SHERIFF APPEAL COURT

[2024] SAC (Civ) 14
KIL-AD7-23

Sheriff Principal A Y Anwar
Sheriff Principal S F Murphy KC
Sheriff Principal C Dowdalls KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL A Y ANWAR

in application for remit to the Court of Session

in terms of section 112(2) of the Courts (Reform) Scotland Act 2014

by

MM

Respondent and Appellant

against

GLASGOW CITY COUNCIL

Petitioner and Respondent

Respondent and Appellant: Allison, advocate; Livingstone Brown
Petitioner and Respondent: Sharpe, advocate; JK Cameron

5 April 2024

Introduction

[1] The respondent, Glasgow City Council, applied to the sheriff for a permanence order in terms of section 80 of the Adoption and Children (Scotland) Act 2007 ("the 2007 Act") in respect of M, who is currently 16 years old. The appellant, MM, argued that it was not competent to make a permanence order in respect of a child aged 16 or over. In December

2023, having heard submissions on the competency of the petition, the sheriff found in favour of the respondent.

[2] In January 2024, the sheriff granted a permanence order in terms of section 80 of the 2007 Act, including the mandatory provision set out in section 81(1), as required by section 80(2). The sheriff limited the mandatory provision to that referred to in section 81(1)(a), vesting in the respondent the parental responsibility mentioned in section 1(1)(b)(ii) of the Children (Scotland) Act 1995 of providing guidance appropriate to M's stage of development. He made certain ancillary orders, including extinguishing the appellant's parental responsibility of providing guidance appropriate to M's stage of development and vesting the same parental responsibility in M's foster carer.

[3] The appellant appeals against both the sheriff's decision on the competency of the application (ground of appeal one) and the sheriff's finding in fact that the test in section 84(5)(c)(ii) of the 2007 Act had been met (ground of appeal two).

[4] The appellant has lodged a motion for remit of the appeal to the Court of Session in terms of section 112(2) of the Courts Reform (Scotland) Act 2014 ("the 2014 Act"). She relied upon ground of appeal one only for the purposes of the motion. The motion was considered on the basis of written submissions.

Submissions for the appellant

[5] It was submitted that ground of appeal one raises a complex and novel point of law. The question of whether it was competent to grant a permanence order in respect of a child aged 16 or 17 will require to be resolved by careful scrutiny of the terms of the 2007 Act and by both considering Parliamentary intention and the broader statutory provisions in respect

of the duties owed by local authorities to children in need. It is likely to involve some public policy considerations.

[6] There is no binding authority on the issue. The sheriff's decision is contrary to the opinion expressed by the authors of Wilkinson and Norrie, *The Law Relating to Parent and Child in Scotland* (3rd edition) and contrary to an unreported sheriff court decision, namely, *Clackmannanshire Council, Applicants*, 1 June 2022. The law is currently uncertain. The issue in this appeal is of Scotland wide importance and will inform decisions made by all local authorities in relation to the welfare of those children looked after by them and who are over the age of 16.

[7] It was appropriate to remit the appeal to the Inner House. Both the Sheriff Court and the Outer House exercise first instance jurisdiction in respect of permanence orders. Only a decision of the Inner House would resolve the issue of competency for both forums. If the appeal proceeds before this court, there is a high probability that the unsuccessful party will seek to further appeal the decision and that the second appeals tests in section 113(2)(a) of the 2014 Act will be met. Remitting the appeal now would prevent further procedure and provide the child with certainty.

Submissions for the respondent

[8] It was acknowledged that ground of appeal one raised a novel point; however, it was not complex. It raised a simple matter of statutory interpretation. This court regularly dealt with such issues and was accustomed to dealing with conflicting first instance decisions and academic opinions.

[9] Were the Sheriff Appeal Court to hear the appeal, its decision would be binding on all sheriffs. Almost all applications for permanence orders are raised in the sheriff courts.

That the Court of Session and the sheriff courts enjoy first instance jurisdiction in such applications is an irrelevant consideration; that is the case for many different types of actions and should not inform the decision on a motion to remit. The appellant's submission that there was a high probability that the losing party will appeal to the Inner House is speculative. It assumes that this court will grant permission for such an appeal and that the legal aid board will fund such an appeal. Were a second appeal to be permitted, the Inner House would benefit from this court's analysis of the correct interpretation of section 81 of the 2007 Act.

Decision

[10] Section 112(2) of the 2014 Act provides as follows:

> "(2) The Sheriff Appeal Court may—
>
> (a) on the application of a party to the appeal, and
> (b) if satisfied that the appeal raises a complex or novel point of law, remit the appeal to the Court of Session."

[11] As is plain from the terms of section 112(2), when considering whether to remit an appeal to the Court of Session, this court requires to be satisfied that the appeal raises a complex or novel point of law. That issue is to be resolved by reference to the particular legal issues set out in the grounds of appeal. If it is so satisfied, it requires to consider whether it is appropriate to exercise its discretion to remit the appeal to the Court of Session. As explained by Sheriff Principal Scott QC in *Donnelly* v *Royal Bank of Scotland Plc (No 2)* 2016 SLT (Sh Ct) 333, even if an appeal raises a complex or novel point of law, there is no necessity to remit it to the Court of Session.

[12] In the present case, the legal issue arising relates to sections 80 and 81 of the 2007 Act which provide as follows:

"80 Permanence orders

(1) The appropriate court may, on the application of a local authority, make a permanence order in respect of a child.

(2) A permanence order is an order consisting of—

(a) the mandatory provision,
(b) such of the ancillary provisions as the court thinks fit, and
(c) if the conditions in section 83 are met, provision granting authority for the child to be adopted.

(3) In making a permanence order in respect of a child, the appropriate court must secure that each parental responsibility and parental right in respect of the child vests in a person.

81 Permanence orders: mandatory provision

(1) The mandatory provision is provision vesting in the local authority for the appropriate period—

(a) the responsibility mentioned in section 1(1)(b)(ii) of the 1995 Act (provision of guidance appropriate to child's stage of development) in relation to the child, and
(b) the right mentioned in section 2(1)(a) of that Act (regulation of child's residence) in relation to the child.

(2) In subsection (1) *'the appropriate period'* means—

(a) in the case of the responsibility referred to in subsection (1)(a), the period beginning with the making of the permanence order and ending with the day on which the child reaches the age of 18,
(b) in the case of the right referred to in subsection (1)(b), the period beginning with the making of the permanence order and ending with the day on which the child reaches the age of 16."

[13] The issue, simply put, is this: are parts (a) and (b) of section 81(1) to be read as one or are they severable? Can a permanence order consist of only one part of section 81(1) or must it contain both? Is the word "and" where it appears in section 81(1) used conjunctively? If it is used conjunctively then it follows that a permanence order (which must consist of the

mandatory provision) cannot competently be made in respect of child who is over the age of 16.

[14] The point of law arising is a narrow and focussed one of statutory interpretation. It may have a degree of complexity but it is not of sufficient complexity to merit the appeal being remitted to the Court of Session. On behalf of the appellant it was submitted that the appeal would entail a consideration of the terms of the 2007 Act, Parliamentary intention and the broader statutory provisions in respect of the duties owed by local authorities to children. That may be the case. Having regard to the factual and legal matrix in the present case, such an exercise is not a complex undertaking. To the contrary, it is part of the ordinary process of statutory interpretation.

[15] Nor are we persuaded that the appeal raises a novel point of law. That there exist competing interpretations of a statutory provisions which have not hitherto been the subject of significant judicial consideration does not in our view, of itself, render a point of law novel. Sections 80 and 81 of the 2007 Act have been in force since September 2009. To date, there has been only one unreported decision on the question of whether it is competent to make a permanence order in respect of a child who is 16 or 17. That might suggest that there is a widespread understanding that such orders are not competent, in which case, the issue raised is not novel, or it might suggest that there has been a lack of challenge to such orders because of a widespread misinterpretation of the statutory provisions. This appeal will resolve that question. In doing so, the court will interpret the existing statutory provisions; it will not innovate or develop the law.

[16] Accordingly, we are not persuaded that the test in section 112(2)(b) of the 2014 Act has been met. Had we been so persuaded, we would have refused to exercise our discretion to remit the appeal to the Court of Session.

[17] We accept that there is no binding authority on the issue. At paragraph 20.22 of Wilkinson and Norrie, *The Law Relating to Parent and Child in Scotland*, (3rd edition), the authors have expressed a view that the two aspects of the mandatory provision are complimentary and not alternatives and accordingly "it would seem to be incompetent to make a permanence order in respect of a 16 or 17 year old". That view was endorsed by a summary sheriff in an unreported decision. In that case, having been invited to address the court on the issue, the parties agreed a permanence order could not competently be granted in respect of a 16 or 17 year old child. As such, the summary sheriff did not have the benefit of hearing full submissions on the issue (*Clackmannanshire Council, Applicants*, unreported, 1 June 2022 at pages 38 and 39). The sheriff in the present case was not referred to the earlier unreported decision. He has formed the opposite view. There are thus two conflicting first instance decisions.

[18] A decision of this court will, however, be binding upon all sheriffs (section 48(1) of the 2014 Act). As the respondent submitted, the vast majority of applications for permanence orders are made in the sheriff courts. While the Court of Session enjoys concurrent first instance jurisdiction in such applications, that is also true of a number of species of actions; it is not a cogent reason for remitting an appeal.

[19] If, as the appellant suggests, there is a high probability of a further appeal to the Inner House by the unsuccessful party and assuming that the second appeals test is met, in our judgment the submissions at any further appeal would benefit from being informed by the analysis contained in a decision of this court which regularly deals with appeals from the sheriff courts in relation to adoption and permanence proceedings.

[20] Accordingly, the motion is refused.

[21] This matter will now proceed to an appeal hearing in terms of Chapter 7, in early course. The respondent's submissions did not address the issue of expenses. Any motion for the expenses of this application can be considered at the Procedural Hearing.