

SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES & GALLOWAY AT
HAMILTON

[2018] SC HAM 3

Case No. B808/17

JUDGMENT OF SHERIFF DANIEL KELLY QC

in the cause

ESTHER BROOKE

Appellant

against

REPORTER TO THE CHILDREN'S PANEL

Respondent

Appellant: Dobbin, Lee Doyle, Solicitors, Glasgow;
Respondent: Gallagher, Scottish Children's Reporter Administration.

Hamilton Sheriff Court

12 January 2018

Appeal

[1] This appeal against a relevant person determination involving the appellant and her grandchild revolves around the question of significant involvement in the upbringing of a very young child.

Determination

[2] A pre-hearing panel requires to deem an individual to be a relevant person if it considers that the individual has (or has recently had) a significant involvement in the upbringing of the child: *Children's Hearings (Scotland) Act 2011, section 81(3)*.

[3] On 4 December 2017 a pre-hearing panel determined that the appellant was not a relevant person in relation to her grandchild Josephine March. (The names in this Judgment have been changed.) The reason given for the decision was that:

“The panel decided that Esther Brooke clearly did not meet the test of significant involvement in Josephine’s upbringing.”

[4] On 11 December 2017 an appeal was marked against this determination under section 160(1) of the 2011 Act.

Factual background

[5] With the appeal having to be concluded on the day that it was heard, the third day after the day on which it was made, both parties agreed that there would be no need to hear evidence. The facts can be summarised as follows:

[a] Josephine March was born six weeks prematurely on 15 September 2017. The appellant, her maternal grandmother, was present at her birth.

[b] Josephine remained in hospital for six weeks. Her mother, Hannah Brooke, went to the hospital during the week to attend to Josephine while the appellant looked after Hannah’s other children. At the weekends the appellant went to the hospital while Ms Brooke stayed with her older children.

[c] On Josephine’s discharge from hospital the appellant, who lives across the road from her daughter, visited daily to help with Josephine’s feeding, changing and comfort needs.

[d] Josephine did not require any medical intervention. The only matter of note was that the appellant observed that Josephine was not taking her milk as she should. After raising this with the health visitor the milk was changed and the situation was rectified.

[e] On 22 November 2017 the appellant was present when the child protection order was enforced.

[f] On 24 November 2017 the appellant attended at the centre where the second working day hearing was to be held. She was not allowed admittance to the meeting though remained there while it took place.

[g] Since Josephine was taken into care the appellant had been contacting the social work department to find out what was happening and had sought legal advice and support to enable her to participate in the decision making process.

Submissions

[6] The solicitor for the appellant submitted that the panel had not provided adequate written reasons for its decision. Both agents had been at the panel and she was able to amplify that the Chair had explained orally that there had not been a period of significant decision making which could be taken into account. She argued that the panel had misapplied the legal test and had erred in its determination.

[7] While not disputing that the reasons provided were inadequate, the Reporter maintained that the appellant did not meet the test. Referring to *Norrie, Children's Hearings in Scotland*, paras. 5-12 to 5-13, the Reporter relied upon the passage that "significant involvement in the upbringing of the child" required more than significant contact with the child and implied that the individual played an important role in the child's upbringing. He referred to the commentary that it required that the individual be involved in upbringing decisions, such as those relating to schooling, medical treatment, religious observances and the like. The Reporter also relied upon *MT v Gerry* 2015 SC 359 at para [17] to the effect that a significant involvement in the upbringing of the child – as opposed to a significant involvement in the child's day-to-day care – was what the test required. The

Reporter submitted that while the appellant helped with the care of the child, she was not involved in her upbringing.

Decision

[8] In considering whether the determination made was justified, there was little disagreement that the appellant had a significant involvement in Josephine's life.

Parties were principally in dispute as to whether this was in relation to her upbringing as opposed simply to her care. In particular, what does significant involvement in the upbringing of a three month old child entail?

[9] The decision of the panel of 4 December 2017 was patently inadequate as regards its provision of reasons, none having been provided, but the question remains as to whether the determination was justified. The oral reasoning expressed indicated that the panel concluded that there had been no period in which the opportunity for significant involvement in the child's upbringing might be demonstrated. The panel's approach is in keeping with the dicta in *MT v Gerry* and in *Children's Hearings in Scotland*. In *MT v Gerry*, the two children were older, being aged 10 and 12. Decided in the context of foster carers, the mere fact of the existence of a foster care arrangement for almost 18 months was found insufficient to establish a relationship involving a significant involvement in the children's upbringing without further enquiry. However, had there been fuller information a different conclusion might have been warranted. Moreover, while Norrie in *Children's Hearings in Scotland* states that involvement in upbringing decisions is required, he adds that panels ought not to be too strict in excluding persons who have a genuine involvement in the child's life. If the test is to be construed in the context of the child concerned, the context here is that of the grandmother of a three months old child

having been born six weeks prematurely and having only recently come out of hospital.

[10] As Josephine was so young there had been no significant decisions, such as those relating to schooling, medical treatment or religious observances, which had been required to be made in her life. It is conceivable that the parliamentary intention was that an individual could not be a relevant person until a period had elapsed during which such decisions had arisen into which an input could be made. However, that would mean that there could be no relevant person other than those who were relevant persons as of right for a very young child in the absence of significant decisions being required.

[11] I am satisfied that the appellant's involvement was in Josephine's upbringing, insofar as that would be understood in relation to a three month old premature child. The appellant was very much involved in bringing up a child of that age. Certainly, that mainly concerned providing care to the child and safeguarding her health. It was the appellant who was instrumental in relation to the change of milk. She had also done what she could to be involved in decision making in that she attended for the second working day hearing but was excluded from it. That was the only occasion when a substantive decision was to be made regarding the child into which the family could have had some input. Thereafter, she had been contacting the social work department to find out what was happening. The involvement in the child's upbringing would have to be of such significance as to warrant the procedural protection of constituting the appellant as a party to proceedings, but that is consistent with her being described as the second most significant person to the child, the father visiting less than she did.

[12] Though not cited, such an approach is in keeping with the one taken in *DH v Scottish Children's Reporter*, Haddington Sheriff Court, 25 April 2014, though admittedly that decision preceded the one in *MT v Gerry*.

[13] The determination therefore falls to be quashed in terms of section 160(4) of the 2011 Act and an order made deeming the appellant to be a relevant person in relation to the child.