SHERIFF APPEAL COURT

[2022] SAC (Civ) 22

Sheriff Principal M W Lewis
Appeal Sheriff N McFadyen
Appeal Sheriff P Hughes

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M W LEWIS

in the Petition of

HIGHLAND COUNCIL

Petitioner and Respondent

for

A Permanence Order re the child A

Appellant: Mr Allen; Dunlop Allen & Co
Respondent: Ms Davey; Highland Council

12 July 2022

Introduction

[1] At a preliminary hearing on 8 April 2022 the sheriff granted a permanence order in respect of the child A, who is now 12 years of age and has global developmental delay. The order includes the mandatory provision and various ancillary provisions. As part of the order the sheriff specified that contact between A and his mother (the appellant) would be permitted, albeit, with the exception of annual indirect contact, to be at the discretion of Highland Council.

[2] The appellant was not present or represented at that hearing and no Form of response had been timeously lodged.

[3] In this appeal, the appellant focuses on the lack of appropriate remedies available under the Adoption and Children (Scotland) Act 2007 and the Act of Sederunt (Sheriff Court Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009 in respect of an order which she equiparated to a decree in absence.

Background

[4] A has significant generalised developmental delay. He is the eldest of four siblings. The children are all in foster care.

[5] Highland Council ("HC") lodged an application for a permanence order under section 80 of the 2007 Act in respect of A. The application included craves for ancillary provisions vesting in HC various responsibilities and rights: extinguishing such rights and responsibilities from the birth parents in so far as they were vested in them immediately before the making of the order; specifying annual indirect contact between A and his birth parents and such additional contact as may be determined by HC to be appropriate and in the best interests of A; and terminating the Compulsory Supervision Order. The application did not contain a provision for A to be adopted.

[6] By interlocutor of 25 January 2022 the sheriff appointed SL as curatrix *ad litem*, assigned a preliminary hearing to take place on 8 April 2022 at 9.45 hours within Inverness Sheriff Court, and ordained HC to intimate the diet by serving a copy of the application (Form 11A) along with Form 12 on the birth parents of A. These documents were served on the appellant on 23 February 2022 by sheriff officers.

[7] The last day for lodging opposition to the application was 16 March 2022. The appellant took no steps to oppose the granting of the order until shortly after midnight on 23 March when she sent a copy of the application electronically to her solicitor. Later that morning she gave instructions by way of a telephone call to her solicitor to oppose the application.

[8] The papers were passed to a trainee solicitor. The trainee prepared a Form of response (Form 15) and endeavoured to lodge it by way of email dated 25 March and timed 14.24 hours. Form 15 was not intimated to HC. By email of 25 March timed 14.40 hours the clerk rejected the Form advising that electronic lodgings were no longer acceptable as they did not comply with the Guidance issued by the Sheriff Principal of Grampian, Highland & Islands and that as the period of notice had expired a motion to receive the application though late would be required. No such motion was lodged. The date, time and place of the preliminary hearing (which was to be held remotely by video conferencing) were not entered in the firm's court diary.

[9] At 9.52 hours on 8 April the appellant contacted her solicitor by telephone and advised that she would not be able to attend the hearing as she did not have sufficient funds to travel to Inverness (she apparently understood that the hearing was in person). The solicitor realised the magnitude of the problem and immediately attempted to contact the sheriff clerk by telephone but was confronted with a recorded message to the effect that the court was shut. He could not get beyond the switchboard. He attempted to contact the solicitor representing HC but she did not answer her phone as she was attending the preliminary hearing.

[10] The hearing took place by way of Webex video conferencing. In his note the sheriff explained that although the solicitor for HC was present "No one else attended and, so far as

I can recall, there was nothing to indicate that there was an intention on the part of any party to oppose the application." Having been addressed by the solicitor for HC and having regard to the accompanying reports the sheriff granted the order concluding that "in the absence of opposition it was in the best interest of [A] for the order sought to be granted".

[11] On discovering that the order had been granted, the solicitor representing the appellant sent an email to the clerk of court requesting that the sheriff be invited to recall the application. The sheriff has no clear recollection of this. He did not recall the application. He was engaged in other substantive business for the rest of the working day.

Submissions

[12] The solicitor for the appellant submitted that the order is the equivalent of a decree in absence. In contrast to most other forms of civil litigation there is no provision in the 2009 rules for a party to apply or to be reponed by the sheriff. Had Form 15 been lodged timeously and had the appellant been represented at the preliminary hearing, decree could not have been granted (rule 35(1)(b)) as the proceedings would have to be treated as opposed and the matter would proceed to proof. The appellant has learning difficulties. Despite these difficulties she has fully and effectively participated in prior hearings relating to the care of A and her other children and she actively participates in the contact sessions. As a consequence of the omissions and failures of the solicitor and the lack of provision in the rules for reponing, a clear injustice has resulted which is not the making of the appellant. She is being denied the opportunity to present her position.

[13] The only remedy is an appeal under section 110 of the Courts Reform (Scotland) Act 2014 which ought to be interpreted to include a procedural irregularity on the part of the

instructed solicitor. The appellant cannot apply for revocation under section 98 and variation under section 92 as there has been no material change in circumstances.

[14] The appellant has a right to a fair hearing (article 6 of the ECHR). The order has resulted in interference with her right to respect for private and family life (article 8). The appellant is vehemently opposed to the granting of the order and has expressed her views at previous children's hearings. She has what she maintains are reasonable grounds for opposition, although these were not elaborated on. Despite wishing to contest the order, the appellant has, in any event, an *esto* position which is to challenge the contact arrangements which she regards as unduly restrictive. The granting of the order in absence has resulted in a violation of her article 6 right: she has been precluded from participating in a process in which she wished to oppose the granting of the order and had a reasonable expectation of being able to do so (*MB* v *Principal Reporter* 2021 S.L.T. 383).

[15] In response, the solicitor for HC submitted that an appeal to this court is a remedy not available to the appellant under the 2007 Act (*Aberdeen City Council* v *X* [2011] 10 WLUK 776) or in terms of section 110 of the 2014 Act (Macphail, Sheriff Court Practice, 4th Edition, para 18.02). She cautioned against innovation.

[16] The current appeal is unnecessary because the appellant could make application to the court in terms of section 98 of the 2007 Act for revocation of the order (*R* v *Angus Council* [2010] 11 WLUK 281) or an application in terms of section 92 for variation of the ancillary provision in respect of contact. The appellant does not need to demonstrate a material change in circumstances: the provisions are sufficiently wide to embrace the situation which has arisen here.

[17] The 2007 Act is ECHR-compliant. The procedure under the rules is fair. The appellant was given ample time to lodge a Form of response: she could have sought relief

under rule 4 in respect of late lodging; she could have attended the preliminary hearing; she could have exercised her rights under sections 92 and 98. The process also has to be fair to the child. A has, despite his difficulties, completed mainstream primary education and is about to start secondary education. We were provided with information about the plans to relocate A to join two of his siblings subject to the grant of permissive orders under the 2007 Act. A requires stability – and he has that.

Decision

[18] The first issue for determination verges on being a matter of competency, although it was not presented as such. The respondent submitted that the appellant does not have a right of appeal under the 2007 Act against an order granted in absence. We disagree with the generality of that proposition. Rule 7 provides that an appeal to the Sheriff Appeal Court "against an order of the sheriff under these rules" is to be made in accordance with Chapter 6 of the Act of Sederunt (Sheriff Appeal Court Rules) 2015. Given the timing of the application and the appeal, it is the Act of Sederunt (Sheriff Appeal Court Rules) 2021 which apply. Nothing turns on this. An appeal may be taken without the need for permission against a decision of the sheriff constituting final judgment in civil proceedings (section 110 of the 2014 Act). The order was made under the 2009 rules and is a final judgment.

[19] We do not consider the decision in *Aberdeen City Council* v *X* [2011] 10 WLUK 776 is authority for the proposition on behalf of HC that an appeal cannot be taken against a decree in absence. The facts are not entirely dissimilar to the situation in the present appeal; the parties repeated failed to comply with the rules and orders of court. However motions were eventually made on behalf of the parties to allow Forms 15 to be lodged late. The sheriff granted the motions. On appeal the Sheriff Principal concluded that the sheriff erred

in the exercise of his discretion, noting that if they wished to oppose the applications, each appellant

> "ought to have lodged a separate Form of response in respect of each child (making four in all), if not by 15 April 2011, certainly by 19 May 2011. This they did not do, and no reason, let alone any satisfactory reason, was advanced to explain this failure. And even when they had the opportunity following the hearing on 8 June 2011 to lodge forms of response, they still failed to do so and it was only on 22 June 2011, after the sheriff had been invited to grant the applications and had indicated that he was inclined to do so, that two (rather than the required four) forms of response were produced, both of them incomplete."

[20] In the present appeal there is no challenge to the exercise of the sheriff's judicial discretion. There was no motion before him to allow late lodging. Rule 35 governs the conduct of the preliminary hearing. If no Form of response is lodged under rule 34 the sheriff must "dispose of the case or make such order as he considers appropriate." If the sheriff is not satisfied that the facts stated in the petition are supported by the documents lodged with it or by the reports, he may order the production of further documents and make such other order as he considers appropriate for the expeditious progress of the case. The conduct of the hearing is set out in paragraph [10] above. The sheriff considered that the facts in the reports justified the making of the application. There was no reason for him to do anything other than grant the order.

[21] Turning now to the grounds of appeal, the note of appeal does not identify any error of law on the part of the sheriff. As the submissions developed the solicitor for the appellant struggled with that issue, eventually suggesting that the decision is flawed because it was made in ignorance of the unsuccessful attempts to enter appearance. We do not find that part of the submission to be persuasive. In reaching that conclusion we have considered carefully the background circumstances in light of the rules.

[22] As mentioned in paragraph [5] above, the application did not contain a provision for A to be adopted. Rule 33(1)(b) applies in these circumstances and provides that the applicant must send a service copy of the petition in Form 11A along with a notice of intimation (Form 12) to any person who has parental responsibilities or rights in respect of the child. The appellant falls within that category. A service copy of Form 11A was served on the appellant along with Form 12 on 23 February. Form 12 gives notice of the making of the application and sets out what steps a party who wishes to oppose the application must take. It also give notice of the date, time and place of the preliminary hearing. The Form 12 which was served on the appellant contained all relevant information.

[23] Any person who has received intimation of an application for a permanence order and who intends to oppose that application must lodge a Form of response in Form 15 not later than 21 days after the date of intimation of the application (rule 34(1)). The Form 12 served on the appellant narrates "IF YOU WISH to oppose the application you must lodge a Form of response in Form 15 before the expiry of the period of notice specified therein. A copy of the Form is attached." The last day for lodging a Form of response was 16 March. There is no suggestion in this appeal that the Forms are deficient in any respect.

[24] The purpose of Form 15 is to provide an opportunity to a party, who is opposed to the granting of such an application, to give a brief statement of the reasons for the opposition. The appellant instructed her solicitor to oppose the application one month after service was effected and seven days after the expiry of the period of notice. The reason for that delay is attributed to her learning disabilities and problems with literacy. Form 15 was completed quickly.

[25] The circumstances relative to the attempt to lodge Form 15 are set out in paragraph [8] above. The Guidance for Grampian, Highland & Islands to which reference

was made in the email exchange was issued by Sheriff Principal Pyle on 14 May 2021. It provides that since electronic documents in adoption proceedings cannot be retained and sealed and with the easing of some restrictions imposed through Covid it is appropriate to revisit the guidance in relation to the electronic submission of documents. He directed that "All original petitions, birth/marriage certificates, local authority reports and any other documents lodged electronically must now be submitted in hard copy Form …". Similar guidance applies across the other Sheriffdoms. Nothing was made of this during the appeal.

[26] The failure to lodge Form 15 timeously is an inconvenience for the Court and also the other party (HC did not have sight of Form 15 until the appeal Appendix was lodged, despite the requirement to serve a copy on the applicant: rule 34(2)) but is not necessarily fatal. Rule 4(2) provides that the sheriff may relieve a party from the consequences of failure to comply with a provision of the rules which is shown to be due to a mistake, oversight or other excusable cause, on such conditions as he thinks fit. Despite the admonition from the clerk of court on 25 March, the solicitor did not lodge a motion seeking relief and requesting that the Form of response be received although late. Had such a motion been lodged, the sheriff may well have granted it having regard to the appellant's known learning difficulties and the attempt to lodge electronically.

[27] Although the solicitor for the appellant candidly shouldered responsibility for the omissions, these do not amount to a procedural irregularity on the part of the sheriff. The position is readily distinguishable from that in *MB* v *Principal Reporter* 2021 SLT 383, an authority relied on by the appellant. In that case a "bespoke procedure" had been arranged whereby the reporter had undertaken to relay the petitioner's submissions to the sheriff, but for reasons that were unclear the sheriff had not been aware of such submissions. Consequently Lady Wise found that the court had failed to allow the petitioner adequate

participation. Here in contrast the failure to participate is due entirely to omissions on the part of both the appellant and her agents. The sheriff cannot be criticised for failing to take into account information which had not been placed before him. This ground of appeal has no merit.

[28] However that does not completely close the door on other issues raised by the appellant. Quite separately the 2007 Act makes provision for the modification of some orders without the need to involve the Sheriff Appeal Court. Examples of that can be found in section 92 (variation of ancillary provisions in a permanence order) and section 98 (revocation of such an order).

[29] If the appellant was solely focused on achieving an increase in contact or an alteration to the operation of contact, section 92 facilitates the lodging of an application to the court for that very purpose. We were advised that the appellant does indeed wish to challenge the present contact arrangements despite assurances given by HC as to the operation of contact (in respect of which direct contact is essentially at the discretion of HC).

[30] However the appellant seeks to challenge the granting of the order, not simply the ancillary provision relative to contact. A powerful submission was made on behalf of HC on the interpretation and practical application of section 98 to a permanence order granted in absence. Section 98 provides -

> (1) The appropriate court may, on an application by a person mentioned in subsection (2), revoke a permanence order if satisfied that it is appropriate to do so in all the circumstances of the case, including, in particular—
>
> (a) a material change in the circumstances directly relating to any of the order's provisions,

(b) any wish by the parent or guardian of the child in respect of whom the order was made to have reinstated any parental responsibilities or parental rights vested in another person by virtue of the order.

It is broad in its terms. It is a discrete process with specific criteria which have nothing whatsoever to with a failure to comply with rules. The purpose of this section is to enable certain factors to be reviewed leading to possible revocation. A material change in circumstances is not an absolute necessity for the making of such an application but it is a factor. The wishes of the parents are not an absolute necessity but are another factor. The only outcomes of an application under section 98 are revocation of the permanence order or refusal of revocation (variation being reserved to section 92 applications). Section 98 procedure is distinct from, not a replacement for, reponing or an appeal, both of which have different procedures, criteria and outcomes. The appellant has chosen to appeal under section 110 rather than seek revocation under section 98. We find that such an appeal is competent but for the reasons set out above it cannot succeed in the instant case. It is therefore unnecessary for us to rule on whether section 98 is apposite to addressing the mischief caused in the present case.

[31] Moving on to the matter of reponing, such a facility is not afforded to parties under the 2009 rules. Reponing under the Ordinary Cause Rules (chapter 8) is a means by which a party may seek to have a decree in absence recalled. The party seeking to be reponed has to set out in a Note the proposed defence and the reasons for the failure to enter appearance and the remedy is a discretionary one where the sheriff will require to be satisfied that the defence is statable (Macphail, 4th Edition, 7.32-34).

[32] The appellant's solicitor has approached this appeal to an extent as if he was promoting a reponing note. We have been provided with reasons for the failure. The

grounds of opposition as they appear on Form 15 are brief – "The respondent is able to look after the child and therefore the legal test for dispensing with the respondent's consent is not met. Esto, the test if met it is in the best interests of the child to have contact with the respondent." The primary ground of opposition is wrong in law. The threshold test is set out in section 84(5)(c) of the 2007 Act. It is whether (i) there is no person who has the right mentioned in subsection (1)(a) of section 2 of the 1995 Act to have the child living with the person or otherwise to regulate the child's residence, or (ii) where there is such a person, the child's residence with the person is, or is likely to be, seriously detrimental to the welfare of the child. As the secondary ground flows from the primary ground, it too is flawed.

[33] That said, we do not consider the unavailability of reponing creates an injustice for the appellant and others in her situation, nor do we consider that to offend the appellant's article 6 right. The appellant and those advising her had ample opportunity to enter appearance or to seek relief under rule 4(2). The rules make provision for appeals and alternative remedies. There is a recognised need in this process to avoid unnecessary delay in making decisions about future care arrangements of children. The position in respect of accommodation of A and his siblings is at a particularly sensitive stage. To add yet another layer of superfluous intervention will result in an avoidable extended process and generate uncertainty for the child and potentially his siblings. We were not provided with any outline of a basis to the grant of permanence, in contrast to practice in reponing and we struggle to see on what basis it can be said that the grant of permanence was inappropriate on the facts. It seems to us that any desire on the part of the appellant for greater specification or clarity as to direct contact arrangements can properly be pursued by means of application for variation of an ancillary provision under section 92, which, unlike section 98, contains no reference (even illustrative) to change in circumstances.

[34] For the foregoing reasons the appeal is refused.