[2016] SAC (Civ) 5
XO5/16

Sheriff Principal D C W Pyle
Sheriff Principal M Lewis
Sheriff N C Stewart

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D C W PYLE

in appeal by

JM

Appellant;

in

Application by Aberdeenshire Council

Respondent:

for Welfare Guardianship in respect of JC

Appellant: JM
Respondent: Ingram

8 July 2016

[1] This is an appeal from the decision of Sheriff Summers in Aberdeen to make a guardianship order under section 58(4) of the Adults with Incapacity (Scotland) Act 2000 appointing the Chief Social Worker of Aberdeenshire Council ("the respondent") to be the guardian of JC conferring on her for a period of three years the powers craved in relation to

the adult's welfare. He also dismissed the minute of JM ("the appellant") for her appointment as JC's welfare guardian. She has appealed that decision.

[2] The appellant is the sister and nearest relative of JC. At the date of lodging of the respondent's application JC was 57 years of age. He has been diagnosed with severe mental retardation and learning disability. He requires 24 hour support. He has limited understanding and communication levels. His incapacity is permanent. In 1992 he was living with the appellant, but moved elsewhere after the respondent was granted a guardianship order in April of that year. That order was renewed until December 2001. Prior to moving to his present accommodation JC lived in the same village in Aberdeenshire for about 20 years. He moved to new accommodation in 2013.

[3] The respondent's application was lodged in May 2015. It was accompanied by the usual reports, including a report from a mental health officer. That report was in favour of the terms of the application. An interim guardianship order was granted, in terms of which the respondent's chief social worker was appointed interim guardian. The appellant lodged answers in June 2015. The following month she lodged her minute to which the respondent lodged answers. This minute was not accompanied by any reports. In particular, it was not accompanied by a report from a mental health officer. The sheriff ordered the mental health officer who had produced the original report to produce a report on the appellant's suitability to be appointed as guardian. In that report the mental health officer concluded that the appellant was not suitable to be so appointed.

[4] There being disputed matters of fact, a proof was heard before the sheriff, following upon which he issued a written decision setting out his findings in fact and findings in fact and law. He also prepared a note setting out the reasons for the conclusions he reached.

[5] The sheriff heard evidence only from the mental health officer, the appellant and her husband. He also had before him two medical reports lodged with the respondent's application. They explained JC's medical condition and were supportive of that application. The sheriff found the mental health officer to be a credible and reliable witness. He reached the opposite conclusion about the appellant. She complained about the care which her brother had received in his supported accommodation, which had included a formal complaint to the Care Inspectorate, which had been partially successful. The sheriff concluded that in her evidence she was both inconsistent and evasive. He was suspicious that no matter the best interests of her brother she would, if appointed as his guardian, move him from his present accommodation to live near, or even with, her. Indeed, the sheriff was greatly exercised by the suggestion by the appellant's husband that his wife would try to ensure that JC "got whatever he wanted", the implication being that she would do so no matter her brother's best interests.

[6] The hearing before us was brief. Both parties had lodged notes of argument. The appellant, despite her not feeling well, gratefully accepted our suggestion that rather than trying to persuade us to adjourn the hearing to a day when she was feeling better she should simply rely on what she had set out in writing. We think that decision was a wise one and we were grateful to her for having produced a note which set out clearly the points she wished to make. Perhaps more surprisingly the solicitor for the respondent also advised that he was content to rely upon his written submissions which were brief to the point of being skeletal.

[7] We intimated that we intended to refuse the appeal but would make avizandum and issue our decision in writing in due course.

[8] The first ground of appeal raised a preliminary point: the appellant had written to the sheriff clerk immediately before the proof seeking an adjournment so that she could find additional witnesses, particularly expert ones, in support of her application. In our opinion, there is no substance in this ground. The appellant was represented by a solicitor at the proof. He made no motion to adjourn the diet. It is not open to the appellant to complain about that now. Any concerns she has about it ought to be raised with her solicitor; it has nothing to do with her minute at this stage of the process.

[9] Her more substantive complaints were (1) that the mental health officer should not have prepared a report in respect of the appellant's application, there being a conflict of interest; (2) that in that report the mental health officer had "proceeded to destroy my character again", despite having never met her; (3) that the mental health officer had committed perjury in her evidence in that the criticisms of the appellant were "false allegations"; (4) that the sheriff's decision was not in JC's interests; and (5) that his views had not been heard and, in so far as she had expressed them, had been ignored.

[10] We said at the end of the hearing that we would explain in writing the limited role of this court in reviewing the sheriff's decision. The law on this matter, as expressed most recently in a number of Supreme Court cases, is well known to practitioners. But for the appellant's benefit we quote a passage from the judgment of Lord Reed in *Henderson* v *Foxworth Investments Limited* 2014 SC (UKSC) 203 (at para [67]):

> "It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding in fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings in fact made by a trial judge only if it is satisfied that his decision cannot be reasonably explained or justified."

The difficulty for the appellant is that there is no such identifiable error in the manner in which the sheriff has considered the evidence and framed his findings in fact. The sheriff found the mental health officer to be a credible and reliable witness. Any criticism of her evidence was based solely upon the evidence of the appellant. As we have said, the sheriff found her to be neither credible nor reliable for the reasons he gave. We can find no basis to criticise those reasons. At the end of the day, the assessment of the witnesses was a matter for him. It is not the role of this court to substitute our view of the credibility and reliability of witnesses who were seen and heard by the sheriff. The appellant did not found upon any passages in the evidence. Indeed, a transcript of the evidence was not produced. She did not seek to amend any of the sheriff's findings in fact. The sheriff explains why he decided that the grant of the respondent's application was in JC's best interests. We can find no fault in his reasoning. Nor do we accept that JC's wishes were ignored. The sheriff made an express finding in fact that such is JC's mental disorder that he does not have the capacity to act, to make decisions or to understand decisions to safeguard and promote his personal welfare (finding in fact 10). Indeed, the mental health officer in both of her reports records the attempt made by her to meet JC and to obtain his wishes and feelings about the order sought and the powers requested. She states that the interview was ended at an early stage to avoid distressing him. It was, she concludes, "not possible to ascertain [JC's] view on this application".

[11] Nor do we consider that the appellant's complaint about conflict of interest is well founded. The short answer to that ground is that while all of the sheriff's interlocutors come under review, the appellant did not move that we review the interlocutor of the sheriff, which ordered the mental health officer to prepare the report on the appellant's suitability as the guardian. But putting that procedural point to one side, we also reject the underlying

proposition in the ground. In *JM* v *LM*, an unreported decision from Kilmarnock Sheriff Court dated 29 May 2009, the sheriff requested a report by the mental health officer on the suitability of the minuter as the guardian. The sheriff had anticipated that the report would be prepared by the same mental health officer who had prepared the report in respect of the applicant. Instead, a different mental health officer was employed. The sheriff commented as follows:

> "I have to say that I thought it was unfortunate that the same mental health officer who prepared the suitability report in respect of the Applicant did not carry out the suitability report in respect of the Minuter. I was advised during the course of the proof by the two mental health officers who gave evidence, that they perceived a conflict of interest and did not consider it appropriate for the same mental health officer to carry out the suitability reports. Neither myself, nor Miss Kelly, the Safeguarder, quite understood this position and I think it would have been preferable if the same mental health officer had prepared both reports."

We agree with the sentiment behind the sheriff's comments. It is for the sheriff, not the mental health officer, to decide whether or not to appoint a guardian (section 58 of the Act). To assist the sheriff in that task, Parliament has determined that there should be produced reports from at least two medical practitioners and from the mental health officer (section 57(3)). In preparing their reports the medical practitioners and the mental health officer will doubtless rely upon their individual professional qualifications and experience. In particular, the mental health officer can be expected to act in an independent manner from the local authority which seeks the appointment. He or she will consider the evidence and will, so far as reasonably possible, interview the adult and the applicant. Indeed, the requirement to interview the adult is expressly provided by section 57(3)(b)(i). But unlike a court the mental health officer cannot make findings in fact; instead, all that he or she can do is to consider the reported history of the case and the views of the various parties involved and then make a professional and independent assessment based upon the information

provided. It is for the court to assess the value of that report. If, for example, the sheriff decides that material facts were not as reported to the mental health officer, the value of the report will be less. Indeed, as in this case, the mental health officer can expect in disputed cases to be examined and cross-examined at length under oath before the sheriff. So, there is a further opportunity for the sheriff to ingather information about the worth of the conclusions in the report.

[12] We do not know whether it is the practice in some jurisdictions for mental health officers always to decline to prepare a second report in such circumstances. But if there is such a practice we would discourage it. We readily acknowledge that there might be cases, probably rare, where the individual circumstances require a different approach, but we do not consider it to be either necessary or desirable as a matter of common practice.