

SHERIFFDOM OF NORTH STRATHCLYDE AT PAISLEY

[2022] SC PAI 24

AW77-21

NOTE BY SHERIFF B MOHAN

in the application for “nearest relative” status in Application for Welfare Guardianship by

RENFEWSHIRE COUNCIL  
(in respect of the Adult HS)

Applicant

**Pursuer: Panton; Renfrewshire Council Legal Department**  
**First Interested Party: Lunny; Lunny & co, Bellshill**  
**Second Interested Party: Ward; Neill Clerk & Murray, Greenock**

19 August 2022

**Introduction**

[1] This was an undisputed application by Renfrewshire Council to be appointed as Welfare Guardian for the Adult (HS). She is aged 95, suffers from dementia, and now resides in a care home. The issue before me arose from a dispute between the Adult’s three daughters (all now in their 50s or 60s) who cannot agree about aspects of their mother’s care. The oldest daughter would, in normal circumstances, be regarded as the “nearest relative” under the Adults with Incapacity (Scotland) Act 2000, but she has a number of health problems which have prevented her effective participation in decision-making. Consequently, one of her younger sisters has applied to be nominated as the nearest relative. However, the sisters are in conflict among themselves to such an extent that the day to day care of the Adult can sometimes be compromised. As a result, I have had to decide whether any –or none – of the Adult’s children should exercise the functions of the nearest relative under the Act.

**Factual background**

[2] HS, the Adult in this case, was born in 1927. She is now 95 years of age. Until 2021 she lived in sheltered accommodation in a town in Renfrewshire, where she received care visits several times each day. While she lived there she was generally independent-minded and resistant to receiving support. She is widowed and has three daughters – JM, LM and KG. During the Covid-19 crisis only the younger two daughters – LM and KG – were able to visit their mother. They did so at different times because they do not enjoy good relations with each other. Since the lockdown the oldest sister (JM) has been shielding or otherwise indisposed due her own health difficulties.

[3] The Adult developed dementia and cognitive impairment. She experienced hallucinations, and believed that people on television were communicating directly with her alone. She became unable to make informed decisions regarding her own welfare, and required direct assistance with medication, dietary needs, and personal care. She remained resistant to receiving support, but her condition placed her at risk. The risks included fire, poor nutrition, weight loss, and poor personal hygiene. There were also risks from her wandering out of her home, and suffering infections.

[4] All three sisters accepted that their mother's difficulties would require a guardianship application under the Adults with Incapacity (Scotland) Act 2000. Two relevant medical practitioners assessed the Adult as lacking capacity as defined under section 1(6) of the Act. Because of her diagnosed condition of dementia, the Adult lacked insight into her cognitive difficulties and her care needs. She was incapable of making decisions concerning her own personal welfare. Her incapacity was assessed as likely to be lifelong. It was therefore appropriate and necessary that a Welfare Guardian be appointed for the Adult.

[5] The Adult's daughters initially sought to be appointed as joint guardians under the Act. A Mental Health Officer (MHO) carried out an assessment relating to the possible appointment of the siblings as joint guardians. However, the rift between them was such a significant feature of the MHO's findings that the joint application was not pursued. The sisters were – and remain – in conflict about aspects of their mother's care. This led the MHO to conclude that they were unable to work together; furthermore, because of their mutual hostility, she was unable to support the application of any of the sisters individually as welfare guardian.

[6] Thereafter Renfrewshire Council, as the relevant local authority, applied to have its chief social work officer appointed as welfare guardian. This appointment was agreed by the Adult's daughters. Following an interim appointment in October 2021 (to allow the Adult's move to a care home) a final order was agreed by all parties for a three year period. That order has been granted. This has allowed the parties to focus on the remaining matter before the court, the application by LM under section 4(1) (b) of the Act to be appointed as her mother's nearest relative in preference to the older sister JM.

#### **“Nearest relative”**

[7] The position of “nearest relative” of an Adult who is the subject of a guardianship order has some significance in relation to the exercise of the appointed guardian's powers and duties. Under the 2000 Act any “intervention” by a guardian or any other person requires the views – and possible objections – of the Adult's nearest relative to be sought and considered, as can be seen from the extracts from the statute reproduced below.

**(1) Relevant sections of the Adults with Incapacity (Scotland) Act 2000 (as amended)**

[8]

**“Section 1** *General principles and fundamental definitions*

(1) The principles set out in subsections (2) to (4) shall be given effect to in relation to any intervention in the affairs of an adult under or in pursuance of this Act, including any order made in or for the purpose of any proceedings under this Act for or in connection with an adult.

(2) There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention.

(3) Where it is determined that an intervention as mentioned in subsection (1) is to be made, such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.

(4) In determining if an intervention is to be made and, if so, what intervention is to be made, account shall be taken of—

- (a) the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature or otherwise) appropriate to the adult;
- (b) the views of the nearest relative, named person and the primary carer of the adult, in so far as it is reasonable and practicable to do so;
- (c) the views of—
  - (i) any guardian, continuing attorney or welfare attorney of the adult who has powers relating to the proposed intervention; and
  - (ii) any person whom the sheriff has directed to be consulted, in so far as it is reasonable and practicable to do so; and
- (d) the views of any other person appearing to the person responsible for authorising or effecting the intervention to have an interest in the welfare of the adult or in the proposed intervention, where these views have been made known to the person responsible, in so far as it is reasonable and practicable to do so.....

.....

**Section 4** *Power of Court of Session or sheriff with regard to nearest relative*

(1) The court may, having regard to section 1 and being satisfied that to do so will benefit an adult with incapacity, make an order that—

- (a) certain information shall not be disclosed, or intimation of certain applications shall not be given, to the nearest relative of the adult;

- (b) the functions of the nearest relative of the adult shall, during the continuance in force of the order, be exercised by a person, specified in the order, who is not the nearest relative of the adult but who—
- (i) is a person who would otherwise be entitled to be the nearest relative in terms of this Act;
  - (ii) in the opinion of the court is a proper person to act as the nearest relative; and
  - (iii) is willing to so act; or
- (c) no person shall, during the continuance in force of the order, exercise the functions of the nearest relative.

(2) An order made under subsection (1) shall apply only to the exercise of the functions under this Act of the nearest relative.

(3) The court may make an order varying the terms of an order granted under subsection (1).

(3A) The court may make an order under subsection (1) or (3) only on the application of—

- (a) the adult to whom the application relates; or
- (b) any person claiming an interest in that adult's property, financial affairs or personal welfare.

(3B) The court may dispose of an application for an order under subsection (1) or (3) by making—

- (a) the order applied for; or
- (b) such other order under this section as it thinks fit.

.....  
**Section 87** *Interpretation*

....'nearest relative' has the meaning given by section 254 of the Mental Health (Care and Treatment) (Scotland) Act 2003"

**Mental Health (Care and Treatment) (Scotland) Act 2003**

[9]

**"Section 254** *Meaning of 'nearest relative'*

(1) In this Act, "nearest relative", in relation to a person (the 'relevant person'), means.....

- (b) subject to subsections (3) and (4) below.....the person.... first appearing in the list set out in subsection (2) below.

(2) .....(c) the relevant person's child;.....

- (4) Where two or more persons fall within..... the list set out in subsection (2) above, the nearest relative shall be—
- (a) if those persons agree that one of them should be the nearest relative, that person; or
- (b) if those persons do not so agree, the person determined in accordance with the following rules—
- (i) brothers and sisters of the whole blood shall be preferred over brothers and sisters of the half-blood; and
  - (ii) the elder or eldest, as the case may be, shall be preferred.”

## **(2) The role and functions of nearest relative**

[10] An “intervention” under section 1 (1) of the Act (as set out above) includes “any order made in or for the purpose of any proceedings under the Act for or in connection with an adult”. The term is not conclusively defined in the Act: section 53 allows for “intervention orders” but does not further detail what “intervention” itself means. The solicitor and author whose work underpinned much of the Scottish Executive’s approach to the Act suggests that “intervention” was intended to cover:

“any decision, act or deliberate omission within the broad scope of the Act’s provisions in any way affecting (or intended or having the potential to affect) the welfare, affairs, interests or status of an adult with incapacity.”  
*(Adult Incapacity, by Adrian D Ward, W. Green, 2003, Chapter 4, para 4-3).*

[11] It follows that the high number of acts or omissions which can be regarded as an “intervention” could give rise an equally high number of occasions when the views of the nearest relative may have to be taken and considered. In addition to the general requirement to take account of the views of the nearest relative set out in section 1(4)(b) above, the Act details a number of specific instances when the nearest relative must be consulted, and where he or she has a right to object or be heard:

- Section 26 (application for authority to intromit with funds),
- Section 37 (3) (managers of an establishment seeking to have the adult medically examined)

- Section 41 (f) (managers of an establishment must produce relevant records when requested by the nearest relative),
- Section 72 (2) (application for discharge of financial guardian)
- Section 73 (5) (application for recall of guardian's powers)
- Schedule 2, para 6 (2) (application for consent to dispose of accommodation).

### **(3) Restriction on court's powers as to nearest relative**

[12] It is clear from the wording of section 4(3A) (set out above) that the court cannot *ex proprio motu* make a decision about the nearest relative, whether that is to appoint someone who does not automatically hold that position, or to decide that no one should exercise the role. However, section 4(3B) stipulates that, once an application has been made by an interested party, it is open to the court to make *any* of the orders available under section 4(1) or (3). Section 4(1) establishes that the court must be "satisfied" that any order which it makes under the provision will benefit the adult.

[13] In this case, the dispute was focussed not on the appointment of the guardian, but only on the application by LM to be appointed as nearest relative. None of the parties sought a proof to resolve the dispute. Consequently, in order to be satisfied about what decision was appropriate in the circumstances of this case, I decided to consider evidence by way of Affidavits. I was able to assess those together with the various productions lodged.

The following items were before me:

- 1) Productions lodged by the Applicants, being the two medical reports and the MHO Report,
- 2) An Affidavit by LM, the First Interested Party, together with productions lodged on her behalf; this included a letter signed by her older sister JM,

- 3) An Affidavit and emails lodged by KG, the Second Interested Party, together with Minutes of a social work meeting dated 25 August 2021,
- 4) Written submissions from each of the parties, supplemented by oral submissions at a hearing before me.

### **Parties' submissions**

#### **(1) *The Applicants – Renfrewshire Council***

[14] The local authority had become involved in an application for welfare guardianship precisely because of the conflict between the sisters. There had been difficulties in communication and in reaching agreement about the Adult's care plan. The interim guardianship order made in October 2021 had allowed the Adult's move to a suitable care home, where her needs were being met. The authority would continue to involve the Adult's daughters in meetings and discussions, even if none held the position of nearest relative. That was the *de facto* situation at the moment: neither LM nor KG was the nearest relative, but both spoke regularly to social work and care home staff, as JM (the oldest) had health difficulties which precluded her involvement. All of the sisters were already kept involved, informed, and had their views taken into account by the local authority.

[15] The Applicants' primary submission was that the court should make no order. This would leave JM as the nearest relative, and avoid the unfortunate situation where the other two sisters - whose conflict was obvious to all involved – could engage in a form of one-upmanship. The history of this case had shown that the conflict between the sisters loomed large over any attempt to seek views, and often resulted in obstruction to any decision being made for the benefit of the adult. The dynamic between the sisters was such that social work and care home staff were put under significant pressure by the competing demands of



the Adult's family members. The Applicants' alternative submission was for the court to use the power available under section 4 (1) (c) to order that no-one should be regarded as the nearest relative. That would ease the requirement to seek the permission of any named individual for interventions, and remove the potential for objections being made for reasons which did not benefit the Adult.

(2) *JM – the Adult's oldest daughter*

[16] JM did not enter the process. If there is no interference with the way the Act operates, she would exercise the functions of the "nearest relative" as the oldest of the three siblings. She signed a letter in support of the application by her sister LM. She wanted LM "to take care of her affairs" (referring to their mother) because JM's own health difficulties meant that she was unable to fulfil the role of nearest relative.

(3) *LM – the First Interested Party*

[17] LM sought to be appointed as the nearest relative under section 4(1)(b) of the Act in place of her older sister JM, who supported the application. She was still on good terms with JM, who was unable to be more active in looking after their mother because of health complications. LM acknowledged that she did not have good relations with KG, the youngest of the three. The difficulties were of some age: they had not spoken for about eight years. LM had hoped that the sisters could work together and be appointed as joint guardians notwithstanding their disagreements, but she now recognised that this was not possible. LM herself had earlier applied to be her mother's welfare guardian in her own right. However, following the preparation of the Mental Health Officer's report, she supported the local authority as the welfare guardian. LM understood that the position of

nearest relative involved acting as a form of advocate for the Adult and, if necessary, challenging any proposed intervention.

[18] It was submitted on behalf of LM that, if she was not to be appointed as the nearest relative on her own, there were other options available to the court. One of these was to appoint LM as a nearest relative *in addition* to JM. While such a scenario was not expressly covered in the Act, it was not expressly prohibited either, and could be regarded as appropriate in this case. A joint appointment would allow JM still to hold the position which the legislation accorded to her, but would enable LM to assist her in performing the role if and when JM remained unable to participate.

[19] The other option was that, if the court was not satisfied that JM's status as the nearest relative should be disturbed, section 1(4)(c)(ii) permitted a solution. That sub-section allowed the court to appoint "any person whom the sheriff has directed to be consulted" to express their views about any proposed intervention. Effectively, this would leave the position of JM as nearest relative intact, but allow LM to support her sister in that role as a consultee.

[20] LM was concerned that, if no-one held the role of nearest relative, the local authority as welfare guardian would respond to the daughter who was "shouting loudest". That description was apt for KG who was often disruptive and sought to impose her own views and opinions on those caring for the Adult day to day.

#### **(4) *KG – the Second Interested Party***

[21] KG expressed a number of concerns about the situation which had developed with her mother the Adult. She lived some distance away from her mother's home, and she was estranged from her two sisters. This had caused great difficulties in her playing an active

role during the worst of the 2020/2021 lockdowns. Once Covid-19 restrictions had eased she was able to become more involved again in her mother's life and care.

[22] KG was alarmed at the deterioration in her mother's health. She was very concerned that her two older sisters had resisted and opposed the help which the Adult needed. The lack of contact between the three had continued. KG had needed to obtain information from social work, medical and care home staff directly because of the sisters' inability to communicate. The disagreements had spilled into decision-making within the care home, with disputes about items within their mother's room. This had affected the first few months of the Adult's residence there.

[23] It was the submission of KG that no-one should be regarded as the nearest relative, and that it was unnecessary to require the local authority to consult with any of the sisters formally. Care home staff and social workers already involved the family in reviews, but to allow one of them to have the opportunity to oppose decisions by the professionals would lead to further problems. The fractured relations between them meant that they were simply unable to co-operate or communicate with each other.

### **Analysis**

[24] I am unable to accept the submission made on behalf of LM that the Act permits two persons to hold the position of nearest relative jointly. That does not appear to be contemplated anywhere in the legislation. I was offered no authority or commentary which supported that position. There is a careful order of priority within the list of persons identified as "the nearest relative" in section 254 of the Mental Health (Care and Treatment) (Scotland) Act 2003: that mechanism was adopted in section 87 of the 2000 Act (as amended). That background, together with the straightforward grammar of the term "the

nearest relative" (using the definite article, the superlative form of the adjective and the singular noun) indicate that it is a position to be held by one individual only. I therefore reject the submission that LM could be appointed as a joint or additional nearest relative.

[25] Furthermore, I do not agree that it would be appropriate for LM to be appointed separately as a consultee under section 1 (4) (c) (ii). That sub-section does allow "any person whom the sheriff has directed to be consulted" and to have their views taken in regard to interventions. But in this case, to leave JM as the nearest relative and appoint her sister LM as a consultee in addition, could lead to confusion about the roles and duplicate the work of those involved in the day to day care of the Adult. It was quite clear in this case that LM's primary submission was that she wanted to be appointed as her mother's nearest relative; in that request she had the support of JM, who otherwise would hold that position. That is the substance of LM's application.

[26] Accordingly, the question in this case is whether I should:

- (1) make no order as to the nearest relative, leaving JM (as the Adult's oldest child) in that role, despite her own health difficulties,
- (2) appoint LM as the nearest relative in terms of section 4 (1) (b) of the 2000 Act in place of JM, or
- (3) make an order that – due to the circumstances presented here - none of the sisters should exercise the functions of the nearest relative for the duration of the order, in terms of section 4(1)(c).

[27] As was required under the Act when the application for welfare guardianship was made by the Applicants, reports were prepared by two approved medical practitioners and a Mental Health Officer. When those reports were being compiled, the impact which the

conflict between the sisters was having on their mother's care was confirmed by many independent professionals.

[28] Dr BH noted in his report dated 29 May 2021 that:

"[The] estrangement between [the Adult's] daughters made the arrangement precarious and left their respective roles and responsibilities undefined. Over the course of the Lockdown, with the consequent limits on their entry to the house and a lack of clarity as to who was responsible for their mother's welfare, [the Adult's] circumstances precipitately declined to a level of self-neglect and squalor."

[29] EA was the appointed Mental Health Officer. In her report she observed difficulties arising from the relationships between the sisters. She noted that two of them were – in June 2021 – resistant to any formal intervention. She stated:

"[JM] noted that the Adult has a dislike of services and wishes to be left alone, however, when highlighted that the Adult is at risk from harm when disengaging from services [JM] did not agree with this. [LM] has also noted in social work notes that she does not believe that the Adult is as bad as everyone is highlighting and that the Adult should just be left alone. There was previously a joint application with all three daughters however, the writer did not support this given that the siblings do not talk to each other and do not appear to understand the level of support that the Adult requires. They have been obstructive in the care of the Adult at times and for adaptations to be made in the Adult's home."

[30] The MHO's conclusion was that she was unable to support any of the siblings being appointed as guardian because the conflict between them "would have an impact on any individual being able to carry out the roles and responsibilities effectively and would continue to impact on the care and support of the Adult."

[31] While agreement was eventually reached between the sisters that the Applicants, as the relevant local authority, should be appointed as Welfare Guardian, the comments within these reports are relevant to the issue surrounding the role of the "nearest relative". This is because it was clear from those reports that the conflict between the sisters had not just begun during the difficult period when their mother's independence and capacity deteriorated.

[32] Whatever its root cause, the conflict was more longstanding, and had become apparent to other professionals dealing with the Adult well before the application for guardianship was made. A manager in the care company which had arranged the four daily visits to the Adult's sheltered home before she moved to a care home reported to the MHO that

"...she has ongoing concerns with regards the poor communication between the siblings.....daily concerns are passed to her by care workers who support the Adult and she at times struggles to get any of the siblings to agree on a proposed course of action."

[33] Social workers were more forthright. One of those who had dealings with the Adult and her daughters told the MHO:

"While [the Adult's] lack of insight and associated non-engagement with her care plan are significant barriers to ensure her well-being, it has also been recognised that the current dynamic between her daughters are an additional barrier. At present KG is estranged from both JM and LM, with the estrangement between K and L being longstanding of many years. This prevents meaningful communication between the three in relation to [the Adult's] circumstances and care needs, not least because J and L have on occasion blocked K's numbers from their telephones, preventing her reaching them.

During the past year or so of social work involvement this has proved detrimental to both the sharing of information and in reaching agreement about their mum's care plan, as well as responses to any arising issues. For example, even with significant communication assistance and supportive input from social work the three were unable to agree on a response to safeguard [the Adult] and other residents from unsafe cooking practices. Agreements...have been reneged on by one or more of her daughters, seemingly driven by intention to undermine the other(s) suggestions."  
(MHO Report, page 10)

[34] Another member of the social work department stated in an email which the MHO appended to her report:

"I am of the view that due to the continued conflict between the three daughters, the lack of communication, undermining each other, and continued negativity towards each other, I do not see how they can reasonably work together in the best interests of [the Adult]. The case has been open to me for over a year now, and there has been no amicable engagement between the three daughters to ensure [the Adult's] needs are met. The other concern is that [the Adult] is picking up on the negativity

between her daughters and appears to have, over the past year, been given differing advice from each of them. [She] has been extremely resistant towards formal services; the negativity and conflict between the daughters may have contributed to this, due to the 'mixed messages' [the Adult] has been receiving from her daughters."

[35] Accordingly, during the preparation of the application for guardianship, five out of six professionals involved in the care or assessment of the Adult commented on the adverse impact which the dispute between the sisters was having on the care and wellbeing of the Adult. The remaining report author – Dr AM - did not comment on the dispute. However, this may be unsurprising, given that he conducted his medical assessment during the course of one visit when, as noted in his report, the Adult and only one of the sisters was present.

[36] All of these observations are highly relevant to the determination which I have had to make. From the information before me I am satisfied that the disagreement between the sisters developed many years ago and has persisted despite the chronic and acute difficulties faced by their mother. The dispute has taken priority over the need to communicate with each other and agree a common plan for the Adult's care. Indeed it was apparent that, notwithstanding the stark observations in the MHO's report - with each of the sisters having had an opportunity to reflect on the views of the various independent professionals about the problems being caused by their fractious relationship - the dispute has not abated. The Affidavits, emails and submissions from LM and KG each asserted how they had been wronged by the other and how they – and not the other – had the best interests of their mother at the forefront of their minds.

[37] Sadly, the problems did not end there. It was evident from the information presented that the feud has spilled into everyday decisions within the care home in which the Adult has resided since late 2021. One sister (KG) left a kettle in the Adult's room, leading to a complaint by LM. One wanted the Adult's room painted in one colour,

resulting in objections by another and a request to staff to change the paint. A rug was placed in the Adult's room by one sister, apparently to provide a more homely atmosphere, but this was objected to by one of her siblings, who reported it as a trip hazard.

[38] This sorry state of affairs has left me to conclude that to have any of the sisters in the role of nearest relative presents risks to the wellbeing of the Adult. Given the poor relations between the Adult's children, it is simply not workable to have one of them as the single point of contact for the Adult's family. Leaving JM as the nearest relative because she is the oldest, or appointing LM to that role, carries the real risk that KG - who visits her mother regularly - will be left "out of the loop" by her sisters, and that she will seek to obtain information independently from the social work and care home. This is likely to lead to more stress in the relationship between the siblings, more public venting of the family's disagreements, and a duplication in the work of care home staff and social work. All of this has already had - and is likely to continue to have - a detrimental impact on the wellbeing of the Adult.

### **Decisions and reasons**

[39] It is not appropriate that either the care home where the Adult resides, or the social work department which carries out the duties of welfare guardian, should be used as a platform for the Adult's daughters to continue to air their mutual grievances. Neither the passage of time, the deterioration in their mother's capacity, nor even the observations of numerous professionals about the impact which their dispute is having on the arrangements surrounding their mother's care, has enabled the sisters to put aside their differences.

[40] I have therefore decided that no person should exercise the functions of the nearest relative during the period of the guardianship order. I make this decision under



section 4(1)(c) of the 2000 Act. I am satisfied that this order will benefit the Adult as it will remove the opportunities for the three sisters to continue to use their mother's care and accommodation arrangements to air their mutual hostility or to make complaints about each other, instead of prioritising her best interests. Having no-one to be consulted formally as the nearest relative should reduce the risk that one or other of the sisters will allow their disagreement to cloud any views which they express in that role.

[41] This decision should enable each of the sisters still to visit or otherwise keep in contact with their mother when they are able to do so, and allow them to be kept updated by medical, care home and social work staff about any interventions under the Act, or other day to day matters. An order that none of the Adult's daughters should exercise the functions of the nearest relative is unusual, but in this unfortunate case I consider that it is appropriate and would benefit the Adult, having regard to the principles set out in section 1 of the 2000 Act.