SHERIFF APPEAL COURT

[2017] SAC (Civ) 10
DBN-B457-16 ; DBN-B458-16 ; DBN-B459-16

Sheriff Principal M M Stephen QC
Sheriff Principal I R Abercrombie QC
Sheriff Principal M W Lewis

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in appeals under section 163 of the Children's Hearing (Scotland) Act 2011

by

M.B.

Appellant:

against

DOUGLAS HILL, LOCALITY REPORTER MANAGER

Respondent:

RE C.M, Z.M. and L.M.

M.B. (Party Appellant)
Flanagan; Solicitor for Reporter
Ms Mitchell; Solicitor for Father
Spowart: Safeguarder to Z.M. and L.M.

16 February 2017

[1] The appellant, M.B., is the mother of three children, C.M. (born 19 April 2001); Z.M. (born 2 June 2004) and L.M. (born 21 January 2006). G.M. is the father of all three children.

They are all subject to compulsory supervision orders (CSO) made under the Children's Hearings (Scotland) Act 2011 ("the 2011 Act"). Z.M. and L.M. live with their father and his partner in Dumbarton. C.M., who is 15, has resided at a Children's Unit since February 2016.

[2] On 19 July 2016 the children's hearing in Dumbarton reviewed the CSOs which had been made on 15 March 2016 in respect of all three children. All relevant persons including the appellant attended the hearing. Panel members spoke to the children to ascertain their views. The panel decision in respect of each child is Tab 1 of the relevant appeal print. The record of proceedings and reasons for the decision is at Tab 2.

C.M.

[3] In respect of the eldest child C.M. the hearing continued and varied the CSO which has effect until 18 July 2017. The hearing decided to review the CSO in three months' time (Oct 2016). The order included the requirement that C.M. reside at the Children's Unit; that he have a minimum of twice weekly unsupervised contact with his mother, however after any such contact he is required to return to the unit by 10pm. In common with his sisters the order included a measure that C.M. would have no contact with his maternal grandmother J.M.

[4] The hearing gives reasons for the decision in respect of contact and these may be seen on page 4 of Tab 2. The panel members had concerns about C.M. absconding from the unit but otherwise the contact put in place by the children's hearing reflected C.M.'s and the appellant's wishes. C.M. wanted to see more of his mother and the hearing decided to set a minimum level of contact of twice weekly but allowing C.M. the flexibility to visit his

mother more often. C.M. advised the panel that he wanted the option of seeing his father and Ms B., his father's partner, which was accepted but did not require any formal measures. Likewise contact with his two sisters would be managed informally in that context.

Z.M.

[5] Z.M. attended the Children's Hearing on 19 July 2016 and spoke to panel members. She told the hearing that she did not want any contact with her mother. She did not take part in the remainder of the hearing. The children's hearing continued the CSO dated 1 March 2016 with the condition that Z.M. reside with her father and his partner and with no contact with her mother or maternal grandmother. The reasons for the children's hearings decision on contact may be found on page 4 of their decision at Tab 2 of the appeal print. The full reasons are conveniently set out by the sheriff, now sheriff principal, in his stated case paragraph [5]. The Social Work Department could not carry out a full assessment of the appellant and her current circumstances. The appellant insisted that any assessment had to be conducted whilst the children were with her. The panel decided that no contact could safely happen until that parenting assessment had been carried out.

L.M.

[6] L.M., who is the youngest child, also attended the children's hearing and spoke with panel members. Thereafter L.M. was excused attendance at the remainder of the hearing. The decision of the hearing continuing the CSO may be found at Tab 1 of the appeal print with the record of proceedings and reasons at Tab 2. The continued measures attached to

the CSO are identical to those in respect of her elder sister and there was to be no contact with the appellant for the same reasons. However, it is noted that L.M. had expressed a wish to see her Mum and C.M. once a week but supervised by an adult. The panel decided that no contact could safely happen until the parenting assessment had been carried out.

Appeal to the Sheriff

[7] The mother appealed the decision of the children's hearing of 19 July 2016 in respect of all three children under section 154(1) of the Children's Hearing (Scotland) Act 2011. The appeals called before the sheriff on 31 August 2016. No evidence was led by or on behalf of the appellant who did however make submissions to the sheriff. The sheriff refused the appeals and confirmed the decision of the children's hearing in respect of all three children, having heard submissions from the appellant and from the safeguarder appointed to safeguard the interests of Z.M. and L.M. The sheriff considered the terms of section 159(2) of the Act and made an order that the appeals were frivolous for the reasons set out in each of the stated cases. This provision applies where the sheriff has confirmed a decision of the children's hearing, as here. If the sheriff is satisfied that an appeal is frivolous or vexatious then he may order that that person requires leave of a sheriff before making another appeal against a decision of a children's hearing in relation to the compulsory supervision order. That requirement applies for a period of twelve months. It is designed to stop or mitigate the detrimental effect which a frivolous appeal has on decision making for 'looked after' children by causing uncertainty, delay and disrupting further reviews of the supervision order.

[8] In terms of s. 156 of the 2011 it is for the sheriff to determine whether he is satisfied that the decision of the children's hearing is justified. In determining the appeal the sheriff is not reconsidering the evidence and information which was available to the children's hearing afresh. (*C v Miller 2003 SLT 1379*). The test is whether the decision reached by the hearing is one which could not, upon any reasonable view, be regarded as being justified in all of the circumstances of the case. The sheriff had little difficulty in concluding that the decisions made by the children's hearing on 19 July 2016 in respect of all three children were justified and that the hearing had given proper consideration to all relevant factors and circumstances.

[9] It is important to consider the powers of the sheriff in an appeal against the decision of the children's hearing in terms of sections 154 and 156 of the 2011 Act. If the sheriff is satisfied that the decision is justified the sheriff must confirm the decision. There is no further substantive decision the sheriff can take unless the circumstances of the child or children have changed. There is no suggestion that the circumstances of the children or any of the children have changed here. The safeguarder who appeared at the appeal before the sheriff confirmed that the views of the girls remained as stated in the decision of the children's hearing.

[10] Even if the decision was not justified the sheriff has limited scope to interfere and may require the reporter to arrange a further children's hearing. Of course, as we will come to, it is the right of the child or any relevant person to require a review of the CSO after a period of three months has elapsed from the date of the decision. The decision relating to C.M. was due to be reviewed in any event on 19 October last year.

Appeal in terms of s.163 of the 2011 Act to the Sheriff Appeal Court

[11] An appeal to this court from a determination by the sheriff is limited to a point of law and any procedural irregularity. (s.163(9)). This is not a court of review. It is not the function of this court (nor of the sheriff) to reconsider the circumstances of these children and come to our own conclusion as to their welfare. An appeal is narrowly focussed on whether there has been an error of law or procedural irregularity.

Appeals to this court in respect of C.M., Z.M. and L.M.

[12] The appellant presented her appeal in effect by making a statement and declaration of her rights as a good mother to the children. She had wrongly been deprived of her children by a spiteful and corrupt social work department supported by the reporter and children's hearing. She assured us that the children would demonstrate their affection for her if they had the opportunity to do so and that could happen if they were allowed to give evidence. In essence, the appellant repeated her submission to the sheriff.

[13] The appellant did not argue any point of law save a brief reference to the continuation of the CSO not being proportionate and therefore contrary to her and the children's Article 8 rights.

[14] Mr Flanagan representing the reporter referred to his written submissions. He confirmed that C.M. had not appealed the decision of the children's hearing of 19 July 2016. In respect of all three children Question 1 should be answered in the affirmative and Question 2 in the negative. All appeals should be refused and each case remitted to the sheriff at Dumbarton to proceed as accords in terms of section 163(10) of the 2011 Act.

[15] Ms Mitchell for the children's father opposed the appeals and invited us to refuse them.

[16] Ms Spowart, who is the safeguarder appointed to Z.M. and L.M., confirmed that there had been no relevant change or alteration to the girls' views or circumstances. The decision of the hearing was justified and promoted their welfare.

Decision

[17] The appellant appeals by stated case the sheriff's decision to refuse her appeal on 31 August 2016 against the decision of the children's hearing of 19 July 2016. The stated cases are in identical form although the issues and circumstances in respect of C.M. differ from these of his sisters. We propose to deal with all stated cases in one composite decision.

[18] The applications for a stated case lodged by the appellant which seek to appeal the sheriff's decision of 31 August 2016 contain no grounds of appeal which point to an error of law or relate to a procedural irregularity. Rather, the note of appeal focusses on the sheriff's finding that the appeals before him were frivolous and vexatious. Of course, these terms apply to the appeal itself not to the appellant's wish to see her children. "Frivolous" and "vexatious", of course, feature in section 159(2) of the 2011 Act. The sheriff made an ancillary order precluding further appeal for a period of 12 months without leave of the sheriff. He did so primarily because the grounds of appeal before him did not disclose any point of law and did not suggest that there had been any procedural irregularity. We deal with that in more detail in paragraphs [23]-[26] below.

[19] In her presentation to us and in the application for a stated case the appellant advances no point of law. The only point which approaches an issue of law is the

appellant's reference to her and the children's Article 8 rights. Article 8 of the ECHR provides that everyone is entitled to respect for their private and family life. It is designed to protect and safeguard against arbitrary interference in family relationships. The making of a compulsory supervision order with a direction as to contact or indeed no contact constitutes an interference by the state in both the appellant's and the children's right to respect for their family life. The children's hearing require to act in accordance with the European Convention on Human Rights and the domestic legislation namely, the Children's Hearing (Scotland) Act 2011. In terms of section 25 of the Act the children's hearing when coming to a decision about a child must have regard to the paramount consideration being "*the need to safeguard and promote the welfare of the child throughout the child's childhood*". There has been no contact between the appellant and the younger girls since June 2013 when the children's hearing made the decision that the stress of contact would be detrimental to their overall wellbeing. The documentary evidence available to the children's hearing and to the court indicates that there has been a lengthy and troubling background to the lives of these children which have required successively child protection orders and supervision orders. The supervision order has been made in accordance with the statute and therefore the question in these cases is whether the interference with Article 8 rights was justified as necessary for the protection of the health and wellbeing of the children. Had the Article 8 point been argued before the sheriff, the sheriff would have had to assess and determine the proportionality of the directions as to residence and contact and to come to the view that it was disproportionate. The sheriff was not asked to do that. Instead, the sheriff addressed the test as required under domestic law and applied the test in *W. v Shaffer* 2001 SLT (Sh Ct)

86 concluding as he did, that the decision of the hearing was justified in all the circumstances of the cases before him.

[20] Although we were not specifically asked by the appellant to consider the proportionality of the continuation of the CSO, we nonetheless recognise that it requires to be justified by the principles in Article 8(2) namely, the making or continuation of the order must be firstly, in accordance with the law, secondly, in pursuit of a legitimate aim and thirdly, necessary in a democratic society. The decision of the children's hearing follows the requirements of domestic legislation namely, the 2011 Act. Its purpose is to safeguard and promote the welfare of the child throughout the child's childhood (section 25 of the 2011 Act). The third requirement of necessity requires the hearing to give relevant and sufficient reasons for the decision to prevent contact between the appellant and the girls. Here the reasons given relate to the history of parenting; the appellant's refusal to countenance a parenting assessment; the wish of Z.M. not to have contact and in respect of L.M. the balancing of her wishes with where her best interests and welfare lie. A parent cannot pray in aid his or her Article 8 rights if they undermine or are contrary to the fundamental and paramount consideration of safeguarding and promoting the welfare of the child concerned. When compulsory measures are required for the welfare of children the hearing requires to strike a fair balance between the best interests of the child and the interests of parents. (*Elsholz v Germany (2002) 34 EHHR 58*). The hearing gave proper consideration to the whole circumstances of the family. In so far as the Article 8 argument is advanced we consider there is no merit in that argument.

[21] The sheriff did not err in holding that the decision of the children's hearing to continue the measure in the CSO that Z.M. had no contact with the appellant was justified

and likewise in the case of L.M. Accordingly, we answer question 1 in the affirmative in respect of the sisters.

[22] In C.M.'s case the question first posed in the stated case is in the following terms "*was I correct to hold that the decision of the children's hearing not to stipulate a minimum period of contact between C and his sisters was justified?*" We answer that in the affirmative also. The children's hearing specifically considered sibling contact. C wished to have contact with the appellant and this was allowed. C.M. has unsupervised contact with his mother on a minimum of two occasions a week. C.M. also wanted to see his father and Ms B. and his siblings, Z and L. The order allowed this to be managed informally which is the most natural approach to contact. Both C.M.'s and the appellant's views have been given respect and weight. In any event C.M., himself, does not challenge the decision of the children's hearing in respect of contact. The appellant has failed to demonstrate what her interest might be in continuing with her appeal in respect of C.M. The hearing acceded to both C.M.'s and the appellant's wishes in respect of contact with each other and with C.M.'s wishes as to contact with his father and sisters. The appellant's persistence in this appeal arguably runs counter to C.M.'s expressed views and wishes which are matters which both the hearing and the court require to have regard to given his age. It is clear that the sheriff had no difficulty in concluding that the decision of the hearing in relation to C.M.'s contact was not only justified but was also a decision which did not affect the appellant directly. The appellant has failed to demonstrate what her interest might be in continuing with an appeal in respect of C.M.

[23] Question 2 in each of the stated cases is in the following terms "*Did I err in holding that the appeal was frivolous and by making an order in terms of section 159(2) of the Children's*

Hearing (Scotland) Act 2011?" In the appeals to the sheriff and before this court the appellant has failed to advance any point of law or procedural irregularity to suggest that the decision of the children's hearing in any of these cases could not, upon any reasonable view, be regarded as being justified in all the circumstances of the case. The question remains whether the sheriff was entitled to make the ancillary order in terms of section 159 to which we have referred.

[24] Sadly, the appellant's persistence in appealing when there is no arguable point of law is both counterproductive and futile. The children's hearing system is based upon the need to safeguard and promote the welfare of children. It is the children's hearing rather than the courts where practical decisions are made for children who are subject to supervision. The aim of promoting the welfare of children may be achieved by making supervision orders when required. The system operates with a series of reviews which the appellant and, indeed, any relevant person or any of the children can instigate by virtue of their right to do so in terms of section 132 of the 2011 Act. Continuing with an appeal which has no merit merely defeats or delays the purpose of the hearing system which is to make decisions which safeguard and promote the welfare of children or in other words, which are in the children's interests. Ultimately, it is futile and detrimental to the interests of both the appellant and the children. We refer to *JM v Taylor [2014] CSIH 62*. It was noted by the court that by appealing, without proper grounds, the sheriff's decision rather than acquiescing in the outcome of the hearing, then seeking a further review of the supervision order as soon as it was competent to do so, the appellant is delaying the possibility of obtaining either the outcome she wishes or any alternative constructive outcome. The appeals to this court are entirely without merit and therefore futile.

[25] The sheriff has provided reasons for his decision. We can summarise the reasons. In C.M.'s case the sheriff concluded that the appellant had no direct interest in the subject matter of the appeal which was contact with his sisters. C.M. himself could have challenged the decision but did not do so. He is now 15. It is not difficult to understand why he didn't challenge the decision as the contact stipulated reflected his wishes. Essentially the sheriff had to decide whether the decision of the children's hearing "*to not put a minimum brother/sister contact time in*" was justified (paragraph [31] of the stated case). It is clear that the sheriff had no difficulty in concluding that it was justified and that the decision of the hearing in relation to C.M.'s contact was a decision which did not affect the appellant leading directly to the conclusion that the appeal was frivolous. We agree with the sheriff's reasoning. An appeal about a matter which does not affect the appellant and has no basis in law is frivolous. In Z.M.'s case there was no issue of law or procedural irregularity identified by the appellant. The hearing's decision reflected Z.M.'s welfare and wishes as to contact. She was 12 at the time of the hearing and capable of forming and articulating her own views to the panel. (See paragraph [35] of the sheriff principal's stated case.) In the appeal to the sheriff the appellant did not address the important matter of Z.M.'s views on contact. We accordingly agree that the appeal in respect of Z.M. was frivolous. In L.M.'s case again no issue of law, far less an error of law, was identified. It was not suggested that there was any procedural irregularity. The appellant failed to address the main impediment to contact with L.M. namely, her own lack of engagement with social work and her failure to co-operate constructively with an assessment of her circumstances. In these circumstances the sheriff was entitled to regard the appeal as frivolous.

[26] The provision restricting further appeals without leave has the purpose of allowing the children's hearing to discharge their duties in terms of the Act. The children's hearing must act in accordance with the principles and the paramount consideration to which we have already referred. The effect of the sheriff's order is not to prevent further appeal but to require that any such appeal has the leave of the court. A meritorious appeal will be granted leave; a frivolous appeal or one without a basis in law will not. The sheriff did not err in concluding that the appeals were frivolous and did not exercise his discretion unreasonably in making the order he did. Accordingly, we propose to answer this question in the negative.