibility is not whether a decision-maker is appointed, but whether the appointed decision-maker takes their decisions on a ‘best interests’ rather than a ‘best interpretation’ basis (as these terms are used in the General Comment).

### III. PART 2: THE STATUTORY PROVISIONS COMPARED

In this section, we compare and where relevant contrast the key features of the MCA and the AWI simply by reference to the statutory provisions, rather than delving into (1) *why* each regime looks the way it does (beyond a brief introductory comparison); or (2) *how the courts* have been applying the regimes in practice; or (3) *how others*

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<sup>2</sup> The English-language version of the General Comment dated 19<sup>th</sup> May 2014 and issued following the 11<sup>th</sup> session of the UN Committee 31<sup>st</sup> March – 11<sup>th</sup> April 2014, and the official versions in other languages, all appear to have ‘and’ or its equivalents, so that the three elements of the definition are conjunctive. However, in at least one subsequent English-language iteration, ‘and’ has been altered to ‘or’, so that the elements are disjunctive.<sup>2</sup> More recently, it has been suggested informally to the authors that the intention of the UN Committee is that element (i) should be followed by ‘and’ and that elements (ii) and (iii) should be alternatives, with ‘or’ between them. If the intention is that all three elements are to be taken separately, then the authors’ view is that the English regime would fail, but there may be more arguments to be had as to the Scottish regime. They are not addressed in this paper.

with significant roles have been applying the regimes in practice. We do not assume any necessary familiarity with the relevant regimes.<sup>3</sup>

Both Acts are predicated upon principles, but even at this stage the drafting differences between them are substantial. They require to be understood, from each side of the geographical border between the two jurisdictions, in order to address the comparisons which form the objective of this article.

The differences in structure and content are significant from the outset, upon comparison of s 1 ('the principles') of the MCA and s 1 ('general principles and fundamental definitions') of the AWI, notwithstanding the similarities in titles. We return in Part 5 to individual observations as to whether, especially as applied in practice, the differences between the two statutes are as great as (or greater than) they are painted in this Part. They are not the result of any deliberate differentiation. We state the MCA position first, in part because it contains the phrase 'best interests' that is such a lightning rod in the context of the CRPD. We could equally have begun with AWI: indeed, AWI as enacted had already reached substantially its final form in 1995,<sup>4</sup> whereas the MCA was introduced into the Westminster Parliament in 2003). The two Acts evolved from broadly parallel law reform processes, conducted with awareness of each other but not unduly influenced by the other, rendering the question 'why are they different?' irrelevant for the purposes of this paper, and probably more a matter for sociological, rather than legal or political, analysis.

#### *A. The Structures of the Acts*

The MCA is predicated upon acts being done or decisions being made on behalf of an individual<sup>5</sup> lacking capacity in relation to a matter (see MCA s 1(5), s 4 and s 5). The AWI, by contrast, is predicated upon interventions in the affairs of adults (see AWI s 1), and includes provision for measures applicable in circumstances where such adults are incapable of taking an action or in relation to a material decision (see e.g. AWI s 53(1) in relation to intervention orders and AWI s 58(1)(a) in relation to guardianship orders).

In both instances, subject only to an exception in relation to the AWI discussed below, the individual in question will be factually incapable of validly acting or deciding in the relevant matter, and a person or persons other than that individual will be required to consider the basis upon which to take an action or make a decision. Both statutes therefore set down how such actions or decisions are to be taken (including, in both cases, not doing something for or on behalf of the individual).

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<sup>3</sup> A useful introduction focused primarily upon England and Wales, but also including an overview of the position in Scotland can be found in Gordon Ashton (ed), *Mental Capacity Law and Practice* (3<sup>rd</sup> edition, Jordans 2015).

<sup>4</sup> See the draft Bill appended to the 1995 SLC Report referred to in Part 4 below.

<sup>5</sup> The MCA applies to those aged 16 and above (with certain limited exceptions and certain limited provisions of application to those below the age of 16). The same also applies to the AWI.

### *B. The Principles and their Accompanying Definitions*

MCA s 1 commences with three ‘screening’ principles, containing a presumption of capacity (MCA, s 1(2)), a requirement to provide all practicable assistance before a person is treated as incapable (MCA s 1(3)), and a declaration that a person must not be treated as incapable ‘merely because he makes an unwise decision’ (MCA s 1(4)).

### *C. AWI Contains No Equivalent ‘Screening’ Principles*

MCA s 2 defines when ‘a person lacks capacity in relation to a matter’. As noted below, that definition is carried back to MCA s 1(5) (which provides the basis for determining what decisions or actions can be taken on behalf of the individual lacking capacity).

The equivalent definition in the AWI is the definition of ‘incapable’ in AWI s 1(6), which, in contrast to the MCA, is not carried back to the principles in AWI s 1(1) – (5), discussed below. The AWI principles simply apply to ‘an adult’. They can thus apply to an adult whose relevant capacity is not impaired, if something done under or in pursuance of AWI results in an intervention in the affairs of that adult. Ward developed this point further in his article ‘Two ‘adults’ in one incapacity case? – thoughts for Scotland from an English deprivation of liberty decision’,<sup>6</sup> when he hypothesised what might have been the treatment under the AWI if the facts addressed in *A Local Authority v WMA and MA*<sup>7</sup> had arisen before a Scottish court.

As regards the basis for acting or deciding on behalf of a person lacking the material decision-making capacity, the MCA then states, and in this regard is predicated upon, two overarching principles:

- a. An action done or a decision made under the act for or on behalf of a person who lacks capacity must be done, or made, in his best interests (MCA s 1(5));
- b. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action (MCA s 1(6)). It should perhaps be noted that that requires consideration of whether there is a need for any action or decision at all.

Two characteristics of the above are notable. Firstly, the two principles quoted immediately above apply only to ‘a person who lacks capacity’. Secondly, MCA s 1(5) places major focus upon the concept of ‘best interests’. MCA s 1(5) is fleshed out by MCA s 4, which identifies the steps to be taken in determining what is in the best interests of the person. The extent to which there is a hierarchy in MCA s 4 as regards these steps is discussed in some detail in Part 3.

The Scottish principles, which stand in place of MCA s 1(5), as fleshed out by MCA s 4, and MCA s 1(6), are as follows:

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<sup>6</sup> [2013] SLT (News) 239-242

<sup>7</sup> [2013] EWHC 2580 (COP)

1. –
- (1) The principles set out in subss (2) and (4) shall be given effect to in relation to any intervention in the affairs of an adult under or in pursuance of this Act, including any order made in or for the purpose of any proceedings under this Act for or in connection with an adult.
  - (2) There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention.
  - (3) Where it is determined that an intervention as mentioned in subs (1) is to be made, such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.
  - (4) In determining if an intervention is to be made and, if so, what intervention is to be made, account shall be taken of –
    - (a) the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature or otherwise) appropriate to the adult;
    - (b) the views of the nearest relative, named person and the primary carer of the adult, in so far as it is reasonable and practicable to do so;
    - (c) the views of –
      - (i) any guardian, continuing attorney or welfare attorney of the adult who has powers relating to the proposed intervention; and
      - (ii) any person whom the sheriff has directed to be consulted, in so far as it is reasonable and practicable to do so; and
    - (d) the views of any other person appearing to the person responsible for authorising or effecting the intervention to have an interest in the welfare of the adult or in the proposed intervention, where these views have been made known to the person responsible, in so far as it is reasonable and practicable to do so.
  - (5) Any guardian, continuing attorney, welfare attorney or manager of an establishment exercising functions under this Act or under any order of the sheriff in relation to an adult shall, in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he has concerning his property, financial affairs or personal welfare, as the case may be, and to develop new such skills.

AWI s 1(3) is broadly equivalent to MCA s 1(6). There are echoes of some of the other AWI principles in the supplementary provisions of MCA s 4. However, a ‘best interests’ test was explicitly rejected for the purposes of the AWI. Instead of focusing the basis for acting and deciding on behalf of a person/adult upon the single concept of ‘best interests’, the AWI provides a set of general principles none of which is stated to take precedence or priority over any other: see the relevant passage from Scottish Law Commission Report No 151 on *Incapable Adults* quoted below. Thus, where the MCA has MCA s 1(5) – the ‘best interests’ test – and subsidiary principles in MCA s 4 relevant to determining what is in a person’s best interests, the AWI has AWI s 1(1), (2), (4) and (5), none of them occupying a dominant position (except as noted below), with AWI s 1(3) ranking equally with them. The AWI accordingly has no principles serving the subsidiary purpose of guiding how to determine the application of any one dominant principle, except to the limited extent noted in the next paragraph.

AWI s 3(5A) was added to the AWI by the Adult Support and Protection (Scotland) Act 2007 (ASP). It provides a principle which is subsidiary to AWI s 1(4)(a), for the purpose of assisting the ascertainment of the adult’s wishes and feelings for the purpose of sheriff court proceedings, by requiring the sheriff to take account of them as expressed by an independent advocate (as defined).

There is an inequality among the various principles in AWI s 1(4) to the extent that the obligation to take account of the adult's wishes and feelings, if ascertainable, is absolute. That is emphasised by the inclusion of 'by any means of communication' and by the exclusion of the qualification, which appears in the other paragraphs of AWI s 1(4): 'insofar as it is reasonable and practicable to do so'.

It should be reiterated that the principles set out in AWI s 1(1) – (5) can, in principle, apply equally to an adult whose relevant capacity is not impaired, if something done under or in pursuance of the AWI results in an intervention in the affairs of that adult. To that extent they could be said to be non-discriminatory on grounds of disability.

#### *D. The Judiciaries*

It is relevant to the following discussion that since the inception of the MCA England & Wales have had the advantage of a specialist court, the Court of Protection, exercising jurisdiction under the MCA. In Scotland, the 1995 SLC Report on *Incapable Adults* No 151 recommended that jurisdiction under what became the AWI be entrusted to specialist sheriffs, and provisions to that effect were included in the draft Bill annexed to the Report, but that recommendation was not implemented, and still has not yet been implemented.<sup>8</sup>

#### *E. Vulnerable Adults*

We note in passing that another significant difference between England & Wales, and Scotland, is that in England & Wales any necessary protection of adults who are vulnerable<sup>9</sup> and at risk, but not necessarily incapable, is dealt with by the High Court under the inherent jurisdiction; whereas in Scotland such situations are addressed under the statutory provisions of the ASP. The remedies available under the ASP are prescribed in that Act, and appear to be more restricted than those under the inherent jurisdiction.

### IV. THE MCA<sup>10</sup>

#### *A. Background*

The MCA was the result of many years of dedicated reform effort, commencing with a Law Commission Consultation Paper in 1991. While the need to have a

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<sup>8</sup> Under the provisions of the Courts Reform (Scotland) Act 2014 the Lord President (the head of the judiciary in Scotland) may designate specialist categories of sheriff to whom sheriffs principal would allocate specific sheriffs; and procedure to create all-Scotland specialisms to which all-Scotland sheriffs would be appointed. At time of writing any decision to implement these provisions in relation to the AWI jurisdiction awaits appointment of a new Lord President, following the retirement of Lord Gill (the principal architect of these and other reforms).

<sup>9</sup> This term is not now used in relation to safeguarding in England following the passage of the Care Act 2014, but retains meaning, not least in relation to the exercise by the High Court of its inherent jurisdiction: see *L (Vulnerable Adults with Capacity: Court's Jurisdiction), In re (No 2)* [2012] EWCA Civ 253; [2013] Fam 1.

<sup>10</sup> This section draws (with permission) upon an article written by Ruck Keene and Cressida Auckland entitled 'More presumptions please: wishes, feelings and best interests decision-making' [2015] Elder Law Journal 231.

mechanism in place to make decisions on behalf of those lacking the cognitive capabilities to do so was not seriously under debate, the basis on which such decisions were to be made was less clear. Drawing on the frameworks in place in other jurisdictions and under the pre-existing common law, two alternative mechanisms were suggested to facilitate the making of these decisions. Substituted judgment, which attempted to reach the decision which the person would themselves have made if they had capacity, was contrasted with an approach predicated upon an objective assessment of what was in the person's 'best interests'. While the 'best interests' assessment had dominated healthcare decisions since the decision of *Re F (An Adult: Sterilisation)*,<sup>11</sup> it may be noted that in at least one domain – statutory wills – the status quo prior to the MCA was one of substituted judgment, whereby the judge was required to consider the 'antipathies' and 'affections' of the particular person concerned.<sup>12</sup>

After much consultation, it was the objective mechanism that found favour with the Law Commission, who highlighted the difficulties posed by substituted judgment when making decisions for those who have never had capacity,<sup>13</sup> as well as the effect it had of giving a lower priority to the person's present emotions than those anticipated in the person had they had unimpaired capacities.<sup>14</sup> The Law Commission did, however, consider that 'the two tests need not be mutually exclusive', instead pushing for a compromise 'whereby a best interests test is modified by a requirement that the substitute decision-maker first goes through an exercise in substituted judgment'.<sup>15</sup>

The result of this long drafting process was (for these purposes) ss 1(5) and 4 MCA 2005 which provide – in combination – the requirement that decisions should be made in the person's 'best interests', taking into account a number of relevant factors. Crucially, under s 4(6), the decision-maker must, 'so far as is reasonably ascertainable', consider:

- (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by her when she had capacity),
- (b) the beliefs and values that would be likely to influence her decision if she had capacity, and
- (c) the other factors that she would be likely to consider if she were able to do so.

However, s 4(6) is only one of the list of factors in the 'checklist'. In addition, the decision cannot be made merely on the basis of the age or appearance of the person lacking capacity;<sup>16</sup> the likelihood of the person regaining capacity must be considered;<sup>17</sup> and the individual must, as far as is reasonably practicable, be permitted and encouraged to participate in the decision.<sup>18</sup> The decision-maker must never be motivated by a desire to bring about death,<sup>19</sup> and must take account 'if it is

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<sup>11</sup> [1990] 2 AC 1

<sup>12</sup> *Re D(J)* [1982] Ch 237

<sup>13</sup> Law Commission, *Mental Incapacity* (Law Com No 231,1995) para 3. 25

<sup>14</sup> *Ibid.*, 3.29

<sup>15</sup> Law Commission, *Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction* (Law Com No 128,1993) para 2.4

<sup>16</sup> Mental Capacity Act 2005, s 4(2)

<sup>17</sup> *Ibid* s 4(3)

<sup>18</sup> *Ibid* s 4(4)

<sup>19</sup> *Ibid* s 4(5)



practicable and appropriate to consult them', of the views of others engaged in the care of the person, or interested in their welfare.<sup>20</sup>

On the face of the statute, no one of these factors is to take priority. Indeed, the Report of the Joint Committee on the *Draft Mental Incapacity Bill*<sup>21</sup> was clear that this was deliberate: determining the best interests of the individual 'required flexibility' and was said to be best achieved by 'enabling the decision-maker to take account of a variety of circumstances, views and attitudes which may have a bearing on the decision in question.' It was for this reason that they did not recommend any weighting or giving priority to the factors involved in determining best interests. In a similar vein, as the Government identified, there was a deliberate policy decision that 'a prioritisation of the factors would unnecessarily fetter their operation in the many and varied circumstances in which they might fall to be applied'.<sup>22</sup>

This approach was carried through into the Code of Practice accompanying the MCA. While the individual's wishes and feelings, beliefs and values 'should be taken fully into account', they will 'not necessarily be the deciding factor'.<sup>23</sup>

### *B. The MCA in Practice*

Given the decision not to prioritise any of the factors in s 4, it is of little surprise that the case law on the relative weight that should be ascribed to a person's wishes and feelings superficially lacks coherence.

It is possible to suggest, however, that a dialogue can be seen emerging in the case-law between two lines of thought: on the one hand that a rebuttable presumption exists in favour of giving effect to a person's wishes and feelings; and on the other that the individual's wishes and feelings represent just one factor in the balance sheet which should not receive special consideration.

This dialogue found its roots in *Re S and S (Protected Persons)*<sup>24</sup> where talk of 'presumptions' first emerged. HHJ Marshall QC forcefully remarked:

... where P can and does express a wish or view which is not irrational (in the sense of being a wish which a person with full capacity might reasonably have), is not impracticable as far as its physical implementation is concerned, and is not irresponsible having regard to the extent of P's resources (ie whether a responsible person of full capacity who had such resources might reasonably consider it worth using the necessary resources to implement his wish) then that situation carries great weight, and effectively gives rise to a presumption in favour of implementing those wishes, unless there is some potential sufficiently detrimental effect for P of doing so which outweighs this.<sup>25</sup>

It would, in HHJ Marshall's view, take significant detriment to P to be sufficient to outweigh the 'sense of impotence' and 'frustration' of having one's wishes

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<sup>20</sup> Ibid s 4(7)

<sup>21</sup> (HL 2002-03, 189-I, HC 1083-I)

<sup>22</sup> *Government Response to the Scrutiny Committee's Report on the Draft Mental Incapacity Bill* (CMD 6121, February 2004)

<sup>23</sup> Para 5.38

<sup>24</sup> *C v V* [2009] WTLR 315, [2008] COPLR Con Vol 1074

<sup>25</sup> Ibid [57]

overruled.<sup>26</sup>

What, after all, is the point of taking great trouble to ascertain or deduce P's views, and to encourage P to be involved in the decision making process, unless the objective is to try to achieve the outcome which P wants or prefers, even if he does not have the capacity to achieve it for himself?<sup>27</sup>

The approach espoused by HHJ Marshall was, however, short-lived. No sooner had the judgment been handed down in *Re S and S*, than Lewison J responded in *Re P*<sup>28</sup> that HHJ Marshall 'may have slightly overstated the importance to be given to P's wishes'.<sup>29</sup> Lewison's approach found favour with Munby J in *Re M*,<sup>30</sup> the latter specifically endorsing the 'compelling force' of the judgment. Relying on the drafting of the Act, Munby J was clear that: '[t]he statute lays down no hierarchy as between the various factors which have to be borne in mind',<sup>31</sup> and while 'P's wishes and feelings will always be a significant factor to which the court must pay close regard', 'the weight to be attached to P's wishes and feelings will always be case-specific and fact-specific'.<sup>32</sup> Munby J indicated that the important considerations in determining the weight to be ascribed to the wishes and feelings of the individual were:

- a) the degree of P's incapacity, for the nearer to the borderline the more weight must in principle be attached to P's wishes and feelings...
- b) the strength and consistency of the views being expressed by P;
- c) the possible impact on P of knowledge that her wishes and feelings are not being given effect to;
- d) the extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of sensible implementation in the particular circumstances; and
- e) crucially, the extent to which P's wishes and feelings, if given effect to, can properly be accommodated within the court's overall assessment of what is in her best interests.<sup>33</sup>

The case-law that follows could largely be characterised as a dialogue between these two competing views,<sup>34</sup> but against this backdrop, the MCA first came before the Supreme Court in *Aintree University Hospital NHS Foundation Trust v James*,<sup>35</sup> in which Lady Hale emphasised that the purpose of the best interests test was, in the view of Lady Hale, 'to consider matters from the patient's point of view':

Insofar as it is possible to ascertain the patient's wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being.<sup>36</sup>

In placing the emphasis on the patient's *own* views, and by stressing the importance of considering decisions from the perspective of the individual concerned, the Supreme Court confirmed the place of the individual at the centre of the assessment,

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<sup>26</sup> Ibid [58]

<sup>27</sup> Ibid [55]

<sup>28</sup> [2009] EWHC 163 (Ch), [2009] COPLR Con Vol 906

<sup>29</sup> Ibid [41]

<sup>30</sup> *Re M (Statutory Will)* [2011] 1 WLR 344; *ITW v Z and others* [2009] EWHC 2525 (Fam)

<sup>31</sup> Ibid [32]

<sup>32</sup> Ibid

<sup>33</sup> Ibid [35]

<sup>34</sup> Discussed at greater length in the article cited above n 7.

<sup>35</sup> [2013] 3 WLR 1299, [2013] COPLR 492

<sup>36</sup> Ibid [45]

recognising the subjectivity that any assessment of an individual's best interests must inevitably entail. It is perhaps not entirely surprising that the sole judgment was given by Lady Hale, who (in a previous existence as Brenda Hoggett) had played a key role in the Law Commission's work identified above, in which a compromise had been attempted between substituted judgment and objective best interests assessment.

Case law decided subsequent to the decision in *Aintree* has (with some exceptions<sup>37</sup>) increasingly followed a model of placing greater emphasis upon identifying the wishes and feelings of the individuals concerned (in particular those wishes identified prior to the loss of capacity). Further, these wishes are taking on a much higher priority in the assessment of 'best interests'; and clear and convincing justification is required before they are departed from.

Nowhere is this perhaps more evident than the decision of Peter Jackson J in *Wye Valley NHS Trust v B*,<sup>38</sup> concerned with medical treatment urgently required to save the life of an elderly man with long-standing mental health difficulties who was said not to have the capacity to consent to or refuse the treatment but was profoundly opposed to the proposed procedure. The treating Trust submitted that the views expressed by a person lacking capacity were in principle entitled to less weight than those of a person with capacity. Peter Jackson J accepted that this was true 'only to the limited extent that the views of a capacitous person are by definition decisive in relation to any treatment that is being offered to him so that the question of best interests does not arise.'<sup>39</sup>

Importantly, however, he went on:

once incapacity is established so that a best interests decision must be made, there is no theoretical limit to the weight or lack of weight that should be given to the person's wishes and feelings, beliefs and values. In some cases, the conclusion will be that little weight or no weight can be given; in others, very significant weight will be due.<sup>40</sup>

Rightly, Peter Jackson J emphasised:

...[t]his is not an academic issue, but a necessary protection for the rights of people with disabilities. As the [MCA] and the European Convention make clear, a conclusion that a person lacks decision-making capacity is not an 'off-switch' for his rights and freedoms. To state the obvious, the wishes and feelings, beliefs and values of people with a mental disability are as important to them as they are to anyone else, and may even be more important. It would therefore be wrong in principle to apply any automatic discount to their point of view.<sup>41</sup>

Not least because he made a determined effort to understand Mr B's perspective – including by spending time with him at his hospital bed-side – Peter Jackson J found himself able to hold that he was quite sure that it was not in Mr B's best interests to

<sup>37</sup> The most glaring being that of the Court of Appeal in *RB v Brighton and Hove City Council* [2014] EWCA Civ 561, [2014] COPLR 629, a decision under appeal to the European Court of Human Rights at the time of writing.

<sup>38</sup> [2015] EWCOP 60, [2015] COPLR 843

<sup>39</sup> *Ibid* [10]

<sup>40</sup> *Ibid* [10]

<sup>41</sup> *Ibid* [11]

...take away his little remaining independence and dignity in order to replace it with a future for which he understandably has no appetite and which could only be achieved after a traumatic and uncertain struggle that he and no one else would have to endure. There is a difference between fighting on someone's behalf and just fighting them. Enforcing treatment in this case would surely be the latter.<sup>42</sup>

## V. THE AWI

### A. Background

The direction of development of Scots law over the two decades preceding enactment of AWI was significantly towards what in the language of the General Comment would be characterised as a regime of best interpretation of will and preferences, rejecting a best interests approach. Disappointingly, since then that trend has halted, and to an extent has been reversed.

In personal welfare matters Scotland had, from 1913 to 1984, enshrined in statute precisely the form of guardianship which is described in paragraph 27 of the General Comment as a 'substitute decision-making regime', and which – according to paragraph 7 of the General Comment - should be abolished. That form of guardianship was introduced by the Mental Deficiency and Lunacy (Scotland) Act 1913 and continued in subsequent legislation. Guardians had the same powers as parents of a young child, regardless of the actual capabilities of each adult to whom such guardians were appointed. The route towards the AWI could be seen as starting with the progressive realisation of the inappropriateness of subjecting adults to such guardianship, so that the numbers in such guardianship dwindled from 2,440 in 1960 to around 300 by 1982, the year in which the Scottish Home and Health Department and the Scottish Education Department, Social Work Services Group, issued its *Review of the Mental Health (Scotland) Act 1960*, proposing radical reform. Three decades before the General Comment, Scotland implemented that key recommendation by abolishing such guardianship.<sup>43</sup> Abolition inevitably created a vacuum in safeguarding and promoting the rights of persons/adults. That vacuum was filled principally by re-introduction, in modernised form, by courts operating in the civil law tradition, of the former Roman law concept of appointment of tutors-dative to adults, the first such case being *Morris, Petitioner*,<sup>44</sup> which Ward described in *Revival of Tutors-Dative*.<sup>45</sup> Modernisation from and including *Morris* took the form of limited powers tailored to need, an emphasis upon provision of support, and time-limiting to ensure review. Subsequent developments included, in appropriate cases, provisions anticipatory of what is now termed supported decision-making such as cases where, in particular matters, tutors were authorised to identify and present viable alternatives from which the adult could make a choice.

If the views of the UN Committee are applied retrospectively to the revival and development of tutors-dative in Scots law over the period from *Morris* in 1986 to Part 6 of AWI coming into force in 2002, it is reasonable to characterise the tutory regime

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<sup>42</sup> Ibid [45]

<sup>43</sup> In terms of the Mental Health (Scotland) (Amendment) Act 1983 as consolidated into the Mental Health (Scotland) Act 1984.

<sup>44</sup> Unreported, 1986

<sup>45</sup> [1987] SLT (News) 69

as being at least well on the road towards a supported decision-making regime based on best interpretation. This is rather than a substitute decision-making regime based on best interests. It also demonstrates a trend towards the former in contrast to the trend towards the latter in decisions under AWI as identified below.

In the area of property and affairs, however, Scots law remained substantially unreformed. The standard technique for managing the property and affairs of adults deemed to be incapable was appointment of curators bonis: a regime which, until it was abolished with effect from 1<sup>st</sup> April 2002 by implementation of relevant provisions of the AWI, graphically demonstrated the injustices resulting from the lack of safeguards such as those required under Article 12.4 of CRPD. This was a regime undoubtedly within the definition of unacceptable substitute decision-making as described in the General Comment, already perceived as ripe for abolition long before CRPD. Unacceptable aspects of that regime, and their consequences, were described at some length in *The Power to Act* (SSMH).<sup>46</sup> Some inroads were made by the reintroduction of the former Roman law tutor-at-law, the first such case being *Britton v Britton's Curator Bonis*.<sup>47</sup> As operated in practice, these appointments addressed the lack of respect for the will and preference of persons/adults in the otherwise unreformed area of property and financial decision-making.

In parallel with the Roman law-based developments described above, the Scottish Law Commission commenced the work leading ultimately to the AWI. In September 1991 the Commission produced Discussion Paper No 94 *Mentally Disabled Adults: Legal Arrangements for Managing their Welfare and Finances* ('the SLC Discussion Paper'). Following wide-ranging consultation and discussion, in September 1995 the Commission published its *Report on Incapable Adults* (Report No 151 – 'the SLC Report'). Government published its own Consultation Paper *Managing the Finances and Welfare of Incapable Adults* in February 1997. There was however increasing anxiety that the pace of deliberation did not match the urgency of the need for law reform. Following sustained campaigning, and steps towards devolution, the Scottish Executive published its proposals in *Making the Right Moves: Rights and Protection for Adults with Incapacity* (August 1999). The AWI followed as 'the first large Bill on a major policy area to be passed by the Scottish Parliament'.<sup>48</sup>

### *B. The SLC Discussion Paper (1991)*

From the outset of the reform process, the purposes of any intervention were made clear. As paragraph 1.7 of the Discussion Paper made clear:

There is also a greater awareness of the rights of the mentally disabled. The philosophy that lies behind the new approach is one of minimum intervention in the lives of the mentally disabled consistent with providing proper care and protection and maximum help to enable individuals to realise their full potential and make the best use of the abilities they have.

The inherent tensions between autonomy and protection, again, were clearly understood from the outset and described in paragraph 1.8.

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<sup>46</sup> Ward, *The Power to Act* (SSMH, 1990)

<sup>47</sup> 1992 SCLR 947

<sup>48</sup> Mr Iain Gray, Deputy Minister for Community Care, speaking in the Scottish Parliament on 29<sup>th</sup> March 2000

There is an inherent conflict or tension between the principles of maximum freedom for mentally disabled people and their protection. Giving mentally disabled people exactly the same rights as mentally normal people would often result in the disabled harming themselves and others and becoming victims of exploitation and abuse. Protection from these consequences necessarily involves some curtailment of the rights that normal people enjoy. Indeed a certain level of protection may enhance the ability of the mentally disabled to enjoy their other rights to a greater extent.

By contrast, as to the core question addressed in this paper, the process of consultation and consideration produced a significant shift. Paragraphs 2.86 and 4.75 of the Discussion Paper, dealing respectively with personal welfare and financial matters, both included the following (close in its intention to the MCA position described in paragraph above):

We tend to favour continuation of the 'best interests' rule coupled with requiring the guardian to consult with and have regard to the wishes of the mentally disabled person, family and carers. The previously expressed views of the disabled person could and should be taken into account but should not override the judgment of the guardian as to the current best interests of the incapacitated person.

### *C. Evolution of Principles and Terminology, Rejection of 'Best Interests'*

Prior to instructing the first draft Bill, the SLC team had however already decided to recommend rejection of the 'best interests' test. That rejection was subsequently expressed in the SLC Report as follows:

Our general principles do not rely on the concept of best interests of the incapable adult. ... We consider that 'best interests' by itself is too vague and would require to be supplemented by further factors which have to be taken into account. We also consider that 'best interests' does not give due weight to the views of the adult, particularly to wishes and feelings which he or she had expressed while capable of doing so. The concept of best interests was developed in the context of child law where a child's level of understanding may not be high and will usually have been lower in the past. Incapable adults such as those who are mentally ill, head injured or suffering from dementia at the time when a decision has to be made in connection with them, will have possessed full mental powers before their present incapacity. We think it is wrong to equate such adults with children and for that reason would avoid extending child law concepts to them. Accordingly, the general principles we set out below are framed without express reference to best interests.<sup>49</sup>

In the passage from the SLC Discussion Paper quoted above, the reference to 'best interests' was coupled with references to the wishes of the adult and others, including previously expressed views of the adult. It is accordingly relevant to balance the ensuing rejection of a 'best interests' criterion with the development of the status accorded to the views and wishes of the adult. In the first draft Bill instructed by SLC, reference to the wishes and feelings of the adult was subsidiary to the principles of minimum necessary intervention and the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention, which was set out in s 1(3). Section 1(4) required that in determining what intervention satisfied the requirements of s 1(3), account should be taken, so far as was reasonably practicable, of 'the wishes and feelings of the mentally disordered adult, in particular any written directions given by him while he was mentally

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<sup>49</sup> Scottish Law Commission, *Report on Incapable Adults*, (Scot Law Com No 151, 1995) para 2.50

capable'. In the draft Bill annexed to the SLC Report, the principles were stated as in the AWI, as quoted in paragraph 24 above. Section 1(4)(a) is not subsidiary to any other principle. It directs that account shall be taken of the present and past wishes and feelings of the adult, if ascertainable by any means.

The term 'paradigm shift' was not used in relation to either the eventual proposals in the SLC Report or the AWI itself. The concept of a shift from 'old law' to 'new law'<sup>50</sup> was however well understood. Further, following passage of the AWI Ward suggested the term 'constructing decisions' for the processes of decision-making required by the AWI. This is a process requiring respect for the competent decisions of every adult, regardless of disability, and a process of what the General Comment terms 'best interpretation' to the extent that the adult is unable to make, or to communicate with any amount of assistance, competent decisions. Ward described the resulting processes fully in Chapter 15.<sup>51</sup>

While that could be claimed to be a description of a 'supported decision-making regime', incorporating – in relation to factual incapacity – a 'best interpretation' approach rather than a 'best interests' approach, questions remain as to whether the AWI is sufficiently robust in *requiring* such an approach and in excluding what may amount in fact (and regardless of terminology) to a paternalistic 'best interests' approach; and whether that outcome is consistently achieved in practice. Those questions lead us to the next section of this Part 4.

#### *D. The AWI: Case Law Evolution*

Perhaps due to the lack of a specialised judiciary, coupled with the smaller volume of cases generated by a smaller population, it is not possible to identify from a review of Scottish case law such differing lines of thought as were identified in Part 3. There have been significant lines of development, through several individual cases, in matters such as use of the AWI to authorise Will-making and similar (in the absence of any 'statutory Will' provisions in Scots law), but there have been no equivalent progressive and differing lines of development in relation to whether (for example) the benefit principle equates to a best interests test, or the relative weight to be given to the benefit principle when balanced against the others, particularly the past and present wishes and feelings of the adult. That is not to say, however, that there have not been significant decisions in these matters. However, it is surprisingly rare for decisions under the AWI to refer to many (or indeed any) precedents under the AWI regime. Where short lines of authority have been developed, contradictory views tend to be formed extraneously – in one case, in the pronouncements of Scottish Government, and in relation to another, a clear but uncited decision of the Supreme Court in an English case.

For the above reasons, the structure of this Scottish section differs from the equivalent section for England & Wales above. All relevant available decisions under AWI are listed in the Appendix to this paper, and are referred to – where not more

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<sup>50</sup> Described by Ward in *Adults with Incapacity Legislation* (W Green 2008) 3

<sup>51</sup> 'Constructing Decisions' in *Adult Incapacity* (W Green 2003)

fully – simply by the numbering in the Appendix.<sup>52</sup> A further feature has shaped this section. Because Scottish guardianship law evolved from the re-introduction and development of tutory described above, some of the experience under that regime remains relevant.

One startling result of analysis of the cases in the Appendix is that, despite the explicit rejection of a best interests test for the purposes of the AWI as narrated above, the frequency with which sheriffs have at least in part chosen to base their decisions on what they considered to be in the relevant adult's best interests. This occurred in cases 10, 13, 21, 22 and 25, that is to say 5 or 18.5% of the cases in the Appendix. It is necessary, however, to look more closely at this finding.

Until his retirement in early 2015, Sheriff John Baird was for all practical purposes a specialist sheriff, being lead sheriff for AWI cases in Glasgow Sheriff Court. In the course of his career he dealt with well over 3,000 AWI cases. Twelve (44%) of the decisions in the Appendix are his, being cases 3, 4, 5, 7, 8, 9, 11, 17, 19, 20, 23 and 24. In all of these he referred to the benefit principle. None of his decisions is based on any 'best interests' concept. Indeed, in case 24<sup>53</sup> he considered a Minute lodged by a consultant geriatrician in charge of a long stay patient in an acute NHS hospital, seeking directions to be given to the appointed guardian. The adult's daughter was her guardian and had for some time refused to exercise her powers enabling her to make arrangements for the adult's long term care, despite being advised that the adult could not return home. The applicant considered that the adult required continuing medical care which could be provided most suitably in a facility such as a care home and asked the court whether in order to secure the adult's welfare and best interests it was necessary for her to reside in a facility providing NHS continuing care, and if so, that the court make an order directing the guardian to consent to the adult residing at the care home and to direct her to convey or make arrangements for the adult's conveyance thereto. The specific question before the court was: 'In order to secure the Adult's welfare and best interests is it necessary for her to reside in a facility which provides NHS continuing care?' Sheriff Baird pointed out that 'benefit', not 'best interests', was the relevant test, but use of the latter term points to a disappointing level of knowledge of the AWI principles even among professionals likely to be much engaged with aspects of the AWI regime. Sheriff Baird in fact referred to 'benefit' rather than 'best interests' in all of the decisions listed.

If Sheriff Baird's decisions are set aside, and also setting aside case 1 in view of the careful and limited use of 'best interests' by Sheriff Ireland in that case (see below), the remaining decisions are those of a total of ten different sheriffs (or sheriffs principal), of whom five – or one half – have founded upon 'best interests' in at least one of their decisions.

We are left with the difficulty of what the sheriffs who have used the term 'best

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<sup>52</sup> Ward thanks his colleague on the core research group of the Three Jurisdictions Project, Rebecca McGregor, for compiling this list and highlighting relevant key features in each case. Rebecca is a research assistant in the Centre for Mental Health and Incapacity Law, Rights and Policy at Edinburgh Napier University.

<sup>53</sup> *B, Minuter* 2014 SLT (Sh Ct) 5



interests' in their decisions actually meant by it. Case 3<sup>54</sup> and case 10<sup>55</sup> both address the question of whether a guardianship order was appropriate in relation to decisions to change the place of residence of an adult who (in each case) was compliant but had been assessed as not capable of making a valid decision in the matter. Sheriff McDonald at Kilmarnock in case 10 stated that she was following the views of Sheriff Baird at Glasgow in case 3. Both referred to the full range of relevant principles, Sheriff Baird without mention of 'best interests', but Sheriff McDonald's judgment included:

This relates to the question as to whether or not intervention is in the best interests of the adult.

It is my view that the best interests of the adult would be served by allowing her sons to take decisions for her. Section 1(4)(a) of the Adults with Incapacity (Scotland) Act 2000 indicates that the present and past wishes and feelings of the adult, so far as they can be ascertained, must be taken into account. I heard evidence from the adult's two sons that it was their mother's wishes that they should deal with all of her affairs. This was not disputed by the respondent. Further, in terms of s 1(4)(b), the views of the nearest relative must also be taken account of and, again, the adult's two sons indicated that they wished to be appointed welfare guardians. These sections are not mutually exclusive, but should be read in conjunction with each other.

The decisions in cases 3 and 10 produced disagreement not by other judges, but Scottish Government in *Guidance for Local Authorities (March 2007) Provision of Community Care Services to Adults with Incapacity*, referring to *Muldoon*, stated that: 'The Scottish Executive does not agree with this interpretation of the ECtHR cases'. This however was not a matter of the relative weight to be attributed to different principles. In general terms, the frequent use of the words 'best interests' above appears to point to the thinking of a generalist judiciary, well-schooled in child law, where the best interests of the child are a paramount consideration, and still guided by that thinking – as well as that language – in the very different situation of adults for whom the best interests text was rejected for purposes of the AWI jurisdiction.

In the context of any attempt to ensure compliance with CRPD, case 3 (*Muldoon*) bears further consideration. Sheriff Baird held that in every case where a court is dealing with the question of determining the residence of an adult who is incapable but compliant, 'the least restrictive option will be the granting of a guardianship order under the Act (assuming of course that all the other statutory requirements are satisfied), for that way only will the necessary safeguards and statutory and regulatory framework to protect the adult (and the guardian), come into play.' Sheriff Baird's conclusion that imposing a decision as to place of residence upon a compliant but incapable adult was a breach of Article 5 of ECHR resonates to an extent with the subsequent decision of the Supreme Court in *P v Cheshire West*.<sup>56</sup> But if a 'constructing decisions' (or best interpretation) approach had been applied to the facts, that might perhaps have warranted the very different conclusion that the adult's contentment with her placement was sufficient to authorise it, and that her desire not to have a guardian should be respected, as there was no contravention of her rights sufficient to overrule in that regard her identified will and preferences.

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<sup>54</sup> *Muldoon, Applicant* 2005 SLT (Sh Ct) 52

<sup>55</sup> *M, Applicant* 2009 SLT (Sh Ct) 185

<sup>56</sup> [2014] UKSC 19

As to the contrast between a supported decision-making approach based on best interpretation, or a substitute decision-making approach based on best interests, among the cases listed in the Appendix, this is most clearly found upon consideration of the first and last, being case 1<sup>57</sup> and case 27.<sup>58</sup> While the decision of Sheriff Seith Ireland in case 1 (*JM*) uses the term 'best interests', he does so only to the extent of equating 'benefit' with 'best interests', then in effect (in that case) giving priority to 'the views of the adult'. Sheriff Principal Stephen in case 27 (*G*) does not use the words 'best interests', but more significantly she appears to equate the benefit test with a best interests approach and – significantly – to treat it as overriding other considerations. Both cases were contests between a relative of the adult and the local authority chief social work officer for appointment as guardian.

In case 1 (*JM*) the 'constructing decisions' methodology proposed in Chapter 15 of *Adult Incapacity* was adopted in the successful arguments for the respondent, Mrs M. Her husband Mr M had been seriously injured in an accident in 1987. After 15 years in hospital, authorities decided that it was appropriate to discharge him on the basis that he no longer needed full-time medical or nursing care. He and Mrs M were happily married. They shared the same outlook and values. Mrs M was initially resistant to discharge because she feared that Mr M would not receive the care which his difficult needs required. However, a placement which appeared to be suitable had been identified, the drawback being that it offered short-term rather than long-term care, so that further decisions about suitable placement were likely to be required within two years. The central question was whether the court should simply make its own objective decision as to what seemed to be in Mr M's best interests, or whether – having found that either contender would be suitable for appointment – the sheriff should arrive at a decision taking into account Mr M's known views which he had been able to express before his accident, the marriage which he and his wife had entered and sustained, and the values which they shared. Sheriff Ireland's judgment included the following passage:

However, coming to a concluding answer to that question has been neither straightforward nor easy for the court. This has required anxious consideration of the general principles set out in section 1 of the Act and the duties placed on the court in appointing a guardian in terms of section 59 of the Act.

...the legislative purpose of the Adults with Incapacity Act goes beyond, in my view, the test of what is in the best interest of the adult. That may be a necessary starting-point - and the test the court has to make of welfare guardian in terms of section 59 has, by implication, the requirements of a 'best interests' approach. However, most importantly, section 59 has to be read against section 1(2) of the Act. In summary, this provides that there should be no intervention in the affairs of an adult unless the person responsible for authorising the intervention (in this case the court), is satisfied that the intervention will benefit the adult. This, in my view, means the court which authorises the intervention, in this case the appointment of a welfare guardian, has to have the best interests of the adult in mind, equiperating 'benefits' with 'best interests' which I hold as a reasonable construction.

Yet the legislative intention of the Scottish Parliament can be found to have gone beyond 'best interests' by an examination of section 1(4), especially paragraphs (a), (b) and (d) which I have quoted above.

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<sup>57</sup> *North Ayrshire Council v JM* 2004 SCLR 956

<sup>58</sup> *G v West Lothian Council* 2014 WL 6862565

I construe these provisions as requiring the court to have regard to the views of the adult (JM) as expressed prior to his incapacity, and as far as is ascertainable, at present, as may be evidenced by the views of the nearest relative (PM) and his daughter (FM).

This can clearly be categorised as a decision based upon a supported decision-making approach, applying a best interpretation of Mr M's will and preferences.

By contrast, in deciding case 27 (G), which was an appeal from the decision of Sheriff Susan A Craig in case 25, Sheriff Principal Mhairi Stephen said:

This is indeed the core principle namely that it is the welfare of the adult and the benefit to the adult which is the overarching principle. The court then has to consider the least restrictive option and take into account the present and past wishes and feelings of the adult and the views of the nearest relative and the primary carer of the adult in so far as it is reasonable and practicable to do so. The sheriff also requires to take into account the views of any other person who appears to the sheriff to have an interest in the welfare of the adult.

It must be a cause for concern that the journey in time from the first case considered (case 1, reported in 2004) to the last (case 27, decided a decade later) has been a journey away from a 'constructing decisions' approach, giving primacy to the 'will and preferences' of the adult or their best interpretation, towards a 'best interests' approach in the sense used, and criticised, by the UN Committee.

## VI. OBSERVATIONS

If the MCA and the AWI as enacted are considered and compared in the retrospective light of CRPD and the views of the UN Committee, they might be seen simplistically as representing the two contrasting models of substitute decision-making based on best interests (the MCA) and supported decision-making based on best interpretation (the AWI). In the case of the AWI, the contrast might seem to be emphasised by consideration of the development of re-introduced tutors to adults in the period 1986 – 1992, and how that experience was carried forward into the AWI, and into early anticipations as to how the AWI should be operated.

Looked at more carefully, however, both Acts ultimately require a structured consideration of a series of questions and analysis of a set of factors relating to the individual in question, against an overarching set of principles. Further, and by reference to the requirement in Article 12(4) CRPD for 'measures relating to the exercise of legal capacity [to] respect the rights, will and preferences of the person,' we would suggest that neither can – at present – properly be said to do so, because on their face neither Act:

1. Expressly places an obligation upon anyone to take steps to identify the wishes and feelings (to the extent that this can be said to be synonymous with the will and preferences) of the individual;
2. Expressly provides that (or how) the wishes and feelings have priority. The 'constructed decision-making' hierarchy identified above in relation to Scotland is not expressly provided for in s.1(4) AWI: for instance by the use of 'particular regard' or some equivalent term in relation to s.1(4)(a)). The MCA provides that consideration must be given to the person's past and present wishes and feelings 'and in particular' any relevant written statement made by him when he had capacity but that could narrowly be read solely as requiring particular regard in the context of consideration of wishes and feelings, as opposed to

requiring particular regard to be given to such written statements in the overall consideration of best interests;

3. Expressly provides how 'respect' for ascertainable wishes and feelings is to be secured, for instance by requiring reasons to be given for departure from them.

It is further important to understand how both Acts have been applied in practice. We have sought to identify above how (on the one hand) the evolution of the case-law in England & Wales could be seen as exemplifying a trend towards paying greater heed to the individual's wishes and feelings (and, perhaps, suggesting what 'respect' might look like in practice), while (on the other) judicial decisions in Scotland have disappointingly trended, particularly in the last decade, towards what seems in practice to bring a more paternalistic 'best interests' approach – even using that rejected terminology – and away from greater respect for the individual's will and preferences, and past and present wishes and feelings.

For these reasons, both stemming from the language of the Acts and from the way that language has been interpreted in practice, we conclude that compliance with CRPD would undoubtedly require amendment of both Acts. In particular, and as a minimum, s 4 of MCA and s 1 of AWI would require to be re-cast.

## VII. APPENDIX

### *Scottish Cases*

In the foregoing paper, these cases are in places referred to only by the numbers allocated below. Note that case 25 was appealed, and case 27 is the appeal decision.

1. *North Ayrshire Council v JM* – 2004 SCLR 956
2. *Frank Stork and Others Pursuers* – 2004 SCLR 513
3. *Muldoon, Applicant* – 2005 SLT (Sh Ct) 52
4. *B, Applicant* – 2005 SLT (Sh Ct) 95
5. *Re T (application for intervention order)* – 2005 Scot (D) 10/7
6. *Fife Council Pursuer against X Defender* – 22 December 2005 (Scottish Court Opinions)
7. *B's Guardian, Applicant* – 2006 SLT (Sh Ct) 23
8. *M, Applicant* – 2007 SLT (Sh Ct) 24
9. *A's Guardian, Applicant* – 2007 SLT (Sh Ct) 69
10. *M, Applicant* – 2009 SLT (Sh Ct) 185
11. *G v Applicant* – 2009 SLT (Sh Ct) 122
12. *Cooper, Appellant* – 2009 SLT (Sh Ct) 101
13. *JM v JM Senior v LM* – 2009 WL 1657166
14. *H's Curator Bonis, Applicant* – 2010 SLT (Sh Ct) 230
15. *W v Office of the Public Guardian* – 2010 WL 2976720
16. *City of Edinburgh Council v D* – 2011 SLT (Sh Ct) 15
17. *Application in respect of M* – 2012 SLT (Sh Ct) 25
18. *H's Guardian v H* – 2013 SLT (Sh Ct) 31
19. *In the Case of Applications by the Guardian of P* – 2012 WL 5894489
20. *JM v Mrs JM* – 2013 WL 425718
21. *A and B, Solicitors as Continuing Attorneys, Solicitors, Aberdeen, C, as Welfare Attorney, Aberdeen v D, Aberdeen* – 2013 WL 617382
22. *CJR v JMR* – 2013 WL 1563208

23. *Application on behalf of MH* – 2013 WL 617656
24. *B, Minuter* – 2014 SLT (Sh Ct) 5
25. *G v West Lothian Council* – 2014 WL 6862565
26. *A.D. v J.G.* – 2015 WL 1786073
27. *West Lothian Council v For appointment of Guardian to JG* – 2015 WL 1786069