



SHERIFF APPEAL COURT

[2024] SAC (Civ) 1

Sheriff Principal Catherine Dowdalls KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL CATHERINE DOWDALLS KC

in the appeal in the cause

S

Pursuer and Appellant

against

M

Defender and Respondent

**Pursuer and Appellant: Thompson Family Law Solicitors
Defender and Respondent: 1st Legal Limited**

5 January 2024

Introduction

[1] This action commenced in November 2020 and concerns the arrangements for the care of the child, J, who is three years old. The pursuer (the appellant in this appeal) seeks declarator that he is her father, orders for parental rights and responsibilities in relation to her and contact with her. The defender (the respondent in this appeal), who is the mother of J and suffers from a mild learning disability opposes the making of any orders relating to parental rights and responsibilities in favour of the appellant.

[2] On 7 September 2023, the sheriff refused the appellant's motion to appoint a curator ad litem to the respondent in terms of rule 33.16 of the Ordinary Cause Rules 1993 ("OCR") and assigned a diet of proof. This is an appeal against that decision.

[3] The present appeal proceeded under Chapter 8 of the Sheriff Appeal Court Rules 2021. The appeal has been considered on written submissions made on behalf of the appellant and the respondent.

The sheriff's judgment

[4] The sheriff has provided a detailed Note explaining the reasons for his decision, and for granting leave to appeal ex proprio motu.

[5] In summary, he explains that the appellant moved the court to appoint a curator ad litem to the respondent in terms of rule 33.16, on the basis that the respondent suffers from a "mental disorder" in terms of section 328(1)(c) of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act"). The sheriff acknowledged that the respondent suffered from a mild learning disability and therefore from a mental disorder in terms of section 328 of the 2003 Act.

[6] The sheriff was provided with psychiatric a report, dated 1 September 2023, which confirmed that the respondent has a mild learning disability. The psychiatrist also opined, on soul and conscience, that the respondent was able to instruct a solicitor and communicate her views and was able to understand the case. The sheriff notes that he has considerable disquiet about appointing a curator ad litem to the respondent, against her wishes, in circumstances where she appeared "perfectly capable of instructing a solicitor".

[7] The sheriff considered rule 33.16 as a whole, rather than focusing, as he was invited to do on behalf of the appellant, on what was described as the "mandatory nature" of

paragraph (2). He noted that rule 33.16(8) requires review at regular intervals of the defender's capacity to instruct a solicitor and that that would suggest that capacity to instruct was the only issue that fell to be reviewed; he noted that that was "completely at odds" with the suggestion that a person having capacity but suffering from a form of mental disorder requires to have a curator ad litem. The sheriff concluded that, seen in context (as is required by rule 33.1(2)), rule 33.16 is intended to apply where the question of capacity to instruct a solicitor arises. Otherwise, as he put it, "even the most minor mental disorder..... would require a curator", an interpretation [of rule 33.16(2)] which would be "absurd".

[8] Finally, the sheriff noted, despite not having been addressed on any ECHR point, that disqualifying a defender from conducting or instructing her own litigation because of a minor mental disorder would "almost certainly" be a breach of her human rights.

[9] The sheriff, ex proprio motu, granted leave to appeal, considering this matter worthy of further consideration by this court.

Appellant's submissions

[10] The appellant moved the court to allow the appeal, recall the interlocutor of 7 September 2023, remit to the sheriff directing that a curator ad litem be appointed and make no award of expenses to or by either party.

[11] The circumstances in which this appeal arises are not in dispute. The appellant submits that the sheriff had no discretion to refuse the motion for appointment of a curator ad litem in terms of rule 33.16, the terms of which are mandatory, and therefore erred in law.

[12] In response to the written submissions for the respondent, the appellant argues that "the objective purpose of rule 33.16 is not to protect the interest of a person with a mental disorder; rather, it is to protect the Court and the wider administration of justice". That

being so, it is for the court to satisfy itself, by way of the mandatory procedure (set out in rule 33.16) “of the problems of proceedings going forward”. The appellant maintains that the respondent attempts to persuade this court that rule 33.16 is discretionary and that the word “shall” in paragraph (1) in fact means “may”.

Respondent’s submissions

[13] Much of what is said by the respondent in her submissions is not relevant to the issue focused in this appeal. On the terms of rule 33.16, it is submitted that the rule relates to something that required to be done “at an earlier point in time”. The point is made that the period of notice mentioned in paragraph (2) ended over three years ago. Since then, the respondent has instructed solicitors and counsel, who are satisfied on the information they have that she has capacity to instruct. It is too late now, given the stage proceedings have reached, to argue that there has been a procedural irregularity.

[14] On whether the rule is mandatory or directive, the respondent submits that the purpose and scope of the rules or legislation must be considered (*Howard v Bodington* (1877) 2 PD 203; *In re X (A Child)* [2015] Fam 186). The objective purpose of rule 33.16, read in context, is to protect the interests of a person with a mental disorder by firstly establishing whether they have capacity to instruct a solicitor and, if not, by making provision for their interests to be appropriately represented. This is a rule specific to family law cases, recognising the importance and effect of the decisions that the court can be asked to make. In this case, the respondent has instructed solicitors for over three years; a psychiatrist has confirmed she has capacity to do so; assessment of the respondent (again), on the appointment of a curator would be unnecessarily invasive and distressing. Procedural rules

exist to assist the court in the exercise of its statutory duties; this appeal does nothing to assist the court in determining where the child's welfare lies.

Decision

[15] This appeal relates to the application of rule 33.16 in an action in which orders are sought in terms of section 11 of the Children (Scotland) Act 1995. Rule 33.16 is concerned with the appointment of curators ad litem to defenders and provides as follows:

- “33.16.** (1) This rule applies to a family action where it appears to the court that the defender has a mental disorder.
- (2) In an action to which this rule applies, the sheriff shall, after the expiry of the period for lodging a notice of intention to defend –
- (a) appoint a curator ad litem to the defender;
 - (b) make an order requiring the curator ad litem to lodge in process a report, based on medical evidence, stating whether or not, in the opinion of a suitably qualified medical practitioner, the defender is incapable of instructing a solicitor to represent the defender's interests.
- (3) ...
- (4) On lodging a report under paragraph (2)(b), the curator ad litem must intimate that this has been done to—
- (a) the pursuer; and
 - (b) the solicitor for the defender, if known.
- (5) Within 14 days after the report required under paragraph (2)(b) has been lodged, the curator ad litem must lodge in process one of the writs mentioned in paragraph (6).
- (6) The writs referred to in paragraph (5) are-
- (a) ...
 - (c) a minute adopting defences already lodged; and
 - (d) a minute stating that the curator ad litem does not intend to lodge defences.
- (7) Notwithstanding that he has lodged a minute stating that he does not intend to lodge defences, a curator ad litem may appear at any stage of the action to protect the interests of the defender.

(8) At such intervals as the curator ad litem considers reasonable having regard to the nature of the defender's mental disorder, the curator ad litem must review whether there appears to have been any change in the defender's capacity to instruct a solicitor, in order to ascertain whether it is appropriate for the appointment to continue.

(8A) If it appears to the curator ad litem that the defender may no longer be incapable, the curator ad litem must by motion seek the sheriff's permission to obtain an opinion on the matter from a suitably qualified medical practitioner.

(8B) If the motion under paragraph (8A) is granted, the curator ad litem must lodge in process a copy of the opinion as soon as possible.

(8C) Where the opinion concludes that the defender is not incapable of instructing a solicitor, the curator ad litem must seek discharge from appointment by minute.
..."

[16] Rule 33.1(2) provides that, unless the context otherwise requires, "incapable" [in Chapter 33] means incapable, by reason of mental disorder, of—

- (a) acting;
- (b) making decisions;
- (c) communicating decisions;
- (d) understanding decisions; or
- (e) retaining the memory of decisions, ...

and "mental disorder" has the meaning assigned in section 328 of the 2003 Act. The meaning of "mental disorder" in section 328 of the 2003 Act includes, at subsection (1)(c) "any ... learning disability".

[17] The appellant asserts that the sheriff erred by refusing to appoint a curator ad litem to the respondent in terms of rule 33.16, as she was suffering from a mental disorder in terms of section 328(1)(c) of the 2003 Act.

[18] It is not in dispute that the respondent has (and had at the time of the hearing on 7 September 2023) a mild learning disability. Such has been diagnosed and that diagnosis was confirmed following examination by a psychiatrist on 1 September 2023. The psychiatrist opined, on soul and conscience, that the respondent is "clearly able to instruct a solicitor and communicate her views and able to understand the case". The sheriff was

content, in the absence of any contrary view, to accept that opinion and diagnosis and thus that the respondent has a mental disorder as defined by section 328 of the 2003 Act. It is therefore clear that rule 33.16 is engaged.

[19] Rule 33.16 requires the appointment, after the expiry of the period for lodging a notice of intention to defend, of a curator ad litem and the making of an order requiring the curator ad litem to lodge a report, based on medical evidence, stating whether the defender is capable of instructing a solicitor to represent her interests. Once such a report has been lodged, the curator ad litem must take steps to enter the process or state that he does not intend to lodge defences. Rule 33.16(7) provides that, notwithstanding that the curator ad litem has declined, by way of a minute lodged in process, to lodge defences, he may appear at any stage of the action "to protect the interests of the defender". Provision is also made, in rule 33.16(8), (8A) and (8C) for review by the curator ad litem of the defender's incapability, and for him to seek discharge from the appointment where medical opinion concludes that the defender is not incapable of instructing a solicitor.

[20] It is apparent from the above that the purpose of rule 33.16 is not to require that, in every case where the defender suffers from a mental disorder, the case is conducted on the defender's behalf by a curator ad litem. The purpose of the rule is to identify, through the appointment of a curator ad litem who will obtain a medical report, whether the defender is capable of instructing a solicitor. The rule requires that the defender's capacity to instruct a solicitor is kept under review by the curator ad litem and that, in the event that the defender is not incapable of instructing a solicitor, to seek discharge of the appointment.

[21] The language of rule 33.16 does not set a time limit for the appointment of a curator ad litem, though references in the paragraphs (2) and (3) appear to anticipate the appointment being made at a relatively early stage and certainly prior to a diet of proof (see

reference in para (3) to “any adjustments and amendments”). Therefore, the appointment of a curator ad litem at the stage this action has reached would be competent. I do not therefore agree with the respondent’s submission that, as this was not done earlier, “the ship has well and truly sailed”.

[22] The central question in this appeal is whether rule 33.16 makes mandatory the appointment of a curator ad litem in every family action in which it appears to the court that the defender has a mental disorder. The appellant submits that, as the respondent suffers from a learning disability, which is a mental disorder in terms of section 328 of the 2003 Act, and as rule 33.16(2) provides that the sheriff **shall** appoint a curator ad litem to a defender in an action to which the rule applies, the sheriff had no discretion to refuse the appointment of a curator ad litem. On the face of it, that argument has much to commend it, provided one looks no further than the first paragraph of the rule. When, however, attention is paid to the rule in its entirety, that proposition becomes less persuasive. The purpose of the rule is twofold: firstly, as it apparent from paragraphs (7) and (8), it is to protect the interests of the defender; secondly it is to ensure that a defender who is not incapable of instructing a solicitor is permitted to do so and to conduct the litigation without the appointment of a curator ad litem (paras 8A – 8C). The rule therefore applies in cases where it appears to the court that the defender has a mental disorder, in which the court requires to ascertain whether the defender is capable of instructing a solicitor. Were the application of the rule to be otherwise, the courts, parties and their children would be faced with unnecessary delay and expense in every family case where it appeared that the defender suffered from a mental disorder, and defenders would be subjected to unacceptable and intrusive medical examination, regardless of medical evidence confirming their capacity to instruct a solicitor. Such an interpretation would produce absurd results, which cannot have been intended by

the drafters of the rules.

[23] In the present case, the sheriff was in possession of an opinion from an appropriately qualified medical practitioner, who had examined the respondent just six days before the 7 September hearing, confirming that she had capacity to instruct a solicitor, communicate her views and understand the case. In those circumstances, the sheriff was correct to take a purposive approach to the interpretation of rule 33.16 and refuse the motion for the appointment of a curator ad litem.

Disposal

[24] I shall refuse this appeal and make a finding of no expenses due to or by either party.