SHERIFF APPEAL COURT

[2024] SAC (Civ) 20
GLW-AW247-17

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

OPINION OF THE COURT

delivered by APPEAL SHERIFF BRIAN MOHAN

in the appeal in the cause

COLIN BOYLE (AP)

Second Applicant and Appellant

against

MOLLY DENTON (AP)

First Applicant and Respondent

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

14 May 2024

Introduction

[1] This appeal concerns the guardianship of an adult, whom we shall refer to as Andrew. Colin Boyle is Andrew's father and is the appellant in this appeal. Molly Denton is Andrew's mother and is the respondent in this appeal. Each of these names are pseudonyms. Andrew is 24 years old. He has autism and a learning disability.

[2] The parties became joint guardians of Andrew under an order granted on 4 September 2017. Thereafter the parties' own relationship broke down. Since their

separation, they have struggled to agree on matters which affect Andrew's welfare. The joint guardianship was due to expire on 27 February 2023. Both parents 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.

[3] On 3 October 2023 the sheriff considered the competing Minutes and appointed the respondent as Andrew's sole guardian. The key matter on appeal is whether the sheriff ought to have fixed a proof before reaching that decision. A further matter concerned whether the sheriff issued his judgment in the correct format and with satisfactory reasoning as required by section 50 of the Sheriff Courts (Scotland) Act 1907.

Background

[4] A hearing on the competing Minutes was fixed for 25 April 2023, at which time the sheriff appointed a safeguarder to report. The preparation of this report took several months because of further changes in the parties' circumstances (most significantly, the appellant moving to live in Ireland). After their separation, the parties had agreed a care pattern whereby Andrew spent half of the week with each parent. He also had a care package which involved support provided by carers several times per week.

[5] The safeguarder interviewed both parents. The respondent's position was that it was not realistic for joint guardianship to continue due to communication difficulties between the guardians and different views on what was best for Andrew. As a result she sought appointment as Andrew's sole guardian. The appellant had applied for guardianship in his sole name. The appellant's circumstances changed and he required to relocate to Ireland. He now sought an order for him and the respondent to continue as joint guardians of Andrew.

[6] The safeguarder's report was issued on 2 October 2023. The case called before the sheriff the following day. The sheriff considered two psychiatrists' reports (one supporting each application), a mental health officer's report (MHO report) and the safeguarder's report. The MHO report, prepared before the appellant's move to Ireland, supported the continuation of joint guardianship, notwithstanding the parties' differences. The mental health officer concluded that, as his parents loved Andrew and were a significant part of his life, it was in his best interests for both to take a central role in decision-making. The safeguarder, on the other hand, having considered the appellant's recent relocation, concluded that the respondent should be appointed as sole guardian.

[7] The parties agreed that a guardianship order was necessary as Andrew was incapable of making decisions about his welfare and no other means was sufficient to protect his interests. However, they continued to disagree about who should be Andrew's guardian and about further procedure. Neither party had adjusted their Minute or Answers to reflect the changes which had taken place over the preceding months. The appellant still sought sole guardianship and averred that the respondent was not suitable to be Andrew's guardian. Notwithstanding that position, at the hearing on 3 October 2023 the appellant moved for joint guardianship to be granted or for a proof to be fixed. He proposed that Andrew should split his time between Ireland and Scotland in order to spend time with both parties. The respondent moved for renewal of guardianship but on the basis that she would be sole guardian to her son.

The sheriff's judgment

[8] On 3 October 2023 the sheriff issued an *ex tempore* judgment. On the basis of the four reports and oral submissions, he appointed the respondent as the sole guardian of Andrew

for a period of three years (the Note provided by the sheriff indicates that this is for a period of two years, but the interlocutor specifies three years). Following the lodging of this appeal, the sheriff produced a Note explaining his reasoning. The Note did not, however, contain findings in fact or findings in fact and law.

[9] The sheriff was sceptical of the proposal by the appellant that Andrew's time should be split between Ireland and Scotland. It was not clear to the sheriff how such a proposal could be funded nor how the local authority would be able to discharge its statutory duties to Andrew if he lived abroad for half (or at least much) of the time. In addition, the sheriff did not consider that it was appropriate – or in the interests of natural justice – to appoint an applicant such as the respondent as joint welfare guardian in circumstances where she did not consent to that role. For these reasons, the sheriff appointed the respondent to be Andrew's sole guardian. Within his interlocutor, the sheriff ordered the parents to engage in mediation.

Adults with Incapacity (Scotland) Act 2000

[10] Section 59 of the 2000 Act sets out who may be appointed as a guardian:-

> "(1) The sheriff may appoint as guardian–
>
> (a) any individual whom he considers to be suitable for appointment and who has consented to being appointed;
> (b) where the guardianship order is to relate only to the personal welfare of the adult, the chief social work officer of the local authority.
>
> …
>
> (4) In determining if an individual is suitable for appointment as guardian, the sheriff shall have regard to–
>
> (a) the accessibility of the individual to the adult and to his primary carer;
> (b) the ability of the individual to carry out the functions of guardian;
> (c) any likely conflict of interest between the adult and the individual;

(d) any undue concentration of power which is likely to arise in the individual over the adult;
(e) any adverse effects which the appointment of the individual would have on the interests of the adult;
(f) such other matters as appear to him to be appropriate."

[11] Section 62(3) applies the above test to applications by a number of individuals to become joint guardians.

Submissions for the appellant

[12] The preliminary issue for the sheriff was whether it was competent to appoint the parties as joint guardians. The issue turned on the proper interpretation of section 59(1)(a) of the 2000 Act and, in particular, the words "who has consented to being appointed".

[13] The appellant contended that the statutory requirement was for consent to an appointment as a guardian "in principle". He acknowledged that, by moving for joint guardianship, he had impliedly conceded that the respondent was also suitable to be guardian. However, his position was that at no point did he concede that the respondent was suitable to be *sole* guardian.

[14] To determine the suitability of an individual to be guardian, section 59(1)(a) was submitted to contain a two-stage test. At the first stage it asked whether, in principle, an individual was suitable and consented to be appointed guardian. The second stage required the sheriff to consider the extent of the powers to be granted, the length of the order and, if there was more than one applicant, whether a sole guardian or joint guardians ought to be appointed. It was not open to a proposed guardian to agree to appointment only on their preferred terms: if that were the case, an applicant could effectively hold the court to ransom. If the court considered that the person was suitable for appointment and that a joint guardianship was appropriate, then so be it. That was a decision for the sheriff.

[15] Even if joint guardianship were not appropriate, the sheriff ought to have fixed a proof to determine whether the appellant or the respondent should have been appointed as sole guardian. There was a clear dispute between them, with each challenging the suitability of the other. This required evidence to determine the issue. Instead, the sheriff relied on and adopted the conclusions of the safeguarder, notwithstanding that the appellant challenged facts and conclusions within the safeguarder's report. As there was a factual dispute on matters of central importance, the appellant submitted that the sheriff should have fixed a proof (*Ward, Appellant* 2014 SLT (Sh Ct) 15, per Sheriff Principal Kerr QC at paras [11] – [13]). A refusal to fix a proof where the interests of justice require it amounted to an error in law (*Ward, Appellant* (*supra*) at para [17]).

[16] The sheriff determined the suitability of each parent to be guardian by reference to irrelevant factors. The appellant's move to Ireland was an important factor in the sheriff's decision to appoint the respondent as the sole guardian. However, the move to Ireland was irrelevant to the question of whether or not he was suitable to be Andrew's guardian in terms of section 59(1)(a) of the 2000 Act. The sheriff had failed to have regard to relevant considerations and erred in law.

[17] The safeguarder had exceeded her remit by providing her opinion on whether the sheriff could appoint a joint guardian and what order the sheriff ought to grant. The safeguarder's opinion on these matters was inadmissible and the sheriff ought not to have relied upon it. The safeguarder was not an expert witness (*Kennedy* v *Cordia Services LLP* 2016 SC (UKSC) 59).

[18] By issuing an *ex tempore* decision at the conclusion of the hearing the sheriff had failed to comply with section 50 of the Sheriff Court (Scotland) Act 1907. Where a court has made its decision and identified the reasons for that, there is nothing which prevents a

sheriff advising parties of the decision from the bench. However, that of itself did not satisfy the requirements of section 50. In such circumstances a sheriff ought thereafter to issue their decision in writing.

[19] In certain instances the issuing of an interlocutor is sufficient to comply with section 50 (*The Child Maintenance and Enforcement Commission Child Support Agency* v *Roy* [2013] CSIH 105 per Lord Brodie at para [7]). If there is a hearing to resolve a dispute between parties, however, an interlocutor alone is not sufficient. The sheriff ought to explain their reason for preferring one party over another. If the sheriff is called upon to determine matters of fact based upon evidence he or she ought to issue a written judgment with findings in fact and findings in fact and law, together with a note explaining the reasoning (*Greenline Carriers (Tayside) Limited* v *City of Dundee District Council* 1991 SLT 673 and *Miller* v *Miller* 2023 SLT (SAC) 33).

Submissions for the respondent

[20] The appellant moved for joint guardianship. That was an implied concession that the respondent was suitable to be a guardian to Andrew, whether by herself or as a joint guardian. A joint guardian has the same powers as a sole guardian (Section 62(6) of the 2000 Act). The distinction that the appellant sought to make regarding this concession in his submission on appeal was without merit. The respondent was either suitable to be a guardian or not.

[21] Since the need for guardianship was agreed, the issue to be determined was whether there should be joint guardianship and, if not, who ought to be Andrew's sole guardian. Section 59(1)(a) did not create a two-stage test as to the suitability of a proposed guardian. There was a single test which, if met, allowed the sheriff thereafter to exercise his discretion

as to which applicant was suitable to be appointed as guardian where there were competing applications. When considering the test at section 59(1)(a) and exercising his discretion, the sheriff had to take into account the factors set out at section 59(4).

[22] The respondent did not consent to being a joint guardian with the appellant. An applicant's consent to be a guardian can be conditional. An applicant such as the respondent is entitled to know what the terms of their appointment will be before they commit themselves. Were the position as submitted by the appellant then an applicant would – in effect – become locked into becoming a joint guardian even where they did not consent. If they then sought to resign they would be unable to do so unless the other guardian agreed to become a sole guardian or a substitute guardian was willing to act in their stead (section 75(2) of the 2000 Act). It was not competent for an applicant simply to be appointed by the court as either sole guardian or joint guardian where they had not consented to appointment under one of those arrangements.

[23] Not every disputed issue before the court required a proof to be assigned. As long as section 50 of the Sheriff Court (Scotland) Act 1907 was complied with, a sheriff had the discretion to determine further procedure as they thought appropriate in line with Rule 2.31 of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999.

[24] The appellant's concession as to the respondent's suitability as a guardian jointly with him made any enquiry as to her suitability by way of a proof redundant. There was no need to hear evidence on the appropriateness of joint guardianship as the respondent did not consent to appointment on those terms. The only matter for which a proof would have been required would be to determine the appellant's suitability and – if he were considered suitable – which of the parties should be appointed as Andrew's sole guardian. However,

the sheriff was not precluded from determining the case in the way he did at the hearing because he had all relevant information before him.

[25] The criticism of the sheriff's reliance on the safeguarder's report was not merited. Whether the safeguarder's comments ought to have been considered and any weight given to them were matters for the sheriff. As to the sheriff issuing an *ex tempore* judgment, it was clearly not the case that every summary application required written reasons. The terms of section 50 of the 1907 Act read together with this court's decision in *Miller* v *Miller (supra)* was that a written judgment was only required when an evidential hearing took place.

Decision

[26] It is clear that, at the hearing on 3 October 2023, the sheriff was confronted with a position advanced by the appellant which did not accord with his Minute. The pleadings were out of date, and neither party took advantage of the flexibility provided by the summary application rules to adjust more accurately to reflect their positions following changes in circumstances.

[27] The appellant's Minute sought his sole appointment as guardian and averred that the respondent was no longer suitable to carry out the duties of a guardian to their son. However at the hearing before the sheriff, once in receipt of the safeguarder's report, the appellant changed tack and moved for his re-appointment as joint guardian with the respondent, which failing his joint appointment together with the Chief Social Work Officer for Glasgow City Council.

[28] For her part, the respondent's position at the hearing remained consistent: she wanted to be appointed as sole guardian and did not consider that she and the appellant could continue under a joint arrangement. Much had happened in the years since their

appointment in 2017, most relevant for present purposes the parties' separation, the breakdown in their ability to communicate, and the appellant's relocation to Ireland.

[29] The sheriff was confronted with these significant changes in circumstances and conflicting positions at the fourth calling of the Minutes. He refused the appellant's motion for a proof and decided to deal with the applications there and then. After hearing parties' submissions, the sheriff appointed the respondent as sole guardian, and ordered the parties to attend mediation. He delivered that decision *ex tempore*.

[30] There were two main points to be addressed in this appeal:

1) At the hearing on 3 October 2023 should the sheriff have assigned a proof?

2) When deciding who to appoint as guardian did the sheriff require to give his decision in writing?

In addition, there were a number of subsidiary points which arose before us:

a) What is the status of a safeguarder and their report in Adults with Incapacity (AWI) proceedings?

b) Can a party who has made an application to be a sole guardian be appointed by the court as a joint guardian without consenting to that specific joint position?

c) Was it appropriate for the sheriff to order the parties to undertake mediation after refusing to appoint one of them as a guardian?

We consider that it is relevant for us to address these further questions because of the volume of AWI applications considered by the sheriff courts in Scotland.

Should a proof have been assigned?

[31] There was some debate before us about whether a party to a summary application has the right to insist on a proof. Rule 2.31 of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999 reads:

> "The sheriff may make such order as he thinks fit for the progress of a summary application in so far as it is not inconsistent with Section 50 of the Sheriff Courts (Scotland) Act 1907."

In Chapter 3, Part XVI – which deals specifically with applications under the Adults with Incapacity (Scotland) Act 2000 – Rule 3.16.6 states:

> "(1) A hearing to determine any application or other proceeding shall take place within 28 days of the interlocutor fixing the hearing under rule 3.16.2…
>
> (2) At the hearing referred to in paragraph (1) the sheriff may determine the application or other proceeding or may order such further procedure as he thinks fit."

[32] These provisions, therefore, give wide discretion to a sheriff considering an AWI application. A party is not entitled to a proof unless the facts in dispute are clearly identified, are both relevant and material, and are likely to have a bearing upon the decision the sheriff is invited to make. *Samantha Young, Appellant* (Glasgow Sheriff Court, 26 July 2013, unreported) was a decision by Sheriff Principal Scott QC in which a party opposing a guardianship application appealed a sheriff's refusal to appoint a proof. In that case the appellant did not accept the terms of reports prepared for the court and wanted a proof "to air disputed issues of fact". But nothing was advanced before the sheriff (or the sheriff principal on appeal) to confirm what matters of fact were being challenged. Sheriff Principal Scott QC concluded that "nothing whatsoever" was before the court to demonstrate that supposed factual errors in the reports "were of such materiality as to justify the leading of proof" (*Samantha Young, Appellant* (*supra*) at para [19]).

[33] In the proceedings before us, however, there was plainly a live dispute between the parties about who should be appointed as guardian and on what terms (sole or joint). That was at the heart of the issue the sheriff was asked to resolve. The sheriff had two conflicting applications. It is also clear that there were identified areas of factual dispute which were relevant to his determination. In his Note to this court the sheriff observed at para [33] that "Four areas of real difficulty associated with the appellant's proposed alternate living arrangements….presented themselves". He went on to list challenges arising from the appellant's temporary relocation to Ireland: funding the arrangement for Andrew while he spent time with his father; the local authority in Scotland being able to discharge its statutory duty while Andrew was abroad; problems which the change of location would cause to Andrew's required routine; and the inappropriateness of making a joint appointment where one party was against this.

[34] These are all matters which go to the heart of the suitability test under section 59(4), since they relate to issues of accessibility (section 59(4)(a)), ability to carry out the functions of guardian (section 59(4)(b)), likely conflict of interest (section 59(4)(c)), and possible adverse effects of the appointment of an individual on the interests of the adult (section 59(4)(e)). As such, the sheriff had to make a determination about those issues and how they could or would affect his decision about who to appoint as guardian.

[35] In reaching his decision, the sheriff did not hear evidence, but relied on the safeguarder's conclusions about factual matters which the appellant sought to challenge. The sheriff noted at para [30] (f): "In rejecting the appellant's motion that I fix a proof I was making it clear that none of the disputed matters could change any decision that I were to make regarding the appointment of a guardian in this case." We have concluded that, in so deciding, the sheriff fell into error.

[36] *Aberdeenshire Council* v *JM* 2018 SC 118 affords relevant authority. In that case the local authority sought its appointment as guardian. The adult's sister sought appointment in her own right, and appealed the refusal by the sheriff at first instance to grant her application. Her appeal was refused by the Sheriff Appeal Court (*JM* v *Aberdeenshire Council* [2016] SAC (Civ) 5). Leave to appeal to the Inner House was granted (on a limited point challenging the independence of the MHO employed by the local authority). In refusing the appeal, Lady Dorrian noted at paragraph [23]:

> "Where the issue of who is to be appointed is contested, the sheriff would no doubt hear evidence, as he did in the present case, and take account of all of the circumstances known to him. The question of suitability is not determined by a report from the MHO but by the sheriff, as the sheriff in *Arthur* v *Arthur* recognised."

[37] Accordingly, 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 in some form. When doing so the sheriff can consider observations and recommendations from those who have provided reports. But the final decision is not for the MHO or safeguarder; it is a matter for the sheriff. In the present case, the MHO – who completed her report prior to the appellant's move to Ireland – favoured the continued joint appointment of the parties, whereas the safeguarder suggested that the respondent's application should be preferred. The sheriff's reliance on the safeguarder's assessment of the facts is apparent in paras [20] to [29] of his Note where he details her findings, including her conclusions on areas where the parties disagreed.

[38] The sheriff heard a position advanced on behalf of the appellant that he wanted to lead evidence to address the concerns raised by the safeguarder about his relocation and the difficulties this may present in his exercise of the functions and duties of a guardian. He wished to lead evidence on the "four areas of real difficulty" identified by the sheriff at

para [33] of his Note. He also wanted the opportunity to demonstrate why an order appointing him and the respondent as joint guardians to Andrew was better than an order appointing the respondent as sole guardian.

[39] In these circumstances, and in accordance with the comments made by Lady Dorrian in *Aberdeenshire Council* v *JM* (*supra*), we consider that the sheriff ought to have assigned an evidential hearing to resolve the disputed issues of fact. It was not sufficient to state that he had enough material before him to reach a decision, because significant elements of that material were based on factual assertions which the appellant sought to challenge. A proof would have allowed the parties to lead evidence and challenge any findings and conclusions, whether by parole proof or affidavit evidence. Undoubtedly, the sheriff was mindful of the need to deal expeditiously with applications of this nature. However any proof, properly managed, would have been short and narrowly focussed on the issue of suitability with scope for the agreement of evidence and the use of affidavits. By refusing to assign a diet of proof, regrettably, the sheriff's decision allows room for the impression that he ostensibly delegated the task to the safeguarder.

Role of safeguarder

[40] It was suggested in the appellant's submissions that, before a safeguarder's conclusions could be considered by a court, that individual required to be treated or certified as an expert, in accordance with the criteria set out within *Kennedy* v *Cordia Services LLP* 2016 SC (UKSC) 59. We do not accept that as a proper characterisation of the role of a safeguarder. Under the 2000 Act a safeguarder is not appointed as an expert witness. Section 3(4) and 3(5) specify the task of a person appointed:

"**3 Powers of the sheriff**

…

(4) In an application or any other proceedings under this Act, the sheriff—

(a) shall consider whether it is necessary to appoint a person for the purpose of safeguarding the interests of the person who is the subject of the application or proceedings; and

(b) without prejudice to any existing power to appoint a person to represent the interests of the person who is the subject of the application or proceedings may, if he thinks fit, appoint a person to act for the purpose specified in paragraph (a)

(5) Safeguarding the interests of a person shall, for the purposes of subsection (4), include conveying his views so far as they are ascertainable to the sheriff; but if the sheriff considers that it is inappropriate that a person appointed to safeguard the interests of another under this section should also convey that other's views to the sheriff, the sheriff may appoint another person for that latter purpose only."

[41] Accordingly, the role of a safeguarder is not merely to express the wishes and feelings of the adult (since the sheriff is specifically empowered to consider a separate individual for that purpose under section 3(5A)), and nor is it to carry out the functions of an expert witness. The role of the safeguarder is to safeguard the *interests* of the adult and to report to the court. This may or may not include conveying the adult's views. In practice (as in this case) a safeguarder will usually review the application, interview relevant parties, meet the applicant(s) and the adult, prepare a report, and comment on the application insofar as he or she observes its effect on the interests of the adult. The safeguarder may also appear at any hearing.

[42] In these proceedings the safeguarder prepared a detailed and thorough report. In her role of safeguarding the adult's interests she was entitled – indeed duty bound – to highlight the difficulties which she observed in the operation of his care plan were he to spend much of his life in Ireland with the appellant. The difficulty in this case did not arise

from the comments or views expressed by the safeguarder nor in her role in these proceedings, but on the weight attached by the sheriff to recommendations and observations made by her which were based on disputed facts.

Consent to joint guardianship

[43] If a party has applied to be sole guardian can a sheriff – after deciding they are suitable – appoint that person to be a joint guardian against their wishes? Section 59(1) allows the sheriff to appoint "any individual ….who has consented to being appointed" whom the court finds to be suitable after considering the terms of section 59(4): *Arthur* v *Arthur* (Sh Ct) 2005 SCLR 350. It was submitted before us that, where a party "has consented" to appointment as a guardian, this amounts to agreement to be appointed in any capacity – as sole guardian, joint guardian with a competing applicant, or with anyone else considered suitable by the court. It was suggested that, if the section were not interpreted in this way, this would allow an applicant to "hold the court to ransom" and insist on appointment only on their preferred terms.

[44] We do not accept that proposition. No authority was provided to support such a wide interpretation of a party's consent. If a party "has consented to being appointed" he or she signifies that consent in one of two ways. They can make an application to the court on their own or together with another proposed joint guardian. Alternatively, they can confirm during the course of proceedings that they are willing to accept the role: *Arthur (supra)* at page 351.

[45] In our view, however, it is not a correct reading of the section that, when a person signifies consent, this means – without further enquiry – consent to being a guardian together with whomever else the court considers suitable. In this case, it was clear that the

respondent did not give consent to remaining a joint guardian with the appellant. We do not agree that the role of joint guardian could be imposed on her because she had made an application in her own name and was considered otherwise suitable. Were we to support the appellant's submission on this point, a party may find themselves appointed as guardian in a form which they were not willing to accept. Indeed, were a party appointed as joint guardian in such circumstances, they would not have the option to decline appointment. Section 75 makes provision for the resignation of a guardian, but this can only be done when certain procedures are considered, such as finding a suitable replacement: section 75(2)(a).

[46] In a reported case from Glasgow Sheriff Court brought under the 2000 Act, the sheriff addressed the procedure for a joint application for guardianship: *Cooke* v *Telford* (Sh Ct) 2005 SCLR 367. We note the commentary by Adrian Ward, the author of *Adult Incapacity*, which accompanied the SCLR report, who observed:

> "As regards joint appointment, it is doubtful whether Parliament envisaged that a contest for appointment should be resolved by appointment of both contenders as joint guardians. It is difficult to see how an adult would be appropriately served by guardians forced into a joint appointment which was resisted by at least one of them."

We agree with that observation.

[47] For these reasons we conclude that the words "who has consented to being appointed" refer to the specific appointment to which the party has consented. That is to say, the appointment sought in their application, or which has otherwise been proposed and accepted by the individual during the court proceedings.

Mediation

[48] The interlocutor appointing the respondent as guardian also appointed the parties to attend mediation. We can well understand why the sheriff considered this to be a pragmatic

solution which had the potential to benefit Andrew. Under the 2000 Act the court can order mediation under section 3 and section 62(8). In *Adult Incapacity* (W. Green, 2003) at paragraph 5-14 Ward notes: "This is a broad and potentially very useful power for resolving not only disputes but also doubts and difficulties where there is no dispute."

[49] However, section 3 is limited in its scope. Under section 3(3) the sheriff may only give directions to any person "exercising… functions conferred by this Act". The court does not have power under this provision to compel a person to attend mediation after their application to be appointed as a guardian has been refused. The sheriff in these proceedings had decided that the appellant should not exercise any of the functions conferred by the 2000 Act. Accordingly, no order to attend mediation could be made in respect of the appellant.

***Ex tempore* decision**

[50] Since we have decided that the sheriff had erred in refusing a diet of proof, it is not necessary for us to address whether his decision ought to have been provided in writing. However, given the volume of AWI cases dealt with in the sheriff courts each year and the appellant's submission that every such case requires written reasons, this is a point of wider interest. We consider that it is appropriate for us to make some observations on the submissions.

[51] An application for appointment of a guardian under the 2000 Act is made by summary application. The procedure in summary applications is governed by the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999 ("the summary application rules"). Chapter 3, Part XVI applies specifically to AWI applications. These are, of course, separate from the Ordinary Cause Rules (OCR). OCR 12.3 – which

makes provision for *ex tempore* judgments after proof in an Ordinary action – is not replicated in the summary application rules.

[52] The interaction of the various provisions at play here may appear initially to present some conflicting requirements. Under Rule 3.16.6 of the summary application rules, at a hearing assigned within 28 days of the interlocutor fixing the hearing under Rule 3.16.2, a sheriff can regulate procedure "as he sees fit" and may even "determine" the application. Section 50 of the 1907 Act confirms that an application must be dealt with "summarily". Yet a "judgment in writing" is also required by section 50.

[53] In many cases, such as unopposed applications, the court's interlocutor will provide the necessary written form of its judgment: Macphail: *Sheriff Court Practice* (4th ed) at para 26.107; Jamieson: *Summary Applications and Suspensions* at para 30-22; and *The Child Maintenance and Enforcement Commission Child Support Agency* v *Roy* [2013] CSIH 105. Where, however, evidence is heard, a written judgment incorporating findings in fact and law and setting out the reasons for the decision is necessary. In the present case, the sheriff did not consider it necessary to hear evidence. It is unsurprising that he did not provide a decision in writing. He has of course provided a Note in this appeal.

[54] The need for a written decision has been made clear in earlier authorities concerning summary applications. *Greenline Carriers (Tayside) Limited* v *City of Dundee District Council* 1991 SLT 673 involved an appeal to the Court of Session against an interlocutor of a sheriff. The case itself related to a summary application to the sheriff which challenged an order by the local authority that the loading and unloading of lorries late at night amounted to noise pollution which thereby formed a "nuisance". After hearing evidence, the sheriff declared that he was satisfied that the order should be upheld, and pronounced an interlocutor to this effect. In allowing the appeal against the decision Lord McCluskey noted (at page 676):

> "But natural justice and, in particular, the rule that justice must be seen to be done demand that he should give adequate reasons so that the parties and others, including any court to which an appeal lies, may be able to understand his reasoning. An appeal court would find its jurisdiction virtually impossible to exercise if the sheriff were permitted to confine his explanation of his interlocutor to a simple, jury-like statement that he finds the case established."

[55] The point was further emphasised in this court in the recent decision of *Miller* v *Miller* 2023 SLT (SAC) 33. At para [7] Sheriff Principal C D Turnbull (as he then was) noted:

> "In our view, in a summary application, where evidence has been led, it is incumbent upon the sheriff to issue a written judgment incorporating findings in fact and law, and including the reasons for their decision on any question of fact or law or of admissibility of evidence".

We note that Schedule 5(1), paragraph 4(g) of the Courts Reform (Scotland) Act 2014 repeals section 50 of the Sheriff Courts Act 1907. While the majority of paragraph 4 has been brought into force by the Scottish Ministers by statutory instrument, that is not the case in relation to paragraph (g). At some point, section 50 of the 1907 Act – and its requirements – may disappear. For the time being however, the position remains as set out in *Miller*.

Disposal

[56] For the reasons given we will sustain the appeal and remit the cause to a different sheriff to proceed as accords. Parties should attempt to agree the disposal of expenses of this appeal and advise the clerk of any such agreement within 14 days, failing which a hearing will be assigned.