SHERIFF APPEAL COURT

2021 SAC (Civ) 33
DBN-AW29-21

Sheriff Principal Murray
Sheriff Principal Pyle
Appeal Sheriff McFadyen

NOTE

delivered by Sheriff Principal Pyle

in appeal by

RM AND SB AS JOINT GUARDIANS OF THE ADULT PKM

Appellants

against

GREATER GLASGOW HEALTH BOARD

Respondent

Appellants: Leighton, advocate; Lunny & Co
Respondent: P Reid, advocate; Greater Glasgow Health Board

9 November 2021

Introduction

[1] This is an appeal from the sheriff's decision to refuse an application in terms of section 70(1)(a) of the Adults with Incapacity (Scotland) Act 2000, in which the joint guardians of the adult sought two orders which, read short, were, first, to require the adult to comply with the decisions and directions of the guardians about his healthcare treatment

and, secondly, to require him to attend for various medical procedures required for the use of kidney dialysis.

[2] Greater Glasgow and Clyde Health Board entered the process. There was also representation before the sheriff for West Dunbartonshire Council and a safeguarder appointed by the court. Only the Health Board appeared in the appeal.

[3] After submissions before us, counsel for the guardians intimated that they no longer insisted on the second order and for the first sought leave to amend the crave so that it was in the following terms:

> "An order under section 70(1)(a) [of the Act] requiring the Adult to comply with the joint guardians' decision to consent to medical treatment by behaving in a manner that allows kidney dialysis treatment to occur and to attend whenever is required for that purpose."

The Health Board's primary concern before the sheriff and before this court was that the original orders sought would trespass upon matters which were for clinical judgment for the medical team and were both as a matter of principle and of practice otiose in that they sought what was in effect continuing compliance by the adult to medical treatment for the rest of his life in the face of his persistent declaration that he did not want the treatment and the medical opinion that he would not comply. The guardians' view was that while it was accepted that the adult at present did not want the treatment, they considered, based upon his past behaviour and attitudes (being his sisters), that he might change his mind if the order in its amended form was granted. Counsel for the Health Board intimated that as the order now sought no longer trespassed on clinical judgment it did not oppose the grant of the order if this court was satisfied with its terms. We granted the order on the acceptance by the guardians that this was very much the last chance to secure the adult's consent, that if their hope of compliance did not materialise there would be no medical treatment and that

the order should not be construed in any way as interfering in clinical decisions which are wholly within the province of the medical team. We agreed to give fuller reasons in writing, our decision given verbally allowing the guardians and, if required, the medical team to begin the discussions with the adult whose present medical condition, if untreated, will be terminal in a matter of months, if not earlier.

[4] The adult, who is aged 47 years, suffers from chronic paranoid schizophrenia, which was the reason behind the appointment of the guardians in June of this year. He also suffers from polycystic kidney disease with chronic kidney disease. There has been a continuous decline in his renal function. Kidney dialysis treatment is lifelong and involves treatment three times per week, each session lasting up to five hours. In the adult's case, the treatment initially requires the creation of a fistula, whereby an artery and a vein are surgically connected, in his neck or groin. If the adult at any point dislodged the line which would be inserted air would probably enter his bloodstream and he would bleed to death within minutes. The adult has consistently refused to give consent to the treatment, despite being advised that his condition could be terminal in a matter of months.

[5] Given that the guardians sought a different order before us than they did before the sheriff, his decision is for present purposes irrelevant. Nevertheless, before us and before him a question of law arose upon which we express an opinion.

Section 67(1) of the Act

[6] The medical reports produced discuss the issue of the capacity of the adult to give consent to treatment. The most recent psychiatric report was prepared in August by Dr Rodriguez on the instructions of the guardians. He concluded that the adult "presents at this time as having capacity to make decisions about his care and treatment". Counsel for

the guardians relied upon the terms of section 67(1) of the Act, which is in the following terms:

> "The adult shall have no capacity to enter into any transaction in relation to any matter which is within the scope of the authority conferred on the guardian except in a case where he has been authorised by the guardian under section 64(1)(e); but nothing in this subsection shall be taken to affect the capacity of the adult in relation to any other matter."

On a proper reading, submitted counsel, the effect of the section was that medical opinion on the adult's present capacity was irrelevant, at least so long as the guardians' appointment continues. To allow the issue of capacity to be raised at the point of any decision by a guardian would undermine the underlying purpose of the Act, which is to vest in the guardian the powers, whether wide or restricted, granted by the court in the interests of the adult. Counsel for the Health Board submitted that the section must be read in light of section 1 of the Act. The problem perhaps was the very wide powers in this case for the guardians to control decisions on the adult's medical treatment, which created a tension between section 67(1) and the requirement, per section 1(4)(a), to take into account the adult's views.

[7] A preliminary question in any discussion of the proper construction of section 67(1) is the meaning of the word "transaction". The sheriff took the view that the word was incapable of a wide interpretation such as to include consent to medical treatment. Before us, counsel for the Health Board submitted that it was so capable. He drew attention to section 67(2) which makes specific reference to powers relating to property and financial affairs and to section 67(3) which makes specific reference to powers relating to personal welfare, which suggests that Parliament intended that the general language of section 67(1) was meant to capture any form of guardianship order. Counsel for the guardians relied upon the definition of the word as contained in the Age of Legal Capacity (Scotland)

Act 1991, which includes "the giving by a person of any consent having legal effect" (section 9(d)).

[8] In our opinion, the term "transaction" does include consent to medical treatment. We reach that view for two reasons. The first is, as counsel for the Health Board submitted, that the terms of sections 67(2) and 67(3) point to section 67(1) being given the broad definition which would include any form of guardianship order. The second is the general nature of the 2000 Act, which is to protect vulnerable adults who in most, if not all, cases will have complex medical needs which will require ongoing medical supervision and treatment. It would make no sense, therefore, for the scope of the guardian's powers to be restricted such that medical treatments should not be included within their responsibilities. There is always a danger in taking a definition of a word in one statute to determine its definition in another. Nevertheless, we consider that at the very least the definition of "transaction" in the 1991 Act lends support to the definition which properly should apply to the 2000 Act.

[9] Turning to the more general issue, we do not consider that there is an inherent tension between section 67(1) and section 1(4). Section 1 on its own terms provides the answer:

> "(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.
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> (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…"

Thus, in the construction of and application in practice of the whole Act the general principles set out in section 1 must be applied. That is no different to the approach which requires to be taken in the application of the general principles contained in the European Convention on Human Rights to all domestic law. We suspect that the difficulty which arose in this case is that the medical opinion which was sought was whether the adult had capacity, rather than what were his present wishes and feelings. It would be inevitable that the extent to which the adult would be able to express his present wishes and feelings and the extent to which they should be taken into account would depend upon the extent to which the medical practitioner considered that the adult's expressions of wishes and feelings were genuinely held and were separate from his general medical condition of schizophrenia. In other words, the issue for the practitioner was the *ability*, rather than capacity, of the adult properly and accurately to express his wishes and feelings. Looked at in that way, we do not see any potential conflict between section 67(1) and section 1(4).

[10] Section 1(6) is in the following terms:

> "For the purposes of this Act, and unless the context otherwise requires—
> … 'incapable' means incapable of—
>
> > (a) acting; or
> > (b) making decisions; or
> > (c) communicating decisions; or
> > (d) understanding decisions; or
> > (e) retaining the memory of decisions,

> as mentioned in any provision of this Act, by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise); and 'incapacity' shall be construed accordingly."

We see no conflict in this definition of capacity and the requirement to take into account the wishes and feelings of the adult. The definition covers "actings" and "decisions" which, depending on the extent of the powers granted to the guardian by the court, will be the practical matters which need to be resolved for the adult's benefit. They are rightly the province of the guardian, not the adult. But in exercising the powers the guardian must take into account the adult's wishes and feelings. Whether such wishes and feelings are followed will depend on the whole circumstances, not least whether the medical opinion supports the view that substantial regard may be had to the adult's expression of them.

[11] It may well be that any perceived tension between section 67(1) and section 1 will surface in specific situations and will have to be evaluated on the facts of the individual case. We should therefore emphasise that our opinion is in the context of an unusual, perhaps unique, case. It should not be seen as being of general application save that regard should be had to the whole circumstances and the weight to be given to the present and past wishes and feelings of the adult.

[12] We also emphasise, as we have already said, that the powers of a guardian and, in particular, any order under section 70 must not trespass on decisions which as a matter of medical ethics but also as a matter of law are properly ones for clinical judgment. In this case, we were careful to obtain an assurance from the guardians that the decision whether to give dialysis treatment to the adult and the assessment of the extent, if any, of his consent to such treatment is a matter for the doctors, not the guardians – or even this court.

[13] No issue of expenses arose.