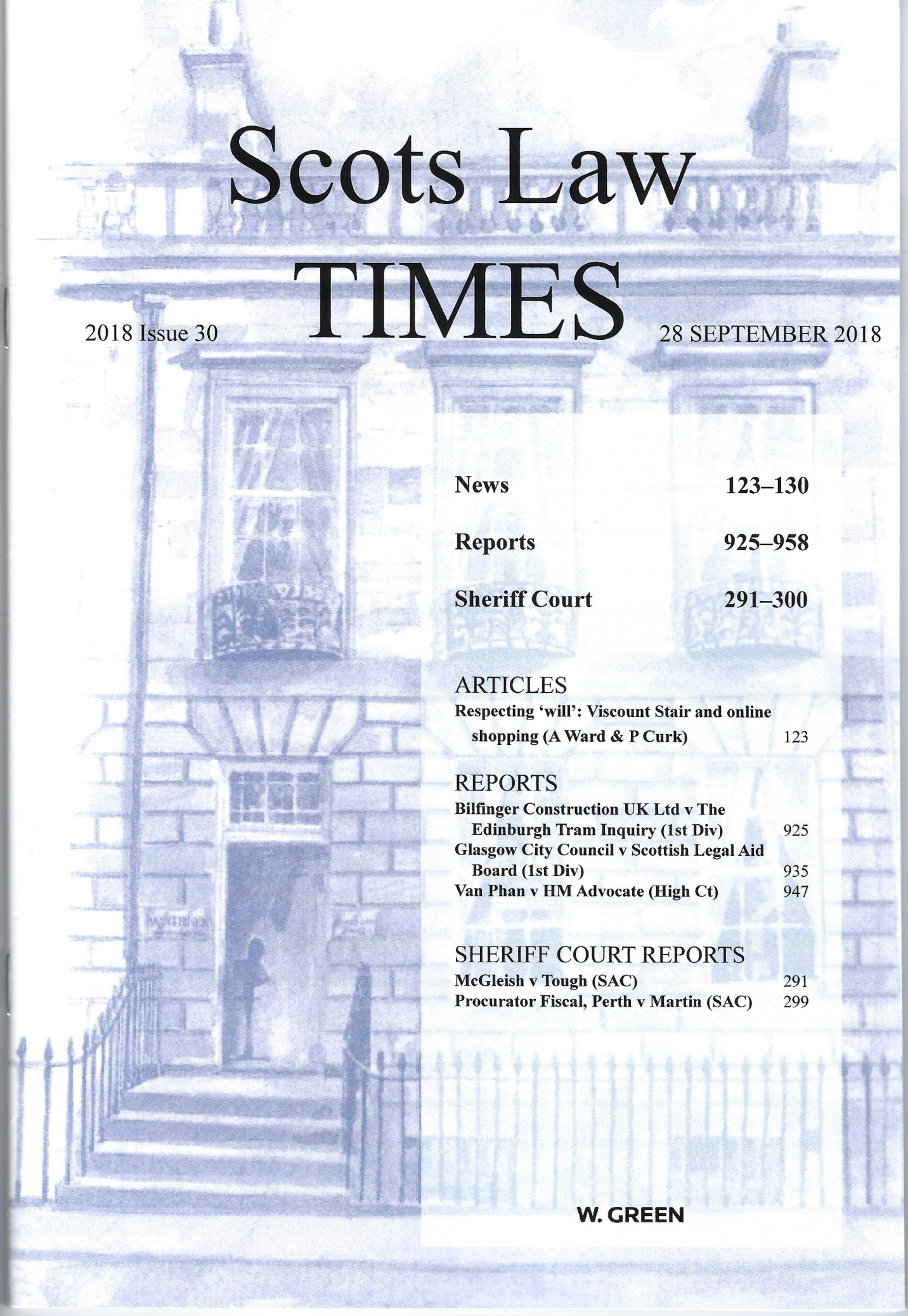

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ARTICLES

Respecting 'will': Viscount Stair and online shopping

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The authors consider the concept of rights, will and preferences, and in particular 'will', in the context of the exercise of legal capacity.

> "States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards … Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, … The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests."

The obligation to respect rights, will and preferences, in this partial excerpt from Article 12.4 of the United Nations Convention on the Rights of Persons with Disabilities ("the Convention"), has generated more contentious debate than any other provision of the Convention. At an extreme is the so-called "hardline position" adopted by, among others, the UN Committee on the Rights of Persons with Disabilities ("the UN Committee"), which wrote in para.7 of its General Comment No.1 (2014) entitled *Article 12: Equal Recognition before the Law*:

> "Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment. These practices must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others."

How can "full legal capacity" be "restored" to someone with a lifelong profound learning disability, someone in a coma or with advanced dementia, or indeed anyone with any impairment of cognitive functioning which significantly limits their ability to act and decide for themselves? Paragraph 21 of General Comment No.1 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 art.12, para.4. The 'best interests' principle is not a safeguard which complies with art.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."

This article addresses the concept of "rights, will and preferences", and in particular "will", but brief comment on the context is appropriate. Section 1(6) of the Adults with Incapacity (Scotland) Act 2000 defines "incapable", then provides that "'incapacity' shall be construed accordingly". However, "capacity" is not used in the Convention in the sense of capability, but to mean the rights and status in law of an individual. "Exercise of legal capacity" refers to the ability to act and decide with legal effect, and "measures that relate to the exercise of legal capacity" may be required in the event of impairment of that ability.

Paragraph 21 of General Comment No 1 comes close to equating "rights, will and preferences" with will and preferences alone; to assuming that those elements are mutually consistent; and to treating "will and preferences" as decisive, rather than (merely) requiring "respect". In art.12.4, "preferences" is in the plural: for anyone, a difficult decision may include balancing incompatible preferences. Further incompatibilities are exemplified in the following real life situation, experienced by Ward (as chairman of an NHS Trust) in the 1990s:

John [not his true name] had a severe learning disability and no verbal communication. Staff who knew him well noticed a deterioration in his behaviour. They noticed in particular that he had

become extremely protective of his face. They suspected toothache. However, he was absolutely resistant to anyone coming anywhere near his mouth. It subsequently transpired that he was indeed suffering from toothache.

Ward's subsequent interpretation in the light of art.12.4 was this: John's will was to resist any interference with his mouth, his preference was for the pain of toothache to end, and his right was to receive the same treatment as anyone else. With the minimum necessary intervention or coercion, it should be ensured that he received appropriate dental examination and treatment.

A prominent member of the UN Committee took a different view: all efforts should be made to persuade John to accept treatment, but if he refused, then he would have to continue to suffer toothache.

An experienced nurse (also a solicitor) commented that if that "hardline" option were to be followed, John would probably start to claw at his own face to try to get rid of the pain, continuing to do so until he caused himself serious injury.

People First (Scotland) is an organisation of people with learning disabilities, run by them, which aims to change the way people with learning disabilities see themselves, the way other people see them, and law and policy that affects them. In 2017 their Law and Human Rights Group ("the People First Group") debated the "toothache story". They concluded that such a complicated analysis of will and preferences is perhaps not needed. Instead, as suggested in the Framework for Supported Decision-Making that the group had produced, they introduce the idea of "high order preference" to challenge the idea that it is necessary to struggle with seeming inconsistency between will and preference(s). They argued that John's high order preference is obvious to all and his overriding will was that the pain should stop. They argue that it would accord with his will to sedate him, and take him to a dentist.

Another example of apparent tensions among the elements of "rights, will and preferences" was an unreported case before Glasgow Sheriff Court:

A lady with dementia was fiercely independent. Above all, she insisted upon remaining in her own home. She believed that she could cope without assistance, and refused to admit carers. In fact, only with such care could she be sustained in her own home. Her son sought a guardianship order. She declared that she much loved her son, but did not need a guardian and did not wish him to be appointed. The son was appointed guardian with powers to ensure that carers would be admitted and could properly perform their functions, because otherwise her overriding desire to remain in her own home would not be sustainable.

In such situations, what is "will" and what are "preferences"? An Essex Autonomy Project position paper *Achieving CRPD Compliance* of 22nd September 2014 hypothesised a woman in labour who has a very severe needle phobia. The baby is breech, the safest way forward is a caesarean section, she "wills" the health of the baby and herself, but sampling her blood is an essential part of preparation for the caesarean section, and upon seeing the needle she is overwhelmed with fear. That paper suggests that her will is the birth of a healthy baby by the safest means possible, but that her preference is "get that needle away from me". One might say that the labels "will" and "preference" could equally well have been attached the other way round. The same applies to Ward's initial analysis of the case of John's toothache.

In a similar way to People First (Scotland), Curk suggests that, rather than between will and preferences, such tensions can be explored as conflicts between different preferences, resulting in potentially different expressions, at different times or in different circumstances, of "will". Preferences are themselves underpinned by various considerations, motivations and factors, perhaps even requiring an extended concept of "preferences". Whilst some of the factors and considerations underlying various preferences might indeed be obvious, and include, as suggested in the idea of high order preferences, thoughts about one's values, identities, attachments, risks, fears, responsibilities, resources, and so forth, Curk emphasises that neither all the underlying factors, nor the complex relationships between them, nor the process of how we arrive at a particular expression of "will", are things that a person is completely aware of, and they are not limited to positive and rational considerations. In addition, as well as different preferences being in apparent conflict with each other, some might be in conflict with what is realistically possible. The process of trying to assess and balance different preferences

normally also includes an assessment of possibilities, of the feasibility of each preference: it transforms a preference as a wish to a preference that is realisable as will. To illustrate, in the example of John's toothache, we might say he would prefer if his toothache could end without anyone interfering with his mouth; however, since this was not possible, we might assume, with People First, that his overriding preference, and therefore will, was still for the toothache to end, one way or another. Similarly, in the case of the lady with dementia, she stated that she would prefer that she could stay in her own home without assistance — however, since this was deemed not possible, perhaps her will might be constructed as based on the next best preference, that she stays in her home but with her son as the guardian.

Thus, as noted above, whenever one tries to make a significant decision, one is often (perhaps always) balancing different "preferences" (within that very wide definition). It makes sense to describe all these competing considerations, including the purely instinctive ones, as "preferences" in some sense. Balancing preferences can include exploring the feasibility of adopting a particular preference, and negotiating to achieve feasibility. That process can then develop into will. This aspect can be important. It can be linked to considering how this process can best be supported, and thus to the idea of supported will, as discussed below. It can also be linked to the concept of "future will", with which this paper concludes. There is much here for further exploration, at the interfaces of law, psychology and lived experience.

The balancing of preferences results finally in an expression of will (or in some cases, as suggested above, its best interpretation). As explained in the next paragraph, that expression itself may subsequently still change. This applies regardless of whether the process of arriving at that expression of will is instinctive, rational, generated with support, constructed, or any of these in combination.

When, then, is "will" final? Stair (Institutions of the Law of Scotland I, 10, 2) distinguishes "three acts in the will", which he characterises as "desire, resolution and engagement". These can be seen as three successive steps taken (or, as the case may be, not taken) as exercises of will. As to desire and resolution, Stair wrote: "Desire is a tendency or inclination of the will towards its object, and it is the first motion thereof, which is not sufficient to constitute a right; neither is resolution (which is a determinate purpose to do that which is desired) efficacious, because, whatsoever is resolved or purposed, may be without fault altered, unless by accident the matter be necessary, or that the resolution be holden forth to assure others." In other words, even if balancing of preferences as described in the preceding paragraph results in an expression of will, this can still be altered. After further discussion of resolution, Stair describes engagement in this sentence: "It remaineth then, that the only act of the will, which is efficacious, is that whereby the will conferreth or stateth a power of exaction in another, and thereby becomes engaged to that other to perform". This can be illustrated with a simple example such as online shopping. The shopper is attracted by various items (desire), and decides to purchase some by adding them to the basket (resolution). But to complete the operation of the will to purchase the items, the shopper has to commit with a further act, that is, pay for them (engagement). Without this final act, for example if the shopper realises that the total price is beyond the shopper's desired spend, the shopper will abandon the whole process: the will is not efficacious. Of course, will may change even after the step of engagement, sometimes leading to questions about release from a commitment, amending it, or having it set aside.

That these are separate steps is shown in cases where a volitional impairment may prevent engagement. In *Ward, Appellant,* 2014 S.L.T. (Sh Ct) 15, it was averred that an adult was able to instruct the terms of a proposed Will, but that in consequence of his mental illness, and the fact that it had been untreated for decades, he was unable to commit himself to the step of "engagement" in this or any other matter. His impairment, it was averred, prevented him from actually signing the Will.

Various concepts of "will", most notably a distinction between "free will" and "natural will", were considered by the German Federal Constitutional Court in a decision of 26 July 2016. The full citation of the decision is "*Bundesverfassungsgericht, Beschluss (des ersten Senats)* vom 26. Juli 2016 — 1 BvL 8/15". Condensing the facts considerably, this case concerned a woman who was described as suffering from a "schizoaffective psychosis". A "Betreuer"

(guardian) had been appointed to her in April 2014. In September 2014, she was briefly admitted to a care facility. While there, she declined to take medications prescribed to treat an auto-immune disorder. She refused to eat. She expressed the intent to commit suicide. In accordance with various orders of the court, she was transferred to a closed dementia unit at a clinic, and treated with medication "through coercive medical measures". Further examination showed that the woman also suffered from breast cancer. She refused treatment for the cancer. Her particular situation fell into a lacuna in German law. The Constitutional Court held that it violated the state's duty to protect its citizens that persons who fell into that lacuna because they are not capable of forming a "free will", should be entirely excluded from necessary medical treatment if giving that treatment should conflict with their "natural will". The court ruled that this deficit was unconstitutional. It would be within the discretion of the legislature how to remedy the deficit, but the court ordered that it must promptly be remedied. It further ordered that in the meantime, because the current legal situation in effect entirely denied the possibility of treatment for persons in the woman's situation even in the face of the threat of serious or life threatening damage to their health, the existing provisions permitting non-consensual treatment should apply to this group of people. "The state community cannot simply abandon helpless persons to their own devices".

Relevant to this article are the concepts of "free will" and "natural will". It is understood that the core meanings of these are well established in German law, though there is some marginal ambiguity and scope for debate. Put simply, free will means a competent formation and expression of will, sufficient for a legally valid action or transaction. Again put simply, natural will means any wish or will that is consciously and wilfully expressed or made known to others, notwithstanding that it might lack legal validity because it was not capably formulated and communicated.

The court mentioned a third concept of "will". "Original free will" appears to mean a competent formation and expression of will in the past of a person who may no longer retain such competence, but which remains decisive.

All of these concepts of "will" are consistent with Curk's proposed approach. The court however appeared to accept that humanity does not divide neatly into people capable of "free will", on the one hand, and those incapable of "free will" and able only to communicate expressions of "natural will", on the other. These concepts are at two ends of a spectrum. The formation and expression of will by different people, by the same person at different times and in different circumstances, or by the same person in relation to different matters, can all be at different points along that spectrum, as well as at one end or the other. Thus, for example, the court refers to "the quality of the natural will": a particular formation and expression of natural will may be at some point closer to, or further from, the "free will" end of the spectrum.

This leads to the even more significant aspect in the decision, which is the apparent synthesising of these different categories of "will" into a single overall concept of "will", particularly in a passage where the court elaborates how the legislature must resolve the question of proportionality and give the highest possible weight to the person's will. The requirement is that the legislature should provide methodologies for carefully determining whether a person's "free will" can be identified, or even constructed, so that such "free will" will be decisive. This echoes the process of "constructing decisions" which Ward described in the final chapter (Chapter 15: "Constructing Decisions") of *Adult Incapacity*, W Green, 2003. That chapter offered a description of the decision-making process required by the then newly enacted Adults with Incapacity (Scotland) Act 2000. There is however a quantum leap from a process of constructing a decision, to transferring a somewhat similar methodology to a process of identifying and perhaps constructing what is a person's will, and assessing the quality of that will, in relation to a particular purpose and at a particular time. Constructing a person's will can be equated with the recommendation in para.21 of General Comment No.1 that: "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". An assessment of the quality of the will thus interpreted or constructed is necessary when there is conflict among a person's rights, will and preferences in the context of the requirement of

art.12(4) of the Convention that safeguards must "respect the rights, will and preferences of the person".

The court went further by introducing a fourth concept of "will" — the "when-necessary-supported-will of the person with a disability". The court said that the free will of the person needs to be respected even if it can only be determined by reference to previously expressed views of the person, or based on the quality of the natural will:

> "This can, *inter alia*, require differentiation as to how much weight should be given to the natural will of the person, depending on how close it comes to the person's free (or presumed free) will after providing due support."

In August 2018, the People First Group discussed "rights, will and preferences" in the context of the Convention. They broadly agreed with Curk's proposed view of a single concept of "will" that might vary, and the significance of Stair's concept of "engagement". They quoted examples from personal experience. One had been convinced that he wanted to move to other accommodation until he reached the point of commitment, when he changed his mind. Another was determined to spend much of his savings on a particular appliance, until his support worker eventually persuaded him to think of the impact upon his budgeting. However, all were of the view that at the point of "engagement", if they reached it, they would want their will to be decisive, not merely "respected".

But what would they say to a less able friend, governed by immediate impulse alone, and not able to review and reconsider as in the above examples? What if they had the authority and responsibility to deny the express will of such a friend? They contemplated a situation in which the friend might want to spend all his money now, and have none even for food next week. They moved uneasily towards overriding that friend's expression of will. They were, however, clear that such intervention could only be justified on the basis of having thorough knowledge of the person, a long standing relationship with the person, and having the person's trust and acceptance, however occasionally, of being in that role, and not ever on the grounds of classification of the person as being incapable.

They hit on a further concept of will to explain such intervention in cases where it might be justified. The friend's "future will", next week, would most certainly be not to go hungry. That certain "future will" had to be respected.

[Subscribers should note that People First (Scotland) made contribution to the preparation of this article.]

NEWS

Court

Court of Session

The Lord President has issued the following practice note, No.1 of 2018, which took effect on 24 September 2018.

"COURT OF SESSION

"PRACTICE NOTE

"No 1 of 2018

"Affidavits in family actions

"1. This Practice Note has effect from 24 September 2018. It replaces Practice Note No.1 of 2004.

"2. The purpose of this Practice Note is to provide updated guidance on the preparation and use of affidavits in family actions. The need for clear guidance has arisen as a result of the increased use that is made of affidavits as evidence in chief in defended family actions.

"3. This Practice Note covers:

"a. Affidavits generally;

"b. Affidavits required under rule 49.28 in certain undefended actions;

"c. Defended family actions.

"PART A: AFFIDAVITS GENERALLY