



This paper considers issues relating to concerns regarding adults at risk of harm who register to marry, where professionals involved have concerns about the nature of the proposed marriage and its consequences for the adult.

## Marriage Proposals within an Adult Support and Protection Context

A Discussion Paper for Adult  
Protection Committees

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## **Background**

The NAPC received a request from the Social Work Scotland Adult Support and Protection Network to explore issues relating to concerns about adults at risk of harm registering to marry in terms of current legislation and guidance. This is based upon local experience of adults at risk of harm registering to marry and concern that their status in this regard is not a factor that can be considered unless there is also a level of incapacity. Although this paper has been reviewed by a solicitor, please note that none of the information contained in this paper constitutes legal advice. This paper has been produced as a discussion paper for Adult Protection Committees (APCs) to assist in the consideration of these complex legal and practice issues.

## **Registrars**

It must be noted that, although Registrars in Scotland are employees of local authorities, they are appointed by the Registrar General to carry out their functions under the Marriage (Scotland) Act 1977 and the Civil Partnership Act 2004. Therefore they also operate under the Registrar General's instructions.

## **Process**

### *Marriage*

Anyone wishing to marry or register a civil partnership in Scotland must submit notice to the Registrars' office for the area where the wedding or civil partnership is to take place. A minimum of 29 days' notice should be given as the names of the couples must be displayed in the Registrars' office for a minimum of 28 clear days. This is to allow for any objections to the marriage/civil partnership to be lodged and considered.

Registrars can only prevent a marriage or civil partnership from proceeding where there is a legal impediment under the Marriage (Scotland) Act 1977 or Civil Partnership Act 2004. One way in which the threshold for such a legal impediment may be met is where one or both of the parties is or are incapable of understanding the nature of a marriage ceremony or of consenting to marriage. In the case of a civil partnership there is a similar threshold where either of the intended civil partners is incapable of understanding the nature of civil partnership or validly consenting to its formation.

It is the writer's understanding that Registrars and religious and belief celebrants are advised that, if there are any concerns on the day about either party's capacity to understand proceedings and give consent, then the ceremony or formation of the civil partnership should not proceed. However this is in the context of these professional groups not being qualified or experienced in assessing mental capacity. This then highlights the need to raise issues of concern through the formal channels prior to any ceremony.

### *Objecting to a Marriage*

The lodging of an objection on grounds of incapacity must be accompanied by a certificate signed by a medical practitioner to assist in the decision making process as to whether a marriage or civil partnership can be prevented.

Where an objection is submitted to the relevant Registrars' office, it will be referred to the Registrar General's Marriage and Civil Partnership Section for consideration. Such an objection must be in writing. If the objection is upheld the relevant Registrars' office will be informed that the marriage or civil partnership cannot proceed.

Any person can object to a marriage on grounds specified in the Marriage (Scotland) Act 1977. These include:

- One of the parties being under 16.
- A level of relationship as defined in Schedule 1 which appears to include; Parent, Child, Great/ Grandparent, Great/Grandchild, Sibling, Aunt or Uncle, Niece or Nephew.
- One or both of the parties is or are incapable of understanding the nature of a marriage ceremony or of consenting to marriage. In such instances the objection should be accompanied by a medical certificate in the prescribed form.
- Either of the persons is already married.
- In certain circumstances where one of the parties does not live in Scotland.

The objection should be submitted to the Registrar in writing which can be in electronic form where it is legible and can be used for subsequent reference.

Practitioners must ensure that any objection is clear and could not be interpreted as only relating to an inaccuracy in the marriage notice or certificate.

### *Outcomes*

Where the Registrar receives an objection they must satisfy themselves that it relates to more than a 'misdescription or inaccuracy' in the marriage notice or certificate. Where this is the case, they will:

- Notify the parties registered to marry about the nature of the objection.
- Make enquiries into the matter.
- Subject to the approval of the Registrar General, make any necessary corrections to any documents relating to the marriage.
- Whilst awaiting consideration by the Registrar General suspend completion or issuing of the marriage schedule.
- Where the schedule has already been issued, notify the celebrant (where possible) advising them not to solemnise the marriage whilst awaiting the outcome of their processes.

Where there is a legal impediment to the marriage, the Registrar General will direct the District Registrar to take all reasonable steps to ensure the marriage does not take place and ensure the parties intending to marry are notified. Therefore it may be important to express to the Registrar any increased risk to an adult at risk of harm where such a notice is issued.

Where there is no legal impediment to the marriage, the Registrar General will inform the District Registrar accordingly.

## Ability to Understand and Consent to Marriage

Based upon the NAPC's enquiries it is understood that the concept of a person's ability to understand and consent includes their understanding of the impact, meaning and expectations of and within a marriage.

It is also noteworthy that as far as consent to marry is concerned, it is the law of the country in which the individual is domiciled that applies. Scots law may therefore be relevant to marriages/ partnerships being solemnised abroad, where one or both of the partners is domiciled in Scotland.

Clearly the above indicates that it is the person's capacity to consent to and understand the meaning and impact of marriage that is key. This will require medical assessment and written support of any objection. There are three other factors which may vitiate (render null or void) consent:

- Consent obtained under duress
- Error as to the nature of the ceremony (e.g. where a party believes it is a betrothal) or
- One (or each) party erroneously thinking the person at the ceremony is actually a different person that they are agreeing to marry.

There are no other grounds for invalidating consent in Scotland. In particular, undue pressure or influence (also called 'falsity and circumvention') is not a ground rendering a marriage void or voidable. These concepts are discussed further under invalid marriages.

## Factors to Consider when Concerned

Other factors that may be usefully considered include:

- The person's capacity to consent.
- Whether the proposed marriage or partnership could meet the definition of Forced Marriage as discussed below.
- Article 8 (Right to respect for private and family life) and particularly Article 12 (Right to marry) of the European Convention.
- Human Rights – the UN states in Article 16 of the Universal Declaration of Human Rights<sup>1</sup> that:
  - i. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

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<sup>1</sup>United Nations Universal Declaration of Human Rights <https://www.un.org/en/universal-declaration-human-rights/>

- ii. Marriage shall be entered into only with the free and full consent of the intending spouses.
- iii. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Practitioners and managers along with their legal advisers may wish to consider whether anything in the suite of protective legislation may be deployed to offer support e.g. Adults with Incapacity (Scotland) Act 2000, Mental Health (Care and Treatment) Scotland Act 2003 or the Adult Support and Protection (Scotland) Act 2007. However in each case the principles of the legislation and the human rights detailed above should be fully considered.

The Stair Memorial Encyclopaedia summarises Scottish law on this matter:

Marriage is a contract based crucially on the freely given consent of both parties. It follows that if the parties, or one of them, could not understand marriage or did not truly consent to marry, then the basis of the contract 'consent' does not exist and the marriage is void. A challenge to the marriage on this basis might found on a party's mental illness or defect, but it has been held that marriage is a simple contract, understandable in its nature to most people, even those of diminished intelligence, and it therefore takes a significant degree of lack of understanding before a marriage will be held void on this basis. The incapacity may be long term, as a result typically of mental illness, or short-term, for example as a result of drunkenness or abuse of drugs, though the effects thereof must be extreme before capacity to consent is lost. The onus is on the person seeking to nullify a marriage on this basis, and this onus is very heavy. The only basis for challenging consent in this way is complete incapacity and it is not open to anyone to argue that consent is invalid due to facility and circumvention.<sup>2</sup>

### **Capacity and Risk Assessment**

It is noteworthy that the means of vitiating (invalidating) consent are construed very narrowly in case law. The writer located case law from England<sup>3</sup> which although is not directly relevant in the Scottish context suggests three questions which may be useful to consider in terms of formally assessing risk and the person's capacity:

- Does the person understand the nature of the marriage contract?
- Does the person understand the duties and responsibilities that usually relate to marriage?
- Is the person able to give valid consent?

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<sup>2</sup> The Laws of Scotland [electronic resource]: Stair memorial encyclopaedia, Smith, T.B. (Eds) LexisNexis (online) 627. Incapacity to understand marriage or to consent thereto [last accessed 5.12.19]

<sup>3</sup> Sheffield City Council v E [2004] EWHC 2808 (Fam)

[http://www.mentalhealthlaw.co.uk/Sheffield\\_City\\_Council\\_v\\_E\\_\(2004\)\\_EWHC\\_2808\\_\(Fam\)](http://www.mentalhealthlaw.co.uk/Sheffield_City_Council_v_E_(2004)_EWHC_2808_(Fam))

However in this case the presiding Judge rejected the assertion that a person's capacity to marry should be assessed within the context of their specific marriage proposal. The determination in this case was that the issue of capacity should relate to their capacity to understand the nature of the contract of marriage not the capacity to understand the implications of a *particular* marriage. Hence the above question around duties and responsibilities is generic to their understanding as opposed to specifically about their own proposed marriage.

A similar issue is also addressed in other English case law which in some ways may contradict the above. In the case of DMM<sup>4</sup> the ruling was based upon the view that some issues are factual consequences of a marriage. This ruling found that the person should be able to understand the specific consequence of their new marriage. In this case this related to the marriage invalidating their current will. This rested on an interpretation of the need to understand, retain, use and weigh information as to the reasonably foreseeable consequences of the marriage. This then draws parallels with the Scottish criteria for assessing capacity. In terms of capacity and risk assessment practitioners may then usefully consider certain specific outcomes of a marriage. That is, where a definite and direct consequence of the marriage can be established, their capacity to understand this may have a bearing on the situation. This could relate to the way in which the marriage or partnership will affect their finances or property. However, as noted below this could inform risk assessment and perhaps other actions that could be taken but may not offer anything in terms of legal argument regarding the persons capacity to consent to marriage. This is partially due to the difficulties in demonstrating that other forms of harm will be a definite and direct consequence of the marriage or partnership. However, the key issue relates to the apparent lack of Scottish case law. The writer was unable to locate specific Scottish authority on this matter. The writer was therefore advised that where there is a lack of specific Scottish authority, *the issue is likely to be considered in terms of the person's ability to consent to marriage in general and that a court would not look into the question of the specific partner chosen*. The key question is therefore the first one, that is: does the person understand the nature of the marriage contract? In this context the second and third questions are really only reformulations of that question. Importantly the international and European Human Rights background highlighted above would tend to support this interpretation. However, agencies may feel they have a Duty of Care to raise their concerns. On this basis they would need to present robustly evidenced capacity and risk assessments, noting that the potential risks highlighted may or may not be viewed as relevant evidence by the court.

## **Forced Marriage**

The Forced Marriage Guide<sup>5</sup> states that forced marriage involves someone being physically pressurised to marry. This includes threats, physical or sexual as well as emotional and

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<sup>4</sup> The Court of Protection in The Matter Of DMM Neutral Citation Number: [2017] EWCOP 32 Case No: 13095074 <https://www.bailii.org/ew/cases/EWCOP/2017/32.html>

<sup>5</sup> Forced Marriage: Support (2019) Scottish Government website last accessed 19.8.19. <https://www.mygov.scot/forced-marriage/what-is-forced-marriage/>

psychological pressure. It emphasises the person's right to choose who they marry, when they marry and more pointedly whether they marry at all.

Where it is believed that forced marriage is indicated this may support the consideration of a Forced Marriage Protection Order. These are court orders that can contain whatever terms the court considers appropriate to prevent a person being forced into a marriage or any attempts by others to force them to marry. Such orders can also be utilised to protect someone who has already been forced into a marriage.

The legal definition of a 'forced marriage' is one obtained without the free and full consent of at least one of the parties. In considering whether to make an order and what order it should make, the court must have regard to all the circumstances of the case. This includes the need to secure the health, safety and well-being of the person to be protected. It must take into account the person's ascertainable wishes and feelings in doing so. Force includes; coercion by physical, verbal or psychological means, threatening conduct, harassment or other means of coercion, and knowingly taking advantage of a person's incapacity to consent to marriage or to understand the nature of the marriage.<sup>6</sup>

### **Invalid Marriages<sup>7</sup>**

Some marriages can be deemed to be void, that is legally being viewed as never having taken place. If there was invalid consent, the marriage is void.

A marriage may also be described as 'voidable'. Advice received states that in Scots law the only ground for a marriage to be voidable is the incurable impotency of one of the parties to it. This is not a reference to mental capacity but apparently an historic reference to sexual impotency.

The difference between a void and voidable marriage is that the first does not exist at all; whereas the second may be annulled by either party applying to court. It follows that a third party may apply to court for a declarator that a marriage is void, where they have sufficient interest (e.g. if an inheritance is disputed). Only the parties to the marriage itself may apply to have a voidable marriage annulled. That is to say that the Local Authority would not qualify as a party in this sense. However where a third party can show an interest in the outcome they can raise proceedings to have a marriage declared void. Although it may be difficult for a Local Authority to demonstrate sufficient interest in such a private matter, they should be able to do so if acting as the adult's welfare guardian.

### **Supported Decision Making**

Due to the nature of the request and issues raised with the NAPC this paper has looked at the interventions that may be possible where there are concerns about an adult at risk of harm in the context of registering to marry or enter into a civil partnership. It is important to consider at this point the role of supported decision-making and professional practice in

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<sup>6</sup> Forced Marriage Practitioner Guidance - update 2014 <https://www.gov.scot/publications/forced-marriage-practitioner-guidance-update-2014/pages/6/#section10>

<sup>7</sup> Citizens Advice Scotland Getting Married <https://www.citizensadvice.org.uk/scotland/family/living-together-marriage-and-civil-partnership-s/getting-married-s/> last accessed 19.8.19.



terms of working with the person to gain a full understanding of their wishes and needs as well as the risks. In this way, other interventions may be avoided. However, it is of note that building such relationships takes time and working with people around such issues requires a level of skill and competency which practitioners may not currently feel wholly confident in. This may require research, taking account of the review of legislation in relation to mental health and incapacity. However, in order to consider this approach and its implications for practice, below is an outline of one model<sup>8</sup> developed overseas which states the required tasks include:

- Recognising when an adult may need to make a decision that requires support.
- Undertake research around options and outcomes to assist the adult make the decision.
- Meet external organisations with the adult to gain information and explore options.
- Assist the adult to analyse the options with reference to their values and preferences.
- Assist the adult to draw comparisons with historical decisions they have made.
- Assist the adult to obtain and balance advice including that from the health or social care professional.
- Communicate the adult's decision and wishes and take an advocacy approach.

## Conclusions

An adult being at risk of harm does not of itself provide grounds for a Registrar or the courts to prevent or void a marriage, the emphasis being upon the person's capacity. This perhaps raises the need to promote a model of assessing capacity, which considers the impact of trauma and other life events upon a person's capacity to make informed decisions as well as their resilience in terms of resisting undue pressure. Furthermore emphasising the need to consider both the person's decisional and executive capacity is essential in developing an understanding of their ability to safeguard themselves and their property. This highlights the need to carefully consider the persons 'ability to act' in terms of the Adults with Incapacity (Scotland) Act 2000.

Adult Protection Committees may wish to consider the options noted below to ensure local processes are robust and understood by practitioners in the event that concerns arise about an adult at risk who is registering to be married.

Where the Adult Protection Committee does not have an established protocol with the local Registrar service, it may be useful to consider establishing such a protocol. This could include how to notify the Registrar of concerns relating to incapacity and the potential need for practitioners to monitor whether an adult at risk of harm submits a marriage notice.

Raising awareness of how to respond in such cases may be a useful approach perhaps utilising joint briefings with Registrars and staff involved in protection planning.

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<sup>8</sup> Office of the Public Advocate South Australia (2011) Developing a Model of Practice for Supported Decision Making [online] (last accessed 6.12.19)  
[http://www.opa.sa.gov.au/files/batch1376447055\\_supported\\_decision\\_making\\_practice\\_manual\\_v1-4.pdf](http://www.opa.sa.gov.au/files/batch1376447055_supported_decision_making_practice_manual_v1-4.pdf)

With regard to capacity assessments APCs may wish to consider establishing a protocol to facilitate urgent requests in these circumstances given the timescales involved i.e. 29 days

APCs may also wish to explore with the Registrar how they will respond to protection concerns and the person's capacity to marry where they have refused to cooperate with an assessment. This could include consideration as to whether such issues can be addressed utilising Protection Orders, especially in cases where the person lacks capacity and/or undue pressure is evident. However, the use of Protection Orders in this regard is likely to be problematic and the best means of addressing such situations may be to follow the procedure for objections outlined above and where appropriate consider:

- A Forced Marriage Protection Order
- A Removal Order in terms of the Mental Health (Care and Treatment) (Scotland) Act 2003, where there is an immediate risk or
- Expediting an application for orders under the Adults with Incapacity (Scotland) Act 2000

Finally, the writer has made reference to civil partnerships but has not reviewed these processes in depth. It may therefore be beneficial to consider whether the same principles, issues and responses would be valid in cases of civil partnership applications.

### **Recommendations**

1. APCs may wish to take local legal advice on these matters and ascertain any local awareness of relevant case law.
2. APCs may wish to engage with their local Registrar services to develop and agree a protocol where concerns arise regarding adults at risk of harm registering to marry or form a civil partnership. This may include considering situations where there are concerns regarding capacity but the adult declines assessment.
3. APCs may wish to seek re-assurance that relevant staff have an awareness of how incapacity may manifest in terms of consenting to marriage or civil partnership.
4. APCs may wish to seek re-assurance that the relevant staff feel confident and competent with regard to formally assessing capacity in relation to marriage/civil partnership and that local processes can facilitate such assessments quickly.
5. APCs may wish to consider whether staff feel confident in assessing the specific risk factors that may require consideration, especially in relation to applying for a Forced Marriage Protection Order.
6. APCs may wish to consider supported decision making models of practice.
7. APCs may wish to include these issues within local procedures and training where required.
8. This paper be considered in any potential future work around national adult support and protection guidance.