

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS

PRACTICE NOTE NO 1, 2005

**ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000:
GUIDANCE FOR SHERIFFS AND PRACTITIONERS**

Purpose

1. The purpose of this Practice Note is to secure the efficient management of contested applications and other proceedings under the Adults with Incapacity (Scotland) Act 2000 (“the Act”).

Commencement

2. This Practice Note applies to all applications lodged, or proceedings commenced, on or after 18 April 2005.

Minimum of delay

3. It shall be the duty of the court to secure that all applications and other proceedings under the Act are dealt with as expeditiously as possible and with the minimum of delay. Such applications and proceedings require the co-operation of all concerned and firm case management by the sheriff.

Identity of sheriff

4. Unless the sheriff principal otherwise agrees, the sheriff presiding at any stage in the proceedings must be a sheriff of this sheriffdom. In the interests of continuity and consistency in management, every stage of each case must, whenever possible, call before the same sheriff on dates and at times assigned by him or her. If a diet of proof has to be fixed, it should normally be assigned to the sheriff who has conducted the previous hearings unless, exceptionally, an early diet can be made available at which another sheriff is free to preside.

5. In the event that a proof is to be taken by a sheriff other than the sheriff who has conducted the previous hearings, the whole process in the case must be made available to the sheriff who is to take the proof not less than three working days before the date upon which the proof is scheduled to commence.

Representatives

6. At every calling of a case any representative of any party must be familiar with the case and must have sufficient authority to deal with any issues that are likely to arise at that calling.

Record of discussion to be kept

7. At every hearing prior to any proof the sheriff should not only pronounce an interlocutor regulating further procedure but should also prepare and keep with the process a brief written record of the main points of the discussion at that hearing.

The sheriff's role

8. Section 3 of the Act and rule 3.16.6(2) of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999 confer upon the sheriff a very wide discretion to determine the procedure to be followed in an application or other proceeding under the Act. Before the first hearing fixed under rule 3.16.2(a), and throughout the proceedings, the sheriff should be prepared to engage in active management of the case. He or she should maintain firm control over the proceedings while exercising flexibility in doing so.

The application

9. In terms of rule 3.16.7(1) an application submitted to the sheriff under or in pursuance of the Act, other than an appeal or remitted matter, shall be in Form 23. It should be written, typed or printed on A4 size paper of durable quality and should not be backed or folded. Subject to any issue of confidentiality that may arise, it would assist the sheriff clerk wherever possible to receive a copy

of the application in electronic form on the same date as the date upon which it is lodged.

Court programming

10. The programming of all classes of business in the courts of the sheriffdom remains exclusively the responsibility of the sheriff principal. In this respect he generally acts through the sheriff clerk. It is therefore essential that the drawing up of timetables (where the sheriff considers this to be appropriate) and the assigning of diets by the sheriff should be undertaken only after consultation with, and with the agreement of, the sheriff clerk. Any timetable that is drawn up must be adhered to, unless in exceptional circumstances.

The initial hearing

11. The hearing fixed in terms of rule 3.16.2(a) must take place within twenty eight days of the interlocutor fixing the hearing unless any person upon whom the application is to be served is outside Europe – see rule 3.16.6(1). The date of this hearing should be fixed after consultation with, and with the agreement of, the sheriff clerk (see the preceding paragraph), and should be of sufficient duration to allow for a proper consideration of the issues likely to be canvassed at it. The sheriff should consider the advisability of ordering intimation by sheriff officer in order to avoid any possible delay due to ineffective postal service.
12. The sheriff clerk should advise the applicant or his or her solicitors forthwith of the terms of the interlocutor appointing the date of the hearing in order that they may intimate it as soon as possible. If so requested (and subject to any issue of confidentiality that may arise), the sheriff clerk should be prepared to send to the applicant or his or her solicitors a copy of the interlocutor by fax or in electronic form as soon as it has been signed. Any such request should be accompanied by the appropriate fax telephone number or e-mail address as the case may be.

Assigning a diet of proof

13. Where it appears that a proof will be necessary, the parties should be in a position to give the sheriff a carefully considered forecast of the time which the proof is expected to take. The sheriff should ask each party to specify in detail how long he expects to take in the presentation of his own evidence and in the cross-examination of the witnesses of the other party or parties. On the basis of this information the sheriff should assess how many days should be set aside for the proof (including closing submissions). At the proof itself, parties may expect to be held to the estimates previously given by them, unless in exceptional circumstances.
14. Consideration should be given at an early stage in the proceedings to where the proof will take place (which, subject to rule 3.16.3, may be elsewhere than at the courthouse) and whether the evidence at the proof should be recorded. The holding of a proof elsewhere than at the courthouse may be anticipated to cause administrative problems, for example for the sheriff clerk. But such administrative problems must not be permitted to get in the way of the expeditious disposal of an application or other proceeding under the Act.
15. Having assessed how many days are needed for the proof, the sheriff should assign the diet, but only after consultation with, and with the agreement of, the sheriff clerk (see paragraph 10 above). The dates assigned should, unless the sheriff otherwise directs, be consecutive working days, and to allow for this, in particular in the smaller courts in the sheriffdom, consideration should be given to the possibility of holding the proof elsewhere than at the courthouse – see the preceding paragraph. The sheriff should consider too whether he or she is likely to require any writing days in order to produce the judgement. If so, the dates assigned should include writing time. As in the case of an application to free a child for adoption, the reason for such arrangements is that the sheriff should “be released from other duties so that he can give priority to the case without interruption and until it has been completed by the issuing of his interlocutor. Special arrangements of that kind are clearly necessary if the sheriff is to maintain the continuity of thought throughout the

proceedings which is so necessary to a proper disposal of the case” (*Lothian Regional Council v A* 1992 SLT 858 at page 862A-B).

16. If a proof is not completed on the last day assigned to it, it should wherever possible continue on the following day or days until it is concluded.
17. At the conclusion of the evidence parties must be heard orally thereon by the sheriff. In anticipation of this the sheriff may require the parties to submit, in electronic form or otherwise, draft findings in fact, or skeleton arguments, or both.

The judgement

18. Any application to the sheriff under the Act requires to be made by summary application – see section 2(2). The sheriff is obliged accordingly in terms of section 50 of the Sheriff Courts (Scotland) Act 1907 to give his or her judgement in writing. In every case the judgement should be issued within four weeks of the date of the making of avizandum.

The Practice Note No 1, 2004: Adoption of Children, Etc.

19. In determining the procedure to be followed in a contested application or other proceeding under the Act, the sheriff may elect to follow the procedure set out in Parts B and C of the Practice Note No 1, 2004: Adoption of Children, Etc. suitably adapted for the purposes of the application or proceeding.

(Sgd) **Stephen Young**

Sheriff Principal of Grampian, Highland and Islands

4 April 2005