SHERIFF APPEAL COURT

[2024] SAC (Civ) 34

Sheriff Principal A Y Anwar
Appeal Sheriff F Tait
Appeal Sheriff B A Mohan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL A Y ANWAR

in application for leave to appeal to the Court of Session
in terms of section 2(3) of the Adults with Incapacity (Scotland) Act 2000

COLIN BOYLE (AP)

Respondent

against

MOLLY DENTON (AP)

Applicant and proposed Appellant

Respondent: D Anderson; Jones Whyte Law Ltd
Applicant and proposed Appellant: Leighton; Lunny & Co

30 July 2024

Introduction

[1] The applicant seeks leave to appeal a decision of this court delivered on 14 May 2024. The respondent initially opposed the application but now conjoins in it.

[2] The parties are the parents of Andrew who is 24 years old. Andrew suffers from autism and a learning disability. The parties were appointed as Andrew's joint guardians on 4 September 2017. The parties have since separated and have struggled to agree on matters relating to Andrew's welfare. Both parties lodged Minutes for Renewal under the

Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act"), each seeking to be appointed as Andrew's sole guardian. During the proceedings before the sheriff, the respondent changed his position and sought to be appointed as joint guardian with the applicant, failing which, he sought a diet of proof. On 3 October 2023, the sheriff refused to assign a diet of proof and appointed the applicant as Andrew's sole guardian.

[3] The respondent appealed the sheriff's decision. This court allowed the appeal, recalled the sheriff's interlocutor of October 2023 and remitted the matter to the sheriff court (*Boyle* v *Denton* [2024] SAC (Civ) 20).

[4] The application for leave to appeal to the Court of Session proceeded by way of written submissions. The parties and the Adult are all identified by pseudonyms in this note.

The proposed grounds of appeal

[5] The applicant seeks to appeal the decision of this court on two grounds, namely: (a) that the Sheriff Appeal Court ("SAC") erred in deciding that the sheriff could not order mediation in relation to the parties; and (b) that the SAC erred in deciding that a proof was necessary.

Submissions

[6] The applicant submitted that the relevant test as to whether leave should be granted was that set out in *JK* v *Argyll and Bute Council* 2022 SC 235.

[7] The two grounds of appeal were of some substance and of some practical importance. They were arguable and were matters upon which the Court of Session might reasonably be expected to take a different view. In particular, the SAC's decision on

whether a proof was necessary may have wide reaching consequences and may result in more proof hearings being assigned. Reliance was placed upon commentary on the SAC's decision in a recent published article: Adrian Ward, "Contested guardianship: helpful clarification but fundamental omissions from SAC", Mental Incapacity Report Scotland, Issue 141, June 2024. There were few reported appellate decisions on the 2000 Act and the Court of Session may take the opportunity to approve the approach of the SAC and to clarify the law in other respects. Incapacity, it was submitted, is a growing field with an ever-increasing number of cases. The SAC did not address the question of whether suitability for joint guardianship necessarily confers that an individual is suitable for sole guardianship.

[8] The respondent withdrew his opposition and conjoined in the application. The respondent submitted that the proposed grounds of appeal were not well focussed and were unconvincing; however, the proposed appeal raised points of principle or practice of more general application. If the matter proceeded to a further appeal, the respondent would wish to pursue a cross-appeal on the grounds that the SAC erred in holding that the words "who has consented to being appointed" in section 59(1) of the 2020 Act refer to the specific terms of the appointment as welfare guardian to which the party has consented. The court ought to have held that – properly construed – the phrase refers to consent to appointment as a welfare guardian in principle, with the specific terms of appointment (such as duration and power and whether to appoint as joint or sole guardian) being matters for the judgment of the sheriff thereafter. This issue of statutory interpretation is relevant to all guardianship appointments where a question of joint guardianship may arise. It does not appear to have been judicially considered previously. In the present case, the SAC's decision will limit the position the respondent is able to adopt following a proof.

Decision

[9] The applicant has sought leave to appeal in terms of section 2 of the 2000 Act, subsection 3 of which is in the following terms:

> "(3) Unless otherwise expressly provided for, any decision of the sheriff at first instance in any application to, or in any other proceedings before, him under this Act may be appealed to the sheriff principal, and the decision upon such appeal of the sheriff principal may be appealed, with the leave of the sheriff principal, to the Court of Session."

[10] Section 109 of the Courts Reform (Scotland) Act 2014 transferred the appellate jurisdiction of the sheriff principal to the SAC.

[11] As explained by the Lord Justice Clerk (Dorrian), the general test for leave to appeal applies to applications under section 2(3) of the 2000 Act (*JK* v *Argyll and Bute Council* 2022 SC 235 at paragraph [12]). The Lord Justice Clerk approved the approach taken by the SAC, namely that the test was akin to the test for an appeal from the sheriff to the SAC (*JK* v *Argyll and Bute Council* [2021] SAC (Civ) 25 at para [3] referring to *KM* v *AKG*, unreported, January 2021). Leave to appeal should be granted if this court is satisfied that there is a substantial and arguable point of law on which the Court of Session might reasonably and on identifiable grounds take a different view or if there is a conflict of judicial opinion on some important matter of principle (MacPhail, *Sheriff Court Practice*, 3rd ed para 18-52). The importance of the substantive issue may also be a relevant consideration (*JK* v *Argyll and Bute Council* per LJC at paragraph [13]).

[12] Applying that test, leave is refused.

[13] The proposed first ground of appeal was not referred to in the written submissions. We have, however, assumed that it is insisted upon. At paragraph [30] of its decision, the SAC noted that the question of whether it was appropriate for the sheriff to order the parties

to undertake mediation after refusing to appoint one of them as a guardian was a subsidiary point. It was not articulated as a ground of appeal nor, as is clear from the summary of the parties' submissions, was the issue addressed by the applicant. The SAC considered it appropriate to address this question together with issues relating to: the role of a safeguarder; whether a party can be appointed joint guardian without consent and; the form of a written decision, because of the volume of AWI applications considered by the sheriff courts in Scotland. The SAC's comments at paragraphs [48] and [49] require to be read in that context. The comments are *obiter*. It is not appropriate to grant leave to appeal in relation to comments which are *obiter*, did not form the basis of any substantive submissions and were not articulated as a ground of appeal.

[14] In relation to the second proposed ground of appeal, we agree with the respondent that this ground is not well focussed. The applicant has described the proposed grounds of appeal as of "some substance". In a submission which is almost exclusively focussed on the wider impact of the SAC's decision upon future applications in the sheriff court, the applicant has singularly failed to articulate on what basis, whether by reference to authorities more generally on the circumstances in which a proof may be ordered, or by reference to any passages in the SAC decision, it is asserted that the SAC has erred in law. No error of law is identified, beyond an assertion that such an error has been made. That the decision of the SAC may have unintended consequences that more proofs will be assigned, is not an error of law. It a potential consequence of an appellate decision. In any event, we do not agree with that analysis. The SAC set out in detail at paragraphs [31] to [39] why, based on the particular circumstances of the application before the sheriff, a proof ought to have been assigned. In doing so, the SAC was careful to note the observations made by Sheriff Principal Scott QC in *Samantha Young, Appellant* (Glasgow Sheriff Court, 26

July 2013, unreported) and the comments made by the Lord Justice Clerk (Dorrian) in *Aberdeen Council v JM* 2018 SC 118. It noted at paragraph [37] that "where there are competing applications for guardianship which involve disputed facts material to the sheriff's decision it is appropriate for the court to hear evidence." Mindful that its decision may be interpreted incorrectly as suggesting that proofs should be assigned in all contested applications, the SAC made clear that the facts in dispute required to be material to the sheriff's decision, commented on the need for expediency and the need for careful judicial case management of any such proof. The applicant has not explained what error of law is said to have been made by the SAC in doing so. The applicant's submission amounts to no more than a disagreement with the outcome of the appeal before the SAC.

[15] The respondent submitted that, were leave to be granted, he would intend to lodge a cross-appeal. It is not strictly necessary for us to address the proposed ground of cross-appeal. We note, however, that the proposed ground of cross-appeal is based upon a misunderstanding of the SAC's decision and its interpretation of section 59(1) of the 2000 Act. The question which the court posed at paragraph [30] was: "can a party who had made an application to be sole guardian be appointed by the court as a joint guardian without consenting to that specific joint position?" That question is repeated at paragraph [43] in a different form: "If a party has applied to be a sole guardian can a sheriff – after deciding they are suitable – appoint that person to be a joint guardian against their wishes?" There is no basis for asserting that the question posed and answered by the SAC has limited the scope of the sheriff's discretion to make specific orders regulating to the terms of an applicant's appointment, such as the powers to be conferred or the duration of the appointment.

[16] The submissions in support of the application sought, by reference in particular to academic commentary, to persuade this court that the proposed appeal raised important points of wider interest. That may be the case. However, as the Lord Justice Clerk noted in *JK*, an issue may be important without raising an arguable point of appeal. The present application does not raise a substantial and arguable point of law on which the Court of Session might reasonably and on identifiable grounds take a different view.

[17] Accordingly, the application is refused.