

SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT PERTH

[2025] SC PER 83

PER-AW163-24

JUDGMENT OF SHERIFF DONALD W FERGUSON

in Summary Application under the Adults with Incapacity (Scotland) Act 2000

ABG

Applicant

against

CDG

Minuter

Applicant: Buchanan

Minuter: Morton

PERTH, 13 August 2025

The court, having resumed consideration of the cause, sustains the applicant's plea-in-law and repels the minuter's craves in the minute; grants the applicant's craves and makes a guardianship order under section 58(4) of the Adults with Incapacity (Scotland) Act 2000 (as amended) and appoints ABG residing at ... to be guardian to AAG (born 1 March 1935) residing at ..., Perth, in terms of part 6 of the Adults with Incapacity (Scotland) Act 2000 with the following functions and duties and conferring on her powers in relation to the adult's personal welfare and financial affairs and, in particular, conferring on her powers to:

Welfare

- (a) decide what care and accommodation may be appropriate for the adult;

- (b) require the adult to reside in a particular Residential Establishment including a locked unit if necessary;
- (c) return the adult to such an Establishment should the adult leave and to prevent removal without prior consent of the guardian.
- (d) consent to any medical treatment or procedure or therapy of whatever nature including covert as they may decide is for the benefit of the adult and may provide access for that, or refuse such consent;
- (e) make decisions about the adult's dress, diet and personal appearance;
- (f) make decisions on behalf of the adult concerning his participation in holidays and cultural or social activities;
- (g) exercise any rights of access the adult has in relation to personal data and records held by any person or organisation;
- (h) take any legal action on behalf of the adult involving his personal welfare;
- (i) decide or sign any deed or document necessary to enable the applicant to implement the powers granted under this application;
- (j) to recover from the adult's estate any outlays reasonably incurred by the applicant in the exercise of the foregoing functions;

Financial

- (a) collect, sue for, receive, discharge and settle all sums, property or rights due or which may become due to the adult;
- (b) draw cheques on and sign forms of withdrawal to uplift money from, or credit money to, or open or close, any account in the adult's name including accounts held in common with other persons;

- (c) authorise expenditure for any service or for the purchase of any item which is required for the adult's benefit, and pay any accounts incurred by the adult or for her benefit;
- (d) invest any sum or sums which may be available for investment in such a way as the guardian may think best; and vary the terms of any investment; and to realise such investments; and purchase any property heritable or moveable wherever situated including property held in common with other persons;
- (e) exercise any rights of access which the adult has in relation to personal data and records pertaining to the adult's property or financial affairs;
- (f) give up and sign on behalf of the adult all returns, claims and forms which may be required in connection with the adult's liability to taxation
- (g) sign, seal, execute and deliver all deeds, conveyances and other documents relative to heritable property in which the adult has an interest; including Affidavits, Renunciations and Consents under the Matrimonial Homes (Family Protection)(Scotland) Act 1981 as amended;
- (h) have access to confidential information about the adult's will and other testamentary provisions;
- (i) make gifts, with the consent of the public guardian, from the adult's estate or renounce, disclaim or assign any interest in the adult's favour including entering into a Deed of Variation or Family Arrangement in terms of section 142 of the Inheritance Tax Act 1984 or any statutory successor, to any person, institution, charity or trust established for any person mentioned in the adult's will, and generally undertake any estate planning with a view to minimising the tax payable as a consequence of the adult's death or during the adult's life;

- (j) raise or defend or compromise any actions or judicial or other proceedings in which the adult is or may be interested so far as he may consider necessary or expedient; refer to arbitration any questions or disputes in which the adult is or may become involved; appeal against, enforce or implement any judgement, order or award, and appear or instruct appearance on the adult's behalf before any tribunal, commission or other official enquiry;
- (k) employ solicitors, factors, stockbrokers, investment managers, bankers or other agents and delegate to them such powers as he thinks fit;
- (l) carry out all appropriate investigations to determine the extent of, and locations of, the adult's financial estate, including the power to require any fund holder, bank, building society or other financial institution holding assets belonging to the adult to disclose to the financial guardian such information as the financial guardian may require to complete such investigations;
- (m) sign any deed or document necessary to enable the guardian to implement the powers granted under this application;
- (n) to do anything ancillary or consequential upon the powers above specified which may reasonably be necessary or appropriate for the full and proper exercise thereof;
- (o) be reimbursed for any reasonable outlays or out of pocket expenses incurred while acting on behalf of the adult as his guardian

Appoints EFG to be a substitute welfare and financial guardian to AAG, born 1 March 1935, in terms of section 63 of the Adults with Incapacity (Scotland) Act 2000 to apply in the event of the applicant being unable to act, conferring on them the following duties and powers;

Welfare

- (a) decide what care and accommodation may be appropriate for the adult;
- (b) require the adult to reside in a particular residential establishment including a locked unit if necessary;
- (c) return the adult to such an establishment should the adult leave and to prevent removal without prior consent of the guardian;
- (d) consent to any medical treatment or procedure or therapy of whatever nature including covert as they may decide is for the benefit of the adult and may provide access for that, or refuse such consent;
- (e) make decisions about the adult's dress, diet and personal appearance;
- (f) make decisions on behalf of the adult concerning his participation in holidays and cultural or social activities;
- (g) exercise any rights of access the adult has in relation to personal data and records held by any person or organisation;
- (h) take any legal action on behalf of the adult involving his personal welfare;
- (i) decide or sign any deed or document necessary to enable the applicant to implement the powers granted under this application;
- (j) to recover from the adult's estate any outlays reasonably incurred by the applicant in the exercise of the foregoing functions;

Financial

- a) collect, sue for, receive, discharge and settle all sums, property or rights due or which may become due to the adult;

- (b) draw cheques on and sign forms of withdrawal to uplift money from, or credit money to, or open or close, any account in the adult's name including accounts held in common with other persons;
- (c) authorise expenditure for any service or for the purchase of any item which is required for the adult's benefit, and pay any accounts incurred by the adult or for her benefit;
- (d) invest any sum or sums which may be available for investment in such a way as the guardian may think best; and vary the terms of any investment; and to realise such investments; and purchase any property heritable or moveable wherever situated including property held in common with other persons;
- (e) exercise any rights of access which the adult has in relation to personal data and records pertaining to the adult's property or financial affairs;
- (f) give up and sign on behalf of the adult all returns, claims and forms which may be required in connection with the adult's liability to taxation;
- (g) sign, seal, execute and deliver all deeds, conveyances and other documents relative to heritable property in which the adult has an interest; including Affidavits, Renunciations and Consents under the Matrimonial Homes (Family Protection)(Scotland) Act 1981 as amended;
- (h) have access to confidential information about the adult's will and other testamentary provisions;
- (i) make gifts, with the consent of the public guardian, from the adult's estate or renounce, disclaim or assign any interest in the adult's favour including entering into a Deed of Variation or Family Arrangement in terms of section 142 of the Inheritance Tax Act 1984 or any statutory successor, to any person, institution, charity or trust established for any

person mentioned in the adult's will, and generally undertake any estate planning with a view to minimising the tax payable as a consequence of the adult's death or during the adult's life;

(j) raise or defend or compromise any actions or judicial or other proceedings in which the adult is or may be interested so far as he may consider necessary or expedient; refer to arbitration any questions or disputes in which the adult is or may become involved; appeal against, enforce or implement any judgement, order or award, and appear or instruct appearance on the adult's behalf before any tribunal, commission or other official enquiry;

(k) employ solicitors, factors, stockbrokers, investment managers, bankers or other agents and delegate to them such powers as he thinks fit;

(l) carry out all appropriate investigations to determine the extent of, and locations of, the adult's financial estate, including the power to require any fund holder, bank, building society or other financial institution holding assets belonging to the adult to disclose to the financial guardian such information as the financial guardian may require to complete such investigations;

(m) sign any deed or document necessary to enable the guardian to implement the powers granted under this application;

(n) to do anything ancillary or consequential upon the powers above specified which may reasonably be necessary or appropriate for the full and proper exercise thereof;

(o) be reimbursed for any reasonable outlays or out of pocket expenses incurred while acting on behalf of the adult as his guardian;

Grants said orders for a period of 10 years;

And that upon issue by the public guardian of a certificate of appointment; and that on finding caution in the sum of under £150,000 within a period of 4 weeks from this date to the satisfaction of the public guardian in 100% of the current estate and thereafter in 100% of the estate as at year end review by the public guardian; awards the expenses incurred by the applicant in making this application out of the adult's estate as taxed on an agent/client basis up until the grant of legal aid; authorises the public guardian to issue a certificate of appointment; and decerns.

NOTE

Having resumed consideration of the cause, finds the following facts to be admitted or proved:

- 1 The applicant is ABG residing at the address in the instance.
- 2 In the application, EFG is specified as the substitute welfare and financial guardian. No party, relevant person or professional expressing a view, took exception to his appointment on that basis.
- 3 The adult is AAG, date of birth 1 March 1935, and is the husband of the applicant. He resides with the applicant at the address stated in the instance.
- 4 The adult has three sons from his first marriage, namely, CDG, EFG and GHG
- 5 The minuter is CDG, residing at the address stated in the instance. He is the eldest son of the adult. He runs a successful house building company together with his brother EFG.
- 6 The adult was incapax as at the date that the application was lodged with the court.

7 Reference is made to the medical reports by Dr Fabian Haut dated 12/12/24 and Dr Gavin Taylor (the adult's GP) dated 18/11/24 which reports were lodged with the application and are referred to for their full terms and are taken to be repeated herein *brevitatis causa*.

8 Both reports confirm that the adult has a diagnosis of Alzheimer's dementia.

9 The adult is incapable of managing his own welfare or his financial affairs. It is necessary for a welfare and financial guardian to be appointed.

10 Reference is made to the original and amended AWI(8) reports by Mrs Samantha Jane Lamond, solicitor, Perth and the contents of the AWI(8) by Ms Sarah McIntyre, solicitor, Dunfermline, and all said reports find the applicant to be a suitable person to be both welfare and financial guardian of the adult and support her application, and said reports are referred to for their terms. Reference was also made to the amended report of Danielle Millar, Mental Health Officer, Perth and Kinross Council dated 27/1/24 (sic – should read 2025). Said report finds the applicant to be a suitable person to act as the welfare guardian of the adult but declined to recommend her as financial guardian given the dispute which had arisen. The mental health officer found the substitute guardian EFG to be a suitable person to be both welfare and financial guardian. The report is referred to for its full terms.

11 The adult is currently 90 years of age. The applicant is 75 years of age. They were married approximately 28 years ago, the applicant being the adult's third wife. They have no children of their relationship.

12 The adult has suffered cognitive impairment for a number of years, the symptoms and effects of which have deteriorated over time so that it was considered necessary to lodge the index application at court in December 2024.

- 13 The applicant acts as the adult's main carer. The Adult continues to reside with the applicant in their home. The applicant has taken on all household and transport responsibilities, prepares meals and medication for the adult and re-orientates him at times when he appears confused. The adult requires monitoring throughout the day and night meaning that he requires 24 hour care. As a result, some professional carers also attend the house to assist with the care of the adult.
- 14 No other party or relevant person opposes the appointment of the applicant as the adult's welfare guardian.
- 15 When the adult and the applicant purchased their home at ... , title was taken in joint names.
- 16 In 2015, the applicant executed a will which *inter alia* directed his executor to hold his one half share in the said property in liferent for his wife (the applicant) and thereafter left his interest in the one half share of the house to his three sons, CDG, EFG and GHG in equal shares.
- 17 On 26 February 2020, the adult executed a disposition on the basis of love, favour and affection which disposed his one half share in the matrimonial home to the applicant. Item 7 in the second inventory of productions for the adult is an affidavit of Alan John Baillie which was sworn by him on 30 April 2024. He was the adult's solicitor and swears in the affidavit that he had no concerns regarding the capacity of the adult when granting the said disposition of the half share of the matrimonial home, referred to above. The adult previously executed a continuing power of attorney and welfare power of attorney in favour of the applicant in 2015 although it was later found to have been incorrectly executed and subsequently held to be invalid.

- 18 With regard to the views of the adult on the application sought, whilst it is unclear whether the adult fully understood all aspects of the order sought, in broad terms he confirmed that he wished the adult to be his guardian when interviewed by the Mental Health Officer Danielle Millar, Ms Sarah McKay and Mrs Samantha Lamond as referred to in their respective reports referred to above. The applicant and the adult's sons CDG (minuter), EFG (proposed substitute welfare and financial guardian) and GHG all care for the adult and wish the best arrangements to be put in place for his continuing care and management of his financial affairs.
- 19 In particular, CDG and EFG visit the adult regularly and are available to provide respite care should the applicant have matters to attend to which might take her away from the matrimonial home from time to time.
- 20 The applicant is a suitable person to be both the welfare and financial guardian of the adult.
- 21 EFG is a suitable person to be the substitute welfare and financial guardian of the adult.
- 22 CDG would be a suitable person to be the financial guardian of the adult.
- 23 In all the circumstances, it is appropriate that the applicant be appointed as both welfare and financial guardian of the adult. She is best placed to undertake the role because she deals with the applicant's financial affairs as detailed in the application on a daily basis as required, manages same in the best interests of the adult, takes professional advice on the adult's investments, deals with the adult's bank and with the local authority and manages the adult's state pension and occupational pension as detailed in the application.

Finding in law

24 The adult being incapable in relation to making decisions about and acting to safeguard or promote his interests in his property, financial affairs and personal welfare and being likely to continue to be so incapable, and no other means provided by or under the Adults with Incapacity (Scotland) Act 2000 being sufficient to enable the adult's said interests to be safeguarded or promoted, the orders should be made as craved.

Note on the evidence and decision

[1] In this application, the adult seeks to be appointed a welfare and financial guardian to her husband, the adult. The adult's son EFG is proposed as substitute guardian. The adult's eldest son CDG entered the process as a minuter opposing the applicant's appointment as financial guardian and seeking his own appointment in that role.

[2] This matter proceeded to proof before me on that narrow issue. It is significant to note that the minuter and all relevant persons and professionals were agreed that the applicant was a suitable person to be the welfare guardian.

[3] That being the case, it struck me as somewhat contradictory that, at the same time, the applicant was opposed as financial guardian by the minuter. When it comes to caring for an elderly person with Alzheimer's dementia, most people would agree that the welfare side of things is the most important. That is not to say that financial matters are not important, just perhaps less so in the whole scheme of things. If the applicant was thought to have probity, the ability, the competence and the trust of others to be a suitable welfare guardian, it seems somewhat strange that no longer applies when financial arrangements are considered.

[4] During the hearing, it became clear that the central point of contention, really the only point of contention, is the fact that the adult disposed his one half share in the house to his wife (the applicant) in 2020 and that this was not discussed with the adult's sons at the time. It came out in evidence that the applicant may be proposing to leave the entire property at ... to her own children from a previous marriage in her will. One can understand, at least, a degree of annoyance and frustration on the part of the minuter and his brothers in this regard.

[5] It was made clear at the proof that it was not the function of this court to determine whether the adult had capacity to dispose his one half share in the house to the applicant in 2020. This has not been challenged elsewhere, as far as I am aware. There is an affidavit in the process from the solicitor Mr Baillie who dealt with that matter. He knew the adult well having acted for him for many years, and indeed, was involved in the 2015 will of the adult and also in the power of attorney which went awry. His sworn evidence was that the adult had capacity to grant the disposition in early 2024.

[6] The minuter in evidence pointed at item 9 in the second inventory of productions for the applicant, namely, an email from Stuart Hutton of Henderson Logie Financial Planning dated 27/01/25. Mr Hutton is the adult's current financial advisor referred to above. In his email, he refers to: "the file indicates that in 2020 [AAG] no longer had the capacity to make decisions". The minuter regarded that as evidence that his father could not have properly executed the disposition in 2020. However, there are a number of difficulties with this email. Whereas hearsay evidence is admissible in civil processes, this is hearsay twice over in that Mr Hutton in his email states that he looked at a file but the file has not been lodged in process. It remains unclear who made such an entry, assuming that the entry has been

accurately described by Mr Hutton. No sworn evidence was forthcoming from Mr Hutton either in court or by way of affidavit.

[7] There was no other evidence available to suggest that the adult had entirely lost capacity by the beginning of 2020. All that can be said from the medical records is that when he was examined in November and December 2024, the doctors were satisfied that he did not have capacity at that point in time. Also, there is the sworn affidavit of the solicitor Mr Baillie which I accepted as being credible and reliable and there was no contrary compelling evidence led.

[8] Accordingly, the matter fell to be decided on a very narrow issue, that is, whether the applicant was a suitable person to be the financial guardian. The solicitors who completed AWI(8) reports for the court, Mrs McKay and Mrs Lamond, both found the applicant to be a suitable person to act as financial guardian and also the most practical as she dealt with matters day in and day out.

[9] Whilst understanding the minuter's frustration and annoyance (and this was to some extent echoed by EFG in evidence) at what had transpired with the disposition of the one half share of the matrimonial home, that is not really the issue. The primary issue is whether the applicant is a suitable person to be financial guardian as well as the welfare one.

[10] The minuter suggested that the applicant has not been open regarding the 2020 disposition and the suggestion that she may have left the property in question to her own children in her will. The minuter suggested that if she could not be trusted in that regard, how could she be trusted with the adult's financial affairs on a day to day basis? I found the minuter's evidence to be somewhat contradictory regarding this central issue. On the one hand, he said he wanted to extend the hand of friendship with the applicant. He hoped that things could be undone, meaning presumably the leaving in her will of the

property to her own children. In evidence he said that “we” (not clear) offered that there should be a codicil to reverse matters- “and then the world is perfect”. It struck me that the minuter wanted things his way, ie, that a share of the house be left to him and his brothers and if that was done he would not have opposition to the applicant being the financial guardian. If one analyses that, it is a somewhat contradictory position because either a person is to be considered suitable or not within their own merits and that suitability should not be dependent on them doing something that you want them to do. The applicant was asked in evidence why the adult would want to change the provisions of the earlier will, given that liferent provided her with an inalienable right to remain in the property for the rest of her life. Her answer was that that was what her husband wanted and it was to make sure that the applicant was properly looked after when he was gone as she would have the security of owning the house. Alan Bailie also confirms that in his affidavit.

[11] Accordingly, I found the evidence of the applicant to be credible and reliable on the central issue as to her suitability as financial guardian. It was supported by the authors of the AWI(8) report. No other party or relevant person opposed her as welfare guardian. The mental health officer supported that, too. I preferred all of the evidence regarding the applicant’s suitability as financial guardian to the evidence of the minuter and EFG which seemed to be focused not so much on that central issue but on the ongoing grievance regarding the share of the house. I am also bound to take into account the views of the adult to the extent that it is possible in the circumstances of an application. The applicant has cared for the adult for years and he seems to be able to recognise that. Insofar as possible to ascertain his views, they were supportive of the application as craved.

[12] Finally, I am satisfied that it is in the best interests of the adult that the applicant should be appointed both as welfare and financial guardian and find her suitable for such an

appointment. Everyone involved supported the appointment of EFG as substitute guardian in respect of both welfare and financial. For these reasons, I have granted the application as sought.

[13] With regard to expenses, at the end of the hearing Ms Buchanan for the applicant moved for the expenses against the minuter because he had opposed the application and the application had been granted. Mr Morton for the minuter submitted that it would be equitable if there were to be no expenses due to or by. Having looked again at the original application I note that the crave is simply that expenses incurred in making the application should be awarded from the adult's estate. I am not aware of that crave being formerly amended. But I do note that in paragraph 6 of the first joint minute there is reference to limiting expenses from the estate up to the grant of legal aid. There is no amended crave for expenses to be awarded against anyone opposing the application. Accordingly, I cannot make an award of expenses against the minuter. The appropriate formulation is that expenses should be against the estate as taxed on an agent-client basis up until the grant of the legal aid certificate. For the sake of completeness, I can confirm that parties agreed that caution should be fixed in the sum of £150,000 and I have made the appropriate order.